No. 22-554

In the
Supreme Court of the United States

ANNA ST. JOHN,
Petitioner,
v.
LISA JONES, ET AL.
Respondents

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

BRIEF OF AMICUS CURIAE THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, or in what circumstances, a court may approve a settlement as "fair, reasonable, and adequate" under Rule 23(e)(2) when it pays a substantial cy pres award to third parties from the settlement fund. *Amicus curiae* is aware of a similar petition pending before this Court in *Yeatman* v. *Hyland*, No.22-566. The views presented in this *amicus* brief likewise support accepting the petition in *Yeatman*.

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INTEREST OF *AMICI CURIAE*

This *amicus* brief is submitted by The Buckeye Institute.[1] The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market solutions for Ohio's most pressing public policy problems. The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute is a non-partisan, nonprofit, tax-exempt organization, as defined by I.R.C. § 501(c)(3).

Through its Legal Center, The Buckeye Institute works to restrain governmental overreach at all levels of government and works to preserve the rule of law and respect for the legal system. The amicus believes that cy pres—especially as it has been implemented—damages the rule of law, harms class members, undermines public confidence in the courts, and oversteps the bounds of Fed. R. Civ. P. Rule 23.

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[1] Counsel provided the notice required by Rule 37.2 and affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae* or its counsel made a monetary contribution to the brief's preparation or submission.

Introduction

Craig N. and his wife joined two other couples to go out to dinner. He announced enthusiastically: "tonight, dinner is on me!" "Why, what is going on?" asked another. Craig whipped out an envelope. "I just got my class action settlement check." Craig opened the envelope and displayed the check. "Seven cents!" Everyone laughed.[2]

The discussion at dinner was about the ridiculousness of a multi-million-dollar class action which resulted in virtually no recovery for individual "victims" but huge financial rewards for the lawyers. All eyes turned to the one lawyer in the group to explain this seemingly—at least from the non-lawyers' view—unethical practice. The legal explanation secured little traction or sympathy. But what none of them knew at the time—including the lawyer—was that there was also likely an undisclosed monetary award to other groups that had nothing to do with the case, that had not been harmed or participated in any way—the cy pres recipients. If there was distaste for the lawyers' windfall, the friends would likely have been disgusted by that revelation.

Indeed, criticisms of class actions have been "manifested through such phrases as 'collusion,' 'conflicts of interest,' 'selling out the class,' and 'sweetheart deals' * * * ." Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 Tex. L. Rev. 1137, 1137 (2009). Even the United States Department of

[2] This is an actual event which the undersigned counsel attended.

Justice opined that "*cy pres*[3] relief has little basis in history, creates incentives for collusion, and raises serious questions under Article III." Br. for the United States as Amicus Curiae Supporting Neither Party, *Frank* v. *Gaos*, 139 S. Ct. 1041 (2019) (No. 17-961).

SUMMARY OF THE ARGUMENT

The Foundations of Class Actions and the Adoption of the Cy Pres Doctrine in Class Actions.

"Class [action] suits long have been a part of American jurisprudence." 7A Mary Kay Kane, Federal Practice & Procedure (Wright &Miller) § 1751 (4th ed.). Initially federal courts used equity rules for "suits involving members of a class so numerous that it was impracticable to join them all as parties." *Id*.

The first prerequisite for class certification is that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). When class certification is sought, prospective class representatives attempt to define the class broadly enough to meet this requirement. A broadly-described class can benefit the defendants by allowing them to resolve more claims at once at a lower cost. Often by the time the dispute is resolved, the number of class members who actively engage in, or benefit from, the class action is far fewer than the number originally encompassed by the broad class description. See Pet'r's App. A6.

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[3] "Cy pres" is italicized herein only when it is italicized within quoted language.

Class actions bind all members of the class, even if they have not consented. Rule 23 turned the concept of "silence is not acceptance" on its head. See *McGlone* v. *Lacey*, 288 F. Supp. 662, 665 (D.S.D. 1968) (silence in response to an attorney retention offer does not create an attorney-client relationship). Under Rule 23, silence *is* acceptance. As a result, putative class members who do not believe they have been injured, who do not care enough to do anything about it, and who are unaware of their potential claims are unwillingly part of a lawsuit and represented by an attorney they did not retain. Rule 23's opt-out provision creates a legal fiction by imposing a theoretical Article III interest on individuals who have not shown any interest in getting involved. Rule 23 tries to prevent misuse or abuse of this involuntary relationship with several rules.

First, Rule 23(b)(3), which applies to most class actions, requires that the "class action [must be] superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). For example, it must be fairer and more efficient than: separate lawsuits; joinder of plaintiffs, Fed. R. Civ. P. 19 and 20; a consolidation of multiple cases, Fed. R. Civ. P. 42; or multidistrict litigation, 28 U.S.C. § 1407.

Second, Rule 23(a) attempts to protect all class members by permitting a class action only if the class representative(s) "will fairly and adequately" represent the interests of the class members. Fed. R. Civ. P. 23(a)(4). Although this works well for representing the class members who are aware of, and

would like to participate in, the lawsuit, it does not protect absent class members.

Third, lawyers serving as class counsel must fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(g)(4). Both the class representative and the class counsel owe fiduciary duties to class members. *In re Dry Max Pampers Litig*., 724 F.3d 713, 718 (6th Cir. 2013). However, Rule 23—for obvious reasons—provides no indication of any duty toward non-class members, i.e., persons who are not actually members of the class. But "[c]y pres [] improperly transforms a bilateral dispute into a trilateral proceeding by introducing into the adjudicatory mix an uninjured third party who has no legitimate interest in the disposition of the suit." Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 666 (2010).

Finally, Rule 23 requires that a court may approve a class settlement *only* if it is satisfied that the settlement "is fair, reasonable, and adequate * * * ." Fed. R. Civ. P. 23(e)(2). These features must be present not only for opting-in class members but also for absent class members.

In 1938 when Rule 23 embedded class actions into the Federal Rules of Civil Procedure, no one recognized the possibility that there might be "left-over" monies that could not be distributed to class members. See Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. Mich. J.L. Reform 1097, 1100 (2013). Neither does the current version anticipate such a scenario. The concept of cy pres originated in the trusts and estates

field. In probating estates, courts sometimes found that a charitable donation was no longer possible because, for example, the beneficiary entity no longer existed. Alberto B. Lopez, *A Revaluation of Cy Pres Redux*, 78 U. Cin. L. Rev. 1307 (2009) (examining the origins and propriety of cy pres in the trust and estates field). Since the courts could not consult with the deceased testator, they attempted to fulfill the testator's intent by doing the next best thing—also known as *cy pres comme possible* (or simply cy pres)—by bequeathing the undistributable funds to a charity similar to the testator's selected charity.

Nothing in the language Rule 23 contemplates the use of cy pres in any way. Nonetheless, in 1974 a court used the cy pres doctrine to distribute the class action's recovered funds to non-parties. Redish et al., *supra*, at 635. In approving the proposed class settlement, the court rationalized its actions as follows:

> In view of the very modest size of the settlement fund and the vast number of shares among which it would have to be divided, the parties have agreed instead * * * to pay the fund to the Trustee of the BLH Retirement Plan, applying a variant of the cy pres doctrine at common law.

Id. (quoting *Miller* v. *Steinbach*, No 66 civ. 356, 1974 WL 350, at *2 (S.D.N.Y. Jan. 3, 1974)). Admitting there was no known precedent for this procedure, the court reasoned that because it was unaware of "any precedent that would prohibit it," and because "no alternative is realistically possible," the settlement

was "fair and reasonable." *Miller*, 1974 WL 350 at *2. But the absence of a case affirmatively rejecting the use of cy pres in this context does not justify inserting that doctrine into Rule 23. Indeed,

> [a] judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence.

Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (1921). See also James M. Beck, *Cy Pres? No Way!*, Drug & Device Law (Oct. 15, 2009), https://tinyurl.com/CyPresNoWay.

From this initial abuse of judicial power, the use of cy pres increased significantly through 2000 and "accelerated sharply after 2000." Redish et al., *supra*, at 653. Parties have used cy pres awards "to conceal problematic types of class actions, such as settlement class actions and faux class actions, where the class action procedure is used primarily for the benefit of participants in the process other than the absent claimants." *Id.* at 653-654. The percent of class actions that were settlement class actions—cases that were certified for purposes of settlement—went from 26.7 percent before 2001 to 52.3 percent after 2000. *Id*. at 654. Further, 36.9 percent of federal class actions from 2000 to 2008 were faux class actions (i.e., "where the damages are [less than $100] to incentivize an

individual plaintiff to pursue the available funds."). *Id.* at 654 n.166.

ARGUMENT

I. Cy Pres Undermines the Foundation of Class Actions and Creates Conflicts of Interest.

The need to use cy pres results from the failures of some or all of the Rule 23 safeguards. The correct application of those safeguards would reduce or eliminate the likelihood of excess funds.

1. The first safeguard is the basis for the class action itself. Pursuant to Rule 23(a)(1), the purpose of a class action is to represent a class only when "joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Class counsel proposes the broadest class possible, and all class members are automatically "opted-in." But the number of class members who actively engage in, and benefit from, the class action is nearly always far fewer than originally anticipated. See Pet'r's App. A6. If a significant number of the class do not participate, whether out of non-interest, disinterest or otherwise, there is no Article III controversy for them, and they should not be considered members of the class. See generally Redish et al., *supra*. When the automatic opt-in procedure is over-inclusive, as it usually is, the court should recognize that the non-responsive class members should either never have been part of the class or should be removed, at least for the purposes of computing damages. See Fed. R. Civ P. 23(d)(1)(D).

2. Second, the "class action [must be] superior to other available methods for fairly and efficiently

adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). But if putative class members will not benefit or receive funds—even if they are interested—then it is not a superior method of resolving the controversy for them. Indeed, as class actions multiplied, courts became skeptical of the "manageability" of such cases when "they are not likely to benefit anyone but the lawyers who bring them." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 164 (1974) (citation omitted). "[I]f it is extremely difficult or almost impossible to distribute these sums to their rightful recipients, the class is unmanageable." *City of Philadelphia* v. *Am. Oil Co.,* 53 F.R.D. 45, 72 (D.N.J. 1971) (cited with approval in *Boshes* v. *Gen. Motors Corp*., 59 F.R.D. 589, 600 (N.D. Ill. 1973)); see also *Gaos,* 139 S. Ct. 1041, 1047–48 (2019) (Thomas J., dissenting) (questioning "whether a class action is 'superior to other available methods for fairly and efficiently adjudicating the controversy' when it serves only as a vehicle through which to extinguish the absent class members' claims without providing them any relief").

The proper solution to the challenge of unclaimed settlement funds is to amend the underlying laws to "alleviate the problem of manageability inherent in class actions" rather than permitting courts to go beyond the provisions of Rule 23. *City of Philadelphia,* 53 F.R.D. at 74. The solution within the scope of Rule 23 would be to restrict the class—for damages purposes—to those persons who actually join the case and have been damaged. See, *e.g.*, *Philadelphia Elec. Co.* v. *Anaconda Am. Brass Co*., 43 F.R.D. 452, 462 (E.D. Pa. 1968) (recognizing that the class may change based on "who will remain in the action, and who will actually present and prove claims for damages").

3. The Supreme Court has "accepted the reality that class representatives []act self-interestedly—or egoistically." Tidmarsh, *supra*, at 1153 (citing *Hansberry* v. *Lee*, 311 U.S. 32 (1940)). Rule 23(a) attempts to protect absent class members by permitting a class action only if the class representative(s) "will fairly and adequately" represent the interests of the class members. Fed. R. Civ. P. 23(e)(2)(A). This imposes a fiduciary duty upon the class representatives. *In re Dry Max Pampers Litig.*, 724 F.3d at 717–18. They are not just names on a paper; they have a duty to those they "represent." Indeed,

> unlike in virtually every other kind of case—in class-action settlements the district court cannot rely on the adversarial process to protect the interests of the persons most affected by the litigation—namely, the class. Instead, the law relies upon the "fiduciary obligation[s]" of the class representatives and, especially, class counsel, to protect those interests.

Id. (citing *Creative Montessori Learning Ctrs.* v. *Ashford Gear LLC,* 662 F.3d 913, 917 (7th Cir. 2011)). This representational framework works well for the class members who are aware of, and would like to participate in, the lawsuit, but not for those persons or entities who do not participate. The class representatives cannot know why non-participants are not participating and so cannot adequately represent their interests. Persons who do not feel aggrieved or do not wish to sue for personal, religious

or other reasons are unlikely to communicate this to the class representative; rather they will just disregard the class notice. Others may find the whole idea of class actions to be repugnant or useless, especially because of the apparent inequity of lawyers receiving outsize fees compared to the often paltry recovery of the individual class members.

More importantly, the class representatives cannot fairly and adequately represent the interests of those who are not even members of the defined class. Cy pres award recipients are, by definition, not members of the class, yet they will receive some of the court-awarded damages. "A [class] representative can't throw away what could be a major component of the class's recovery." *Back Drs. Ltd.* v. *Metro. Prop. & Cas. Ins. Co.,* 637 F.3d 827, 830 (7th Cir. 2011). But that is exactly what a class representative does when agreeing to give a portion of the recovery to cy pres recipients. When class representatives settle a case knowing that the cy pres recipients will benefit, they are giving away funds to the detriment of the absent class members. See Restatement (Third) Of Agency § 8.02 (Am. L. Inst. 2006). This is a breach of the class representative's fiduciary duty and is inconsistent with the text of Rule 23.

Moreover, if the parties and the courts make a cy pres award to non-class-members, has the court invented an Article III interest for the cy pres recipients? If so, does this impose a fiduciary duty upon the class representatives to represent the non-class members? If the cy pres recipients are selected ex ante, then those entities have a vested interest and should have their own representatives in all litigation

and settlement decisions. Of course, that would create conflicts of interest between those who have no Article III interest in the case and those that do.

In addition, who represents those cy pres applicants who are not selected? Should there not be a formal application process notifying all possible applicants, not just those who the class representatives, class counsel, and the court invite? Indeed,

> when a cy pres recipient is needed, legal charities are best positioned to leverage the award. [This] deprive[s] more deserving, less savvy groups of cy pres awards, regardless of which entity is best suited to satisfying the nearness requirement.

Chris J. Chasin, Comment, *Modernizing Class Action Cy Pres Through Democratic Inputs: A Return to Cy Pres Comme Possible*, 163 U. Pa. L. Rev. 1463, 1485 (2015).

It is not unusual for courts to "name the charitable recipient of the cy pres award * * * [and] allocate[e] an award amount up front [ex ante], rather than waiting to see what funds remain unclaimed." Redish et al., *supra*, at 656. "[F]ederal courts awarded cy pres ex ante thirty times out of 120 [class action] cases (or in 25% of the cases)." *Id*. at 657 (analyzing cases from 1974 through 2008, *Id*. at 652). In those cases, the problem of dual representation is exacerbated. The class representative is then in the untenable position of fairly and adequately representing both the class

members and the ex ante cy pres awardees, each of which would like funds to the exclusion of the other.

4. Finally, class counsel must fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(g)(4). Class counsel's adequate representation of the class requires more than knowing the law and negotiating on the class's behalf. "[T]he law relies upon the 'fiduciary obligation[s]' of the class representatives and, *especially, class counsel*, to protect th[e] interests" of class members. *In re Dry Max Pampers Litig.*, 724 F.3d at 718 (emphasis added) (citation omitted). Certainly "class counsel are no more entitled to disregard their 'fiduciary responsibilities' than class representatives are." *Id.* (citation omitted). Class counsel's fiduciary duty requires assuring that "the relief provided for the [absent] class is adequate, taking into account * * * the effectiveness of any proposed method of distributing relief to the class * * * ." Fed. R. Civ. P. 23(e)(2)(C). Cy pres is defended as the next best use of an absent class member's "right to share the harvest of the lawsuit," *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 480 (1980). But the inclusion of cy pres distributions suggests that class counsel may not have fulfilled its fiduciary duty to adequately represent absent class members, particularly when the cy pres distribution is approved ex ante.

Further, since the attorneys' fees are a percentage of the total class action settlement, not the amount delivered to the class members, "*cy pres* provides class counsel with an easy mechanism to generate high legal fees without having to" identify all class members or "devise settlements that confer actual

benefits on the absent class members." John H. Beisner et al., Cy Pres *A Not So Charitable Contribution to Class Action Practice*, U.S. Chamber Institute for Legal Reform, 13 (Oct. 27, 2010), https://tinyurl.com/NotSoCharitable. Class actions "create especially lucrative opportunities for putative class attorneys to generate fees for themselves without any effective monitoring by class members who have not yet been apprised of the pendency of the action." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 788 (3d Cir. 1995). This incentive exists both before and after class certification. "The focus becomes maximizing the total award, rather than the amount that goes directly to the class members. Not only is such behavior unethical, it could also constitute a violation of the class members' due process rights." Jennifer Johnston, Comment, *Cy Pres Comme Possible to Anything Is Possible: How Cy Pres Creates Improper Incentives in Class Action Settlements*, 9 J.L. Econ. & Pol'y 277, 290–91 (2013).

Lawyers also boast about the cy pres money they give to charitable causes and use it as a marketing tool. For example, "Ohio Lawyers Give Back" was "conceived" by a particular law firm to "promote the use of cy pres in class action settlements." Ohio Lawyers Give Back, https://ohiolawyersgiveback.org/about/ (last visited Jan. 9, 2023). The firm claims to have a "reputation for focusing on both client advocacy and community service." *Id.* The firm also claims to "elevat[e] the class action beyond simply compensating groups of individuals"—which is the purpose of class actions—to using class actions to "return meaningful value to

the community by directing significant class action settlement funding to [in its estimation] worthy charities." *Id.* Indeed, the firm is "proactive in negotiating that a reasonable portion of the settlement be earmarked for charity." *Id.* The firm then proclaims its generosity, having "been responsible for the distribution of over $50 million" to dozens of non-parties. *Id.*

Elsewhere, in videos promoting themselves and soliciting more cy pres money, some cy pres recipients refer to individual class counsel, or their firms, who facilitate these awards as "*cy pres* donor[s]." *Cy Pres*, National Consumer Law Center, http://www.nclc.org/get-involved/ways-to-give/cy-pres/ (last visited Jan. 9, 2023). The lawyers seem happy to wear that designation. Another recipient touted the receipt "of nearly $900,000 in *cy pres* funds from 23 cases," and made sure to credit "[t]he attorneys who have named The Institute as a cy pres beneficiary * * * ." *Using Cy Pres to Transform the Workplace*, National Institute for Workers Rights, https://niwr.org/get-involved/using-cy-pres-to-transform-the-workplace/ (last visited Jan. 9, 2023). And they expressed their "gratitude to the [listed] attorneys and law firms for using the power of cy pres * * * ." *Id.* Apparently, "many cy pres distributions are channeled to organizations that support the work done by plaintiffs' attorneys, thus, indirectly benefiting the plaintiffs' attorneys." *S.E.C.* v. *Bear, Stearns & Co. Inc.*, 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009).

Sometimes the appearance of self dealing is blatant. The George Washington Law School bragged that "a GW alumnus and attorney won a class action

lawsuit" and $5.1 million of the $40 million "was given to the GW Law School." Ashely Roberts, *Law School Gets $5.1 Million to Fund New Center*, The GW Hatchet, Dec. 3, 2007, https://tinyurl.com/GWCyPres. That attorney was "added to the 'L'Enfant Society' which is 'the most prestigious of GW's gift societies' and membership in which is extended to individuals donating over $5 million.'" Johnston, *supra*, at 293.

But more troubling than the self-aggrandizement is the lawyers' view that securing cy pres funds for charitable entities is part of their representation even though neither Rule 23 nor the Code of Professional Conduct authorizes this dual representation. "[I]n the end, litigation is not about the bar, but about the client." *Lane* v. *Page*, 862 F. Supp. 2d 1182, 1235 (D.N.M. 2012).

II. Cy Pres Awards Undermine Judicial Integrity and Impartiality.

While lawyers' cy pres-marketing may be distasteful and their pseudo representation of non-class members is likely inappropriate under Rule 23, the judges' role in this process is even more problematic. The Code of Conduct for United States Judges states:

> Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities.
>
> (A) Respect for Law. A judge should * * * act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

> (B) Outside Influence. A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should [not] lend the prestige of the judicial office to advance the private interests of the judge or others * * * .

Every class action "may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). Cy pres funds are never awarded by a jury; the judge approves all cy pres awards. This requires the judge to favor the cy pres recipients which the judge thinks are "worthy" and to reject others. Beyond that, through cy pres the judge may effectively "lend the prestige of the judicial office to advance the private interests of the judge or others." Cannon 2(B).

It is not surprising that cy pres has been called "an invitation to wild corruption of the judicial process." Geoffrey J. Ritts, *Comment on the Use of "Cy Pres" in Class Actions in Ohio*, 37 Ohio N.U. L. Rev. 367, 372 (2011) (Internal quotation marks and citation omitted).

> [One] former federal judge * * * has said that the distribution of cy pres funds "is not a true judicial function and can lead to abuses. It made me more than a little uncomfortable that groups would solicit me for consideration as recipients of cy pres awards. I know that other judges felt that there was something unseemly about this system."

Id. at 379 n.31 (citation omitted).

Recognizing this unseemliness, another judge tried to thread the needle, asserting that "[t]he judicial role [of the district court] is better limited to approving *cy pres* recipients selected by the parties." *In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 180 n.16 (3d Cir. 2013). But there is little difference between the judge preparing a list and the judge selecting recipients from among those listed in a counsel-prepared list. While one would think that Canon 2(B) of the Code of Conduct for United States Judges would prevent judges from directing discretionary, cy pres awards to organizations in which the judge has a family member who would benefit from a cy pres award, in *Fairchild v. AOL, LLC*, the presiding Judge "refused to recuse herself even though her husband was on the board of the Legal Aid Foundation of Los Angeles, [a] recipient [in] the proposed settlement." Beisner et al.*, supra*, at 13–14 (citing *Fairchild* v. *AOL, LLC,* No. CV09-03568 CAS (PLAx), 2019 WL 10680758 (C.D. Cal. Dec. 31, 2009). This was particularly galling given that the class members were to receive *zero* compensation and the lawyers were to receive $320,000. *Id.*

Indeed, "having judges decide how to distribute cy pres awards both taxes judicial resources and risks creating the appearance of judicial impropriety." *In re Lupron Mktg. & Sales Pracs. Litig.*, 677 F.3d 21, 38 (1st Cir. 2012); see also *Lane*, 862 F. Supp. 2d at 1235 ("The Court believes, however, the cy pres awards are inappropriate, because they inject a third party into the litigation, do not adequately reflect the best interests of absent class members, create an

appearance of impropriety, and are not the best use of the Court's time and resources.").

III. Cy Pres Awards have Created a Systemic Problem.

Cy pres awards have become "subject to systematic biases." Chasin, *supra*, at 1483. "[O]rganizations with high numbers of lawyers invested in their financial stability have an upper hand." *Id*. at 1483–84. Indeed, "[d]istributing grants and reviewing the effectiveness of their use is not an appropriate use of judicial resources and transforms courts into eleemosynary institutions." *S.E.C.,* 626 F. Supp. 2d at 415.

One commentator collected some egregious instances of cy pres awards benefiting either the attorneys or judges involved with the cases:

> - Almost a half-million dollars was directed to a nonprofit whose purpose was to buy "historically appropriate" furniture and accessories for the courthouse in which the presiding judge sat.
>
> - A distribution went to a plaintiffs' bar group promoting class-action employment-law cases.
>
> - Millions of dollars went to a charity on whose board of directors sat the presiding judge and three plaintiffs' attorneys, each of whom allegedly was paid several thousand dollars for their "service." The same settlement distributed $1 million to the alma mater

> of one of the plaintiffs' attorneys, which then allegedly hired the lawyer for $100,000 a year.
>
> - Almost $3 million went to the law school from which several of the plaintiffs' counsel graduated.
>
> - $8 million went to the law school attended by the presiding judge.

Ritts, *supra*, at 370–72 n.17–27.

And, contrary to the meaning of cy pres—as close as possible—

> [c]ourts routinely award cy pres to organizations that have no rational ties to the underlying class action, with no expectation that the funds will benefit absent class members. Consider some common cy pres award recipients: bar foundations, law schools, law professors, the National Association of Public Interest Law, and other public interest law organizations. Awards to medical and educational charities also occur frequently, are rarely relevant to the underlying suit, and are often local to the awarding court, even when the underlying class has a national scope.

Chasin, *supra*, at 1476–1477.

The use of cy pres has even overshadowed actual class-members' total recovery. According to a recent Federal Trade Commission study, the median claims rate in the reviewed consumer class action cases was

9%. F.T.C., Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns 11 (2019). Moreover, the number of class members who received compensation is even lower than the claim rate. Of the small number of class members who made claims, 86% received compensation. *Id.* In cases having 1,877 or fewer class members who received notice, at most, only 2% of the class members filed claims. *Id.* at 21–22. Of that number, the claim approval rate was only 55%. *Id.* at 21. In this case, the Eighth Circuit noted that "a claim rate as low as 3 percent is hardly unusual in consumer class actions * * * ." Pet'r's App. 6a.

> Further, cy pres awards averaged 30.8% of the total compensatory damages awarded and ranged from 0.1% to a 100.0%. Interestingly, there are ten cases where the cy pres award was 75.0% or more of the total compensatory damages. All ten of these cases were faux class actions with ex ante cy pres awards and six were also settlement class actions. [I]n some cases, [cy pres awards] comprise the entire compensatory award.

Redish et al., *supra*, 658–59.

IV. Constitutional Impediments to the Use of Cy Pres Under Article III.

"By awarding defendant's money to a charity, cy pres introduces into the class adjudication an artificially interested party who has suffered no injury at the hands of the defendant. In so doing cy pres contravenes the adversary 'bilateralism'

constitutionally required by the adjudicatory process embodied in Article III's case-or-controversy requirement." *Id.* at 622–23. In these cases, the court is no longer evaluating legal claims; rather, it has become an administrator to redistribute wealth for social good. *Id.* at 642.

Rule 23 does not authorize courts to distribute settlement funds to uninjured cy pres recipients; the role of federal judges is to decide cases and controversies. U.S. Const. art. III, § 2. They are not legislators empowered to tax some entities and award the revenues to others. "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not. The Judiciary's role is limited 'to provid[ing] relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm.'" *Tyson Foods, Inc.* v. *Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring); see also, *Klier* v. *Elf Atochem N. Am., Inc.*, 658 F.3d 468, 481 (5th Cir. 2011) ("[Cy pres] distributions likely violate Article III's standing requirements."). Indeed, "[c]ourts should be troubled that a *cy pres* distribution to an outsider uninvolved in the original litigation may confer standing to intervene in the subsequent proceedings should the distribution somehow go awry." *Id.*

> Federal judges are not generally equipped to be charitable foundations: we are not accountable to boards or members for funding decisions we make; we are not accustomed to deciding whether certain nonprofit entities are more "deserving" of limited funds than

> others; and we do not have the institutional resources and competencies to monitor that "grantees" abide by the conditions we or the settlement agreements set.

In re Compact Disc Minimum Advertised Price Antitrust Litig., 236 F.R.D. 48, 53 (D.Me. 2006).

Individuals without injuries never have standing, either to file suit or to intervene in a lawsuit. See, *e.g.*, *Keepseagle* v. *Vilsack*, 307 F.R.D. 233 (D.D.C. 2014). Indeed, the injury and the interest in asserting that injury against an adversary in a court of law is a good "rule of thumb by which to measure a litigant's [] seriousness or good faith." Martin H. Redish & Adrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. Chi. L. Rev. 545, 578 (2006).

Perhaps the only defense of the constitutionality of cy pres awards is "naked functionalism—the argument that the [cy pres awards] should be deemed constitutional * * * simply because [they] serve[] a valuable social function." *Id.* at 552. But "courts do not substitute their social [] beliefs for the judgment of legislative bodies." *Dobbs* v. *Jackson Women's Health Org.*, 142 S. Ct. 2228, 2277 (2022) (quoting *Ferguson* v. *Skrupa,* 372 U.S. 726, 729–30 (1963)).

V. This Case is a Good Vehicle to Address the Issue of Cy Pres Awards.

This case "afford[s] the Court an opportunity to address [the] fundamental concerns surrounding the use of [cy pres] remedies in class action litigation,

including when, if ever, such relief should be considered * * * ." *Marek* v. *Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting the denial of *cert.*). This class action settlement distributed 30% more of the settlement funds to uninjured third-party cy pres recipients than to the injured class members themselves (with about 98% of the class—about ten million members—receiving no cash), and the attorneys getting an astounding 83% of the total amount that the injured class members received. This case illustrates just how far courts have roamed from the actual language and intent of Rule 23 promulgated by this Court pursuant to the Rules Enabling Act.

As of 2010, "forty-six states and the District of Columbia have codified judicial cy pres" as a means of modifying charitable trusts. Redish et al., *supra*, at 628. In contrast, Rule 23, which codifies federal class actions, does not provide for cy pres awards. Federal courts lack the authority to award funds to non-class members, whether through cy pres or some other policy. If there is to be a redistribution of class action settlements to non-parties, it must be done via a revision of Rule 23, not through extra-rule-based judicial "innovation." Cy pres, "must therefore be abandoned by the federal courts." Redish et al., *supra*, at 666.

Cy pres distributions have damaged the reputation of the judiciary and the bar and undermined the rule of law. "Whatever the superficial appeal of *cy pres* in the class action context may have been, the reality of the practice has undermined it. It is time for courts to rethink the justifications of the practice." *Klier*, 658 F.3d at 481.

CONCLUSION

For the foregoing reasons, *amicus curiae* The Buckeye Institute urges that the Petition for Certiorari be granted.

Respectfully submitted,

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