No. 17-961

IN THE

Supreme Court of the United States

THEODORE H. FRANK and MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, on behalf of herself and all others similarly situated, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

JEREMY L. KIDD
MERCER UNIVERSITY
SCHOOL OF LAW
1021 Georgia Ave.
Macon, GA 31210
(478) 301-2431
kidd_j@law.mercer.edu

ILYA SHAPIRO
COUNSEL OF RECORD
CATO INSTITUTE
1000 Mass. Ave. NW
Washington, DC 20001
(202) 812-0200
ishapiro@cato.org

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QUESTION PRESENTED

Federal Rule of Civil Procedure 23(e)(2) requires that a settlement that binds class members be "fair, reasonable, and adequate." In this case, the Ninth Circuit upheld approval of a settlement that disposed of absentee class members' claims while providing those class members no relief at all. Breaking with the Second, Third, Fifth, Seventh, and Eighth Circuits, the Ninth Circuit held that the settlement's award of $5.3 million to six organizations that had prior relationships with class counsel and/or defendants was a fair and adequate remedy under the trust-law doctrine of *cy pres*. The question presented is:

Whether the Due Process Clause of the Fifth Amendment, the Free Speech Clause of the First Amendment, and Federal Rule of Civil Procedure 23(e)(2) require courts to reject proposed *cy pres* class action settlements that deprive class members of their legal remedies and compel speech approved of by class counsel, defendants, and the court without meaningful consent by class members.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, releases the annual *Cato Supreme Court Review*, and files *amicus* briefs.

The present case concerns Cato because it involves a threat to the integrity of the adversarial legal system and thus to constitutional due process.

SUMMARY OF ARGUMENT

The use of *cy pres* awards in class-action settlements violates the constitutional rights of absent class members. Specifically, the Fifth Amendment's Due Process Clause protects class members' right both to adequate representation and to pursue their legal claims against the defendant, while the First Amendment's Free Speech Clause protects the right of class members to be free from compelled speech—including being forced to fund charitable organizations to which class members might be opposed.

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[1] Pursuant to Rule 37.2(a), all parties were timely notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no party's counsel authored this brief in whole or in part and that no person or entity other than *amicus* funded its preparation or submission.

Our opt-out class-action system significantly reduces participation by class members—often eliminating it entirely. Class counsel, without meaningful supervision by their clients, engage in self-dealing and collusion with defendants, selling class claims at a steep discount while maintaining high attorney fees. *Cy pres* awards facilitate that collusion and enable even greater self-dealing—allowing class counsel and defendants to appear publicly charitable while expending money that rightfully belongs to the class.

The Constitution guarantees class members due process through adequate representation. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Those due-process rights are violated when class counsel enrich themselves by selling off class members' legitimate claims without compensation or meaningful opportunity to consent. Only a "rigorous analysis" under Rule 23 can avoid judicial complicity in this wholesale deprivation of class members' due process rights. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2552 (2011).

The judiciary is also complicit in the deprivation of class members' First Amendment rights when a court approves a *cy pres* award as part of a class-action settlement, because it forces class members to "endorse[] . . . ideas that [the court] approves." *Knox v. Service Employees Intern. Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012). The opt-out system used in the class-action context is problematic because it presumes "acquiescence in the loss of fundamental

rights" to be free from compelled speech and places the burden on absent class members. *Id*. at 2290.

More importantly in the context of a cert. petition, the deprivation of all of these rights is not limited to this case—or even to the Ninth Circuit—but will be suffered by class members nationwide, as class counsel file claims in the jurisdiction that exercises the least scrutiny over potential self-dealing.

ARGUMENT

I. WITHOUT MEANINGFUL JUDICIAL OVERSIGHT OF PROPOSED *CY PRES* CLASS-ACTION SETTLEMENTS, CLASS MEMBERS ARE DEPRIVED OF THEIR LEGAL CLAIMS WITHOUT DUE PROCESS

The Fifth Amendment's Due Process clause protects the right of individuals to their liberty and property. Few forms of property are as crucial to a free society as the right to pursue legitimate legal claims, seeking to obtain a redress of wrongs. Similarly, while there is no right to counsel in civil litigation, the Court has said that due process includes the right of litigants to have their claims adequately represented by whatever counsel is bringing claims on their behalf. U.S. Const., amend. V; *Shutts*, 472 U.S. at 812.

The current opt-out regime governing class actions in federal court raises serious due-process concerns by allowing named plaintiffs, class counsel, and defendants to dispose of the legal claims of absent class members without meaningful consent. The only bulwark against this deprivation of

property in federal court is the requirement that district courts approve "proposals [that] would bind class members" only after determining that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Approval of a *cy pres* class action settlement that provides no benefit to class members removes this bulwark, deprives class members of due process, and leaves class members protected only by the goodwill of class counsel and defendants.

A. Present Opt-Out Mechanisms for Class-Action Participation Result in Effectively Zero Participation by Class Members

The evolution of class actions in U.S. courts has yielded a system where litigation is controlled by class counsel and defendants, bargaining over class certification and settlement. Named plaintiffs are likely allowed to offer token input, as required by class counsel's professional obligation, but the vast majority of class members have no way of making their voices heard. This result is not surprising, given the incentives faced by class counsel and the absent class members, but the lack of meaningful participation by absent class members borders on a violation of due process even in the absence of concerns regarding *cy pres* awards.

The Court has stated that "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Shutts*, 472 U.S. at 812. If due process protections are to be meaningful in the class-action context, the absent plaintiff's

"opportunity" must be meaningful. The Court in *Shutts* said as much when it described a Kansas opt-out statute and concluded that the opportunities afforded plaintiffs were "by no means *pro forma*" and that the Constitution required no more protection for plaintiffs who could be "presumed to consent to being a member of the class by his failure to [affirmatively opt out]." *Id.* at 813. See also *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 799 (1996) ("the right to be heard ensured by the guarantee of due process has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest").

Rule 23 provides that class members be notified of the lawsuit, ostensibly providing class members with an opportunity to become informed about their legal claims and participate meaningfully in legal proceedings. Fed. R. Civ. P. 23(c)(2). This is the theoretical foundation for concluding that class members can be presumed to have consented to being part of the class. That foundation falls apart, however, when subjected to a critical review under a practical lens. *See generally* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. 71 (2007). *See also Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2071-72 (2013) (Alito, J., concurring) (inaction in response to a class arbitration opt-out form is not consent).

Having suffered relatively small injuries, class members have little incentive to learn of the existence of class actions in which they may have

legal interests. Class counsel, meanwhile, having already assembled their named plaintiffs, have no incentive to provide meaningful notice to the rest of the class. As a result, when notices arrive at class members' homes, they are likely to resemble little more than the piles of junk mail that most people receive on a daily basis. Most class members, not being on the lookout for class-action "opportunities," will dispose of such notices without any comprehension of the fact that they have forfeited their right to opt out. Class counsel are then able to proceed with the case unencumbered by an informed and participating class that could object to the uncompensated extinguishing of its legal claims.

B. Without Meaningful Class Participation, Class Actions Are Rife with Principal-Agent Problems and Conflicts of Interest

The attorney-client relationship is a classic principal-agent arrangement. As with all principal-agent relationships, the most difficult task is to constrain the self-interest of the agent, especially where the agent has a significant informational advantage over the principal. Standards of professional ethics, enforced by state bar associations, provide some constraint on lawyers' tendencies to enrich themselves at the expense of their clients but, as shown by the number of disciplinary actions commenced each month, professional standards are often not enough. As unfortunate as this truth is, the situation becomes even more problematic when the agent (class counsel) is aware that the vast majority of the

principals (class members) are not monitoring the agent's actions. In fact, most of these "principals" are unaware of the existence of the "agent" or the fact that he is acting in their names and binding them.

Because class counsel need not worry about class members involving themselves in the litigation, they are largely free to pursue their own interests, even when doing so prejudices the interests of absent class members. The Court has previously stated that due process is violated when the named plaintiffs' interests are in line with those of the defendant, rather than the absent class members. *Hansberry v. Lee*, 311 U.S. 32, 45-46 (1940). Self-dealing by class counsel, especially in collusion with defendants, violates the due-process rights of absent class members in precisely the same way.

Self-dealing on the part of class counsel could take a number of forms—including advancement of a particular political agenda—but it typically takes the form of pursuing larger attorney fees. One way that class counsel can inflate fee awards is to be over-inclusive when identifying the class. A larger class means more aggregated damages and, consequently, a larger fee award.

The emergence of *cy pres* awards in the class action context provides circumstantial evidence of this phenomenon. *Cy pres* was initially proposed as a way of disposing of the unclaimed portion of the damages fund. *See generally* Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617 (2010).

Most scholars account for the disparity between awarded and claimed damages by arguing that the damages to be claimed did not justify each class member's cost of obtaining his share. *See id.* It is at least plausible, however, that many of those whose alleged injuries went into the damages calculation were not actually harmed, making their failure to claim damages not only reasonable but ethical.

This raises a related conflict of interest, that class counsel and defendants have a strong incentive to collude in reaching a settlement. Class counsel want to inflate the size of the class in order to maximize damages awards. Defendants want to inflate the size of the class so that a settlement will eliminate more potential legal claims at a discounted rate. Class counsel can agree to the discount and still increase their payoff due to the increased class size. *See Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) ("Would it be too cynical to speculate that what may be going on here is that class counsel wanted a settlement that would give them a generous fee and Fleet wanted a settlement that would extinguish 1.4 million claims against it at no cost to itself?"). This collusion works well for defendants and for class counsel, but legitimate class members suffer because their injuries are compensated at a discounted rate, to say nothing of those outside of the legitimate class, who suffer because their separate claims have been improperly categorized and disposed of through settlement.

Of course, the existence of incentives to engage in self-dealing does not mean that class counsel will do

so, but there is plentiful evidence that class counsel engage in self-dealing, thereby failing to provide adequate representation to absent class members as required by due process. *Shutts*, 472 U.S. at 812. The Court has previously dealt with two such examples of self-dealing by class counsel. In *Dukes*, the Court rejected an attempt to limit damages to back-pay claims in order to make the class action mandatory. *Dukes*, 131 S.Ct. at 2559. The Court rejected this self-interested attempt by class counsel because it would have precluded class members' compensatory damages claim. In *Standard Fire Ins. Co. v. Knowles*, 133 S.Ct. 1345, 1348-49 (2013), class counsel attempted to stipulate to less than $5 million in damages, in order to avoid federal jurisdiction under the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005). While the Court decided that case on other grounds, it acknowledged that the attempted stipulation would have reduced the value of class members' claims. *Knowles*, 133 S.Ct. at 1349.

Lower courts have also rejected selective pleading, waiver, or abandonment of claims in order to achieve certification of the class, even though doing so would impair class members' ability to raise abandoned claims at a later date. *See*, *e.g.*, *Arch v. Am. Tobacco Corp., Inc.*, 175 F.R.D. 469, 479-80 (E.D. Pa. 1997); *Pearl v. Allied Corporation*, 102 F.R.D. 921, 922-23 (E.D. Pa. 1984); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 602 (S.D.N.Y. 1982); *Kreuger v. Wyeth, Inc.*, No. 03-cv-2496, 2008 WL 481956, at *2-4 (S.D. Cal. Feb. 19, 2008).

Not every principal-agent problem or conflict of

interest that arises in the class-action context is the result of class counsel's nefarious motives. For example, it is impossible to effectively communicate with the entire class, which will inevitably lead to some class members being disadvantaged. Courts should be aware of the strong potential for self-dealing by class counsel, however, and should refuse to condone it by certifying classes and approving settlements that appear self-serving. By reviewing class-action certifications and settlements with a skeptical eye, courts will be better able to protect the rights of class members to adequate representation.

C. Fed. R. Civ. P. 23(e)(2)'s "Rigorous Analysis" Provides a Bare Minimum Check on Abuses by Class Counsel

Our current class action regime raises significant due process concerns, but it also contains a safeguard against actual due process violations, by requiring the trial court to engage in a "rigorous analysis" of the plaintiffs' claims. *Dukes*, 131 S.Ct. at 2552 ("Rule 23 does not set forth a mere pleading standard . . . certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied") (internal quotation marks omitted). While the Court in *Dukes* only needed to address the due process requirements of the certification process, due process violations are possible at all points in class action litigation, and especially in the settlement context. The Court should therefore apply its "rigorous analysis" standard to the entirety of Rule 23.

This application of Rule 23 would preclude the

cursory review that many courts give to proposed settlements and the increasingly brazen self-dealing by class counsel, often in collusion with defendants. Broad application of the "rigorous analysis" standard would empower trial courts to protect the interests of those most vulnerable in this context—those absent class members whose liberty and property interests are in the hands of class counsel whose interests are misaligned from those of the class.

D. Due Process Concerns Are Heightened When the Proposed Settlement Includes a C*y Pres* Component

1. Class counsel maximize fee awards by using *cy pres* to inflate settlements.

Class counsel seeking higher fees after a settlement must normally increase the total amount of damages agreed to by the defendant. In a more traditional class-action context, that means that he must increase either the number of class members covered by the settlement or the estimated damages suffered by each class members. Trial courts have experience in scrutinizing both class composition and damages, and have the capacity—if not always the willingness—to reject any attempts by class counsel to engage in self-dealing in these two areas. Introduction of the *cy pres* mechanism into a settlement changes the dynamic in ways that pose increased risks to the due-process rights of absent class members.

Cy pres awards provide class counsel an additional method for inflating the total settlement

amount without having to justify expansion of claimed damages or inclusion of additional class members. Instead, the settlement amount gets larger in a far more public-relations-friendly manner, with large sums being directed towards charitable causes. Class counsel also need not be bothered with determining how to process damages payments to the actual injured parties. To make the point particularly clear, *cy pres* awards are desirable to class counsel because it relieves them of what should be their primary responsibility—delivering actual benefits to the class they promised to represent.

Defendants will not object to the use of a c*y pres* awards—far from it—because they gain significant public-relations benefit, often at minimal to no cost. The benefit to defendants is derived by appearing to accept responsibility and agreeing to settle, and the benefit will be higher with a *cy pres* award because defendants will be seen as engaging in charitable giving. *See S.E.C. v. Bear, Stearns & Co. Inc.*, 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009) ("In general, defendants reap goodwill from the donation of monies to a good cause.") In extreme cases, such as the present one, the defendant may not object because it directly benefits from the *cy pres* award—as it has a pre-existing relationship with four of the recipient organizations. *Id.* ("[D]efendants may also channel money into causes and organizations in which they already have an interest.") Contributions to those four *cy pres* recipients could easily serve as substitutes for future contributions by defendant, meaning that portion of the settlement will cost the defendant nothing.

It is theoretically possible that the various methods for augmenting the settlement amount are perfect substitutes, so that an increase in *cy pres* awards will be exactly offset by a reduction if attempts by class counsel to improperly increase the class size or damages calculation. But class counsel have strong incentives to increase their monetary payoff from each case in whatever way possible. The far more likely result is thus that class counsel will use *cy pres* awards at the margin, increasing total settlement awards as a means of increasing the total fee award. Only enhanced scrutiny of settlement agreements by the courts can properly counter this trend and minimize self-dealing by class counsel.

2. Class counsel can double-dip by choosing *cy pres* award recipients controlled by or benefitting class counsel.

The use of *cy pres* awards raises a related concern over self-dealing by class counsel, that the choice of charity designated in the settlement agreement might allow class counsel to reap significant monetary and other benefits. In one case, class counsel steered $5.1 million to the alma mater of the lead plaintiffs' lawyer. *See* Ashley Roberts, *Law School Gets $5.1 Million to Fund New Center*, GW Hatchet, Dec. 3, 2007. Here, three of the *cy pres* recipients are the alma maters of class counsel. Cy *pres* awards can also be made to charities that have direct financial ties to class counsel or their family members—but even if there is no such direct link, counsel can benefit from "causing" the contribution,

generating goodwill and alleviating the annual charitable-giving goals of the lawyers involved.

3. Class counsel can improperly lobby presiding judges by selecting *cy pres* awards that benefit them.

Even more troubling than self-dealing by class counsel is the fact that class counsel have a strong incentive to corrupt the judicial process by engaging in a form of what public-choice economists would call "rent-seeking." In essence, class counsel can choose as the *cy pres* award a charity or charities with ties to the trial judge in an attempt to improperly encourage the court to approve the settlement. In *Fairchild v. AOL,* LLC, No. CV09-03568 CAS (PLAx) (C.D. Cal. 2009) (class action settlement agreement), for example, the *cy pres* award included payment to the Legal Aid Foundation of Los Angeles, a charity on whose board the trial judge's husband sat. Such an award might normally be a great benefit to society, but "the specter of judges and outside entities dealing in the distribution and solicitation of large sums of money creates an appearance of impropriety." *Bear Stearns*, 626 F. Supp. 2d at 415.

4. Judges have an incentive to approve *cy pres* awards that benefit themselves.

Class counsel have strong incentives to engage in inappropriate rent-seeking. Worse still, judges have an incentive to succumb to rent-seeking pressures and distort their judgment and approve otherwise questionable settlements that benefit charities in which they have an interest. In other contexts, this

could be cause for mandatory recusal. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) ("[T]he Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has 'a direct, personal, substantial, pecuniary interest' in a case. This rule reflects the maxim that '[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.'") (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1948); The Federalist No. 10). This due-process concern typically arises in the context of settlement approval, however, so the defendant has already approved and will not challenge the settlement. If the trial court fails to engage in a rigorous analysis, as was the case here, absent class members' rights will go unprotected in yet another way.

5. Class members often get little or no benefit from *cy pres* settlements.

All of these concerns might be overblown if class members are receiving something of reasonable value in return for the settlement of their legal claims. Hence the requirement that trial courts engage in rigorous analysis to determine whether the settlement is fair, reasonable, and adequate. In the case of *cy pres* awards, however, the award of damages to charitable organizations represents money that defendant is paying, ostensibly in restitution for injuries inflicted, but which will never be received by those who were injured. Not only are the absent class members deprived of any direct compensation for their injuries, but "[t]here is no

indirect benefit to the class from the defendant's giving the money to someone else." *Mirfasihi*, 356 F.3d at 784. Here, the "someone else" that received the money has a prior relationship with the defendant, potentially reducing or even eliminating the net cost to defendant.

The substitution of *cy pres* awards for actual compensation to class members also begins to call into question the entire notion of class action lawsuits. "A consumer class action is superior to individual suits because it allows people with claims worth too little to justify individual suits-so called negative-value claims-to obtain the redress the law provides. But if the consumer class action is likely to provide those with individual claims no redress . . . the consumer class action is likely not superior to individual suits." *Hoffer v. Landmark Chevolet Ltd.*, 245 F.R.D. 588, 603 (S.D. Tex. 2007).

E. The Court Should Require the Ninth Circuit to Honor Its Rule 23 Obligations and Avoid Deprivations of Due Process

The lower court, in its decision to uphold approval of the settlement agreement, acknowledged its basic responsibilities under Rule 23. Pet. App. 7-8 ("we scrutinize the proceedings to discern whether the [lower] court sufficiently 'account[ed] for the possibility that class representatives and their counsel have sacrificed the interests of absent class members for their own benefit"), 10 ("we benchmark whether the district court discharged its obligation to assure that the settlement is 'fair, adequate, and free from collusion.'") It did so, however, without once

mentioning the requirement of a "rigorous analysis." Having previously expressed its unwillingness to inquire too rigorously into the nature of a *cy pres* award because to do so would be "an intrusion into the private parties' negotiations [that] would be improper and disruptive to the settlement process," *Lane v. Facebook, Inc.*, 696 F.3d 811, 821 (9th Cir. 2012), the Ninth Circuit maintained its perverse standard here by "quickly dispos[ing]" of claims that a *cy pres*-only settlement appropriated the class members' legal claims for the personal benefit of class counsel and defendant. Pet. App. 8. The analysis therefore fell short of that required by Rule 23, exhibiting a fundamental misunderstanding about the impact of a *cy pres* award on the incentives faced by class counsel and defendant.

The Ninth Circuit's errors appear to derive from its refusal to acknowledge the due process risks of class actions generally, and the particular dangers of collusion present when *cy pres* awards are used. The Ninth Circuit did acknowledge that "*cy pres*-only settlements are considered the exception, not the rule," Pet. App. 8, but still approved the settlement in cursory fashion merely because the district court had found the settlement fund to be non-distributable. *Id.* By so doing, the Ninth Circuit effectively abdicated its review responsibilities because class counsel and defendants decide what the settlement fund should be. Class counsel and defendants, preferring *cy pres*-only awards for the reasons described *supra*, face a straightforward calculus problem—maximize the settlement and resulting fee award, subject to the constraint of the

settlement fund being non-distributable. Having done so, class counsel and defendants will be assured that the Ninth Circuit will "quickly" approve whatever collusive *cy pres* award is put before it.

Oddly, the court justified its decision by noting the district court's finding that plaintiffs' claims were "shak[y]." Pet. App. 9. It is not entirely clear why the Ninth Circuit believed that the potentially frivolous nature of class counsel's claims was sufficient to justify approval of a settlement of those claims, complete with exorbitant fees to class counsel, without the rigorous analysis required by law.

When addressing the objections raised with regard to the choice of *cy pres* recipients, the Ninth Circuit correctly articulated the risk of using *cy pres* awards—the process of selecting award recipients might "answer to the whims and self-interests of the parties, their counsel, or the court." Pet. App. 12 (citing *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038-39 (9th Cir. 2011)). Once again, however, the lower court failed to engage in a rigorous analysis—or even mention the requirement—a decision which fell short of the required "higher level of scrutiny for evidence of collusion or other conflicts of interest." Pet. App. 25 (Wallace, J., dissenting) (citing *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011).) That the lower court failed to engage in any form of rigorous analysis is made worse by its acknowledgement that "the district court cannot as effectively monitor for collusion and other abuses." Pet. App. 7. To summarize, even though the Ninth Circuit knew that collusion was more likely in this

case, that the district court was ill-equipped to prevent collusion, and that prevention of collusion was one of the lower court's primary tasks, it refused to actively look for collusion.

Had the Ninth Circuit chosen to take its responsibility seriously, evidence of collusion was easily identifiable. The district court had approved the selection by class counsel of three of their alma maters and four groups that had previously received funds from defendant, a practice previously described by the lower court as "unseemly," *Nachshin*, 663 F.3d at 1039, but accepted in this case without a moment's hesitation. Instead of engaging in any substantive analysis, the lower court justified the district court's conclusion merely by comparing it to its previous approval of a *cy pres* award to an entity controlled by defendant. *Lane*, 696 F.3d at 817. Compared to that appalling approval of naked self-dealing by—and collusion between—class counsel and a defendant, almost anything would appear mild, but such a cursory reference hardly satisfies the due process to which absent class members are entitled.

If allowed to remain as Ninth Circuit precedent, this decision will lead to greater levels of self-dealing by class counsel, greater levels of collusion between class counsel and defendants, and greater rent-seeking pressures on judges to corrupt their rulings for personal gain. These deprivations of due process will not be limited to those living in the Ninth Circuit, however, because class counsel nationwide will choose to file claims in whichever forum has exhibited the least desire to police self-dealing.

II. USE OF *CY PRES* AWARDS IN CLASS-ACTION SETTLEMENTS COMPELS CLASS MEMBERS TO SUPPORT SPEECH WITH WHICH THEY MAY DISAGREE, IN VIOLATION OF THE FIRST AMENDMENT

When a class action is settled, the damages funds belong solely to the class members. *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468, 474 (5th Cir. 2011). When a trial court approves a *cy pres* award, therefore, it ratifies a mandatory transfer of value from class members to a charitable organization. That organization will use the funds provided by the settlement agreement to pursue its own goals, including (understandably) by engaging in various forms of speech. In effect, the court forces class members to support groups whose views may be disagreeable to them. *See Knox*, 132 S. Ct. at 2289 ("Closely related to compelled speech . . . is compelled funding of other private speakers or groups.").

This type of *cy pres* imprimatur is problematic because the Court has held that the government "may not . . . compel the endorsement of ideas that it approves." *Knox*, 132 S. Ct. at 2288. "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001).

The Court has approved a narrow class of compelled speech which might not violate the First Amendment: When the government implements a comprehensive regulatory scheme that mandates

association among a defined group—such as a trade or professional association—compelled contributions for the benefit of that group may be allowed. *Id*. And even then, the contribution can only be sustained "insofar as [it is] a necessary incident of the larger regulatory purpose which justified the required association." *Id*. (internal quotation marks omitted).

To state the obvious, the forced subsidization of charitable organization that arises from *cy pres* awards does not meet the initial criteria for that narrow class of permissible compelled speech. Class actions are governed by Rule 23 and the diverse laws that give rise to legal claims, not a comprehensive regulatory scheme. Likewise, association among class members is voluntary, even if not based on full and meaningful consent. *See supra* at I.A.

The Court has also expressed doubts about the use of opt-out systems given compulsory subsidies. *See Knox*, 132 S. Ct. at 2290-96. While there are significant differences between the context here and that of *Knox*, certain principles are the same, such as that courts "do not presume acquiescence in the loss of fundamental rights." *Id*. at 2290. "Once it is recognized, as our cases have, that a nonmember cannot be forced to fund a union's political or ideological activities, what is the justification for putting the burden on the nonmember to opt out of making such a payment?" *Id*. Similarly, class members should not be forced to subsidize class counsel's, defendants', or the judges' charitable goals.

Whether or not an opt-out mechanism is proper for a traditional class action, once a *cy pres* award is

introduced, an opt-in mechanism is needed because courts can no longer presume acquiescence by class members in the loss of their First Amendment rights.

A. Class Members Are Likely to Be Diverse in Their Political and Social Views, while *Cy Pres* Award Recipients Are Likely to Share the Views of Class Counsel, Defendants, and the District Court

In order for a class action to be certified, the class has to be "so numerous that the joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The only required commonality between members of the class pertains to their legal claims, not their personal preferences, or political persuasion. It would therefore be truly extraordinary if members of the class were uniform in their preferences for charitable giving. Some class members could be misanthropes, preferring to avoid all philanthropy. Most class members might agree with the notion of charitable giving generally, but would disagree as to the type of organizations that were worthy of financial support. In light of this diversity of views among class members, it is inappropriate for class counsel and defendants to presume to select a "worthy" charities to be the recipients of funds that represent damages owed to class members.

That a trial or appellate court sanctions the choice is immaterial to the question of class members' First Amendment rights to be free from compelled speech. Such a government imprimatur simply adds one additional external entity that has

"approved" the compelled speech, but it does not render the nature of the speech voluntary.

B. If *Cy Pres* Funds Are at All Controlled by Defendants, Class Members Will Be Forced to Support the Views of the Those Who Caused Their Injury, and May Even Be Compelled to Support a Repetition of the Actions That Resulted in That Injury

One thing that class members must have in common is an injury caused by the defendant. Fed. R. Civ. P. 23(a)(3); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). The result of a fair and just trial should be a transfer of wealth from perpetrator to victim, not the other way around. As a result of the settlement, the defendant admits—impliedly or explicitly—that the victims have a legal right to restitution. To compel the class members to return their rightful compensation to the one who injured them is repugnant to basic principles of justice and fairness and is a particularly pernicious example of Thomas Jefferson's adage that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." Irving Brant, James Madison: The Nationalist 354 (1948) (quoted by *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 n.31 (1977)).

To add insult to injury—quite literally—the money that should have made the class members whole is, instead, used to burnish the public-relations image of the one who inflicted the damages that gave rise to the lawsuit.

From a more practical perspective, if the defendant is thus rewarded for its role in damaging class members, it will feel less reluctance to engage in future activities in the same vein, creating the perverse possibility that the class members will be forced to fund their future, repetitive victimization. This peculiar form of unconstitutional compelled speech can be avoided if courts fulfill their responsibilities under Rule 23, for it cannot be argued that forcing victims to fund their victimizers is fair, reasonable, or adequate.

The use of *cy pres* awards in class-action settlements, particularly those that enable the defendant to control the funds, are an emerging trend, one to which courts must attend in order to preserve the due-process and free-speech rights of class members. If not prevented by proper application of Rule 23's rigorous analysis requirements, class counsel, defendants, and judges great cost to absent class members.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

Jeremy L. Kidd
MERCER UNIVERSITY
SCHOOL OF LAW
1021 Georgia Ave.
Macon, GA 31210
(478) 301-2431
kidd_j@law.mercer.edu

Ilya Shapiro
Counsel of Record
CATO INSTITUTE
1000 Mass. Ave. NW
Washington, DC 20001
(202) 812-0200
ishapiro@cato.org

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