No. 17-961

In the

Supreme Court of the United States

THEODORE H. FRANK, *et al.*,
Petitioners,

v.

PALOMA GAOS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The petition for writ of certiorari asks whether the requirement of Federal Rule of Civil Procedure 23(e)(2) that a binding class action settlement be "fair, reasonable, and adequate" can be interpreted in such a way as to permit a settlement that provides no relief to unnamed class members but only provides *cy pres* awards to third parties not involved in the litigation or in any way harmed by the conduct of the defendant as alleged in the complaint. Amicus believes that the answer to that question of statutory interpretation should be informed by this Court's constitutional avoidance doctrines, because such an interpretation would raise significant constitutional issues, including:

1. Whether a binding class action settlement that redirects remedial compensation away from class members to unharmed third parties because of the causes they represent amounts to compelled speech in violation of the First Amendment?

2. Whether allowing class counsel and the judge presiding over the class action case to determine which third party organizations will receive *cy pres* awards redirected from class members creates an irreconcilable conflict between class counsel and class members, and deprives class members of an unbiased judge, in violation of core Due Process concerns?

3. Whether a class action settlement that provides compensation only to uninjured third parties, and none to the class members injured by the conduct alleged in the case, exceeds the case or controversy limits on the Article III jurisdiction of the federal courts?

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the fundamental separation of powers principles implicated by this case. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing compelled speech issues similar to those at issue here, including *Friedrichs v. California Teachers Association*, 136 S. Ct. 1038 (2016); *Harris v. Quinn*, 134 S. Ct. 2618 (2014); and *Knox v. Service Employees International Union Local 1000*, 567, U.S. 298 (2012).

INTRODUCTION

The *cy pres* doctrine originated in estate law and trusts, but in 1974, the U.S. District Court for the Southern District of New York applied the *cy pres* doctrine in a class action settlement setting. Wilber H. Boies and Latonia Haney Keither, *Class Action Settlement Residue and Cy Pres Awards: Emerging Problems and Practical Solutions*, 21 Va. J. Soc. Pol'y & L. 267, 270 (2014). In *Miller v. Steinbach*, the district court noted that, in implementing a settlement agreement between the parties, it "appli[ed] a variant of the *cy pres* doctrine at common law." *Miller v. Steinbach*, 268 F.Supp. 255 at 3-4 (S.D.N.Y 1974). Since then, *cy*

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[1] Pursuant to Rule 37.2(a), all parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to fund the preparation and submission of this brief.

pres awards have been used as a form of remedy in class actions. *See Lane v. Facebook*, *Inc.,* 696 F.3d 811 (9th Cir. 2012); *In re Lupron Marketing and Sales Practices Litig.*, 295 F.Supp.2d 148 (D. Mass. 2003).

There are three categories of class action settlements in which *cy pres* awards might be applied. First is the situation, at issue in *Miller*, in which all of the plaintiffs who have submitted claims have been fully compensated for their injuries, but excess funds remain because the size of the settlement fund (or, more precisely, the number of people who would file claims against the fund) was overestimated. The Third Circuit has held that a federal district court "does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component directing the distribution of *excess* settlement funds to a third party to be used for a purpose related to the class injury." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 172 (3rd Cir. 2013) (emphasis added); *see also In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61 (D. Mass. 2005); *United States ex rel. Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989) (recognizing that the court has broad discretion in identifying appropriate uses of *cy pres* distribution of *residual* settlement funds); *but see Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 482 (5th Cir. 2011) (Jones, J., concurring). Faced with *excess* funds, the courts in this situation have utilized the *cy pres* award as an alternative to providing a windfall to the already-compensated class plaintiffs or a refund to the tortfeasor defendant that could undermine the deterrent effect of the settlement.

The second situation arises when the settlement did not fully compensate class plaintiffs for their injuries, and because of a lower-than-expected rate of claims against the fund, there is an excess. As in category one, refunding the excess to the tortfeasing defendant could undermine the deterrent effect of the settlement. But the question remains: Should the excess funds at least first be distributed to the class plaintiffs who had filed claims up to the point where they are fully compensated, with any remaining excess distributed via a *cy pres* award, or should all of the excess funds be distributed via a *cy pres* award? Problems of proof (i.e., is "full compensation" what is alleged in the complaint, or something else?) and benefit of the bargain concerns (i.e., the claim-submitting class plaintiffs already got what they agreed to by way of the settlement) regarding what constitutes full compensation might tilt the balance toward the latter, but either way, the *cy pres* award is only made once class plaintiffs have received some measure of compensation for their injuries. *See Pearson v. NBTY, Inc.,* 772 F.3d 778 (7th Cir. 2014); *In re BankAmerica Corp. Securities Litig.,* 775 F.3d 1060 (8th Cir. 2015).

The third situation, at issue here, is where the *cy pres* award is made *in lieu of* compensation to the class plaintiffs. This third category fails to provide plaintiffs with any relief, much less adequate relief, and instead rewards nonparties who admittedly suffered no harm from defendant's conduct, raising serious constitutional concerns. The settlement here was $8.5 million, but of that, only a few thousand dollars was provided to the named plaintiffs as "incentive awards." $2.125 million was awarded to class counsel (more than double its lodestar), and the bulk of the settlement, $5.3 million—was provided to nonparties via a

cy pres award. No compensation whatsoever—not damages, or nominal damages, or even coupons, and not even a change in practices by the defendant—was provided to any of the estimated 129 million unnamed members of the class.

SUMMARY OF ARGUMENT

The Ninth Circuit's ruling raises serious constitutional issues that should inform this Court's determination of whether Rule 23(e)(2) can be interpreted to permit such a settlement. First, by directing the settlement funds away from unnamed members of the injured plaintiff class to advocacy groups such as AARP, Inc. and the World Privacy Forum, the ruling effectively forces those plaintiffs to provide financial support to organizations with which they may not agree, in violation of the First Amendment's prohibition on compelled speech. Second, by allowing class counsel and, worse, the judge, to determine which causes will be supported by the *cy pres* award, the Ninth Circuit's ruling exacerbates the potential conflict of interest between class counsel and unnamed members of the class, and undermines the judge's role as an unbiased adjudicator, all in violation of core Due Process principles. And finally, by redirecting compensatory relief away from those who were injured to those who admittedly suffered no injury by defendant's actions, the Ninth Circuit's ruling raises serious questions about whether there remained a viable case or controversy necessary for Article III jurisdiction. Quite simply, the *cy pres* award recipients have no standing because they have not suffered any injury, and those who do have standing—the unnamed members of the class who suffered injury—not only receive no remedy but are forever foreclosed from obtaining relief.

ARGUMENT

I. Interpreting Rule 23(e)(2) to Permit a Binding Settlement that Redirects Class Action Settlement Funds From Class Members to Third Parties (Often Advocacy Groups) Would Raise Serious First Amendment Concerns.

The *cy pres* settlement at issue in this case redirects class action settlement funds from unnamed class members to outside organizations, including advocacy organizations, that admittedly were not injured by the defendant's conduct. The lower courts approved the settlement by utilizing a nexus requirement developed in the context of *cy pres* awards of *excess* funds, namely, that there by "some connection … between the interests of the class members and the proposed charitable recipient of the funds." Cecily C. Shiel, *A New Generation of Class Action Cy Pres Remedies: Lessons from Washington State*, 90 Wash. L. Rev. 943, 951 (2015). *See* Am. L. Inst., Principles of the Law of Aggregate Litigation §3.07(c) (2010) (suggesting that settlement funds should be awarded to those "whose interests reasonably approximate those being pursued by the class"). However, before any *cy pres* awards are distributed, the recipients must be approved by the court.

But in the context of a case such as this, the redirecting of compensatory funds (rather than just excess funds) from class members to nonparty entities effectively appropriates damages rightly due to the class members for injuries they suffered, to advocacy organizations that had no such harms and that are committed to advocating for causes that particular class members might not approve. In effect, class members

are forced by the terms of the settlement to support speech and advocacy activity chosen by class counsel and approved by the judge, with remedial funds that by rights should have been paid to them.

In other words, the settlement at issue here compels unnamed class members to support causes advocated by AARP and the World Privacy Forum—compelled speech not unlike that at issue in *Janus v. Am. Fed'n*, 138 S. Ct. 54 (cert. granted Sept. 28, 2017), currently pending before this Court. Interpreting Rule 23(e)(2) to allow for such a settlement therefore raises the same kind of First Amendment concerns that are at issue there.

Quite simply, such compelled speech is contrary to the original understanding of the First Amendment. The founding generation voiced its concerns through debates over compelled financial support of churches in Massachusetts and Virginia, the Virginia debate being the most famous. And this Court has often quoted Jefferson's argument that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." Thomas Jefferson, A Bill for Establishing Religious Freedom (1779), in 5 The Founders Constitution, University of Chicago Press (1987) at 77 (quoted in, *e.g., Keller v. State Bar*, 496 U.S. 1, 10 (1990); *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305, n.15 (1986); *Abood v Detroit Board of Education*, 431 U.S.209, 234-35 n.31 (1977); *Everson v. Board of Education*, 330 U.S. 1, 13 (1947)). Jefferson went on to note "[t]hat even forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he

would make his pattern." Jefferson, Religious Freedom, *supra* at 77.

Although these statements were made in the context of compelled religious assessments, these same principles can be applied to compelled financial support of court-endorsed *cy pres* recipients. The petitioners in this case objected to the recipients of the *cy pres* award because the awards were given to organizations already being supported by Google. Pet. App 13. Additionally, Petitioner argued that "[t]he AARP takes political positions opposed by many class members, including" Petitioner. Pet. App. 131. Requiring the petitioner to give their settlement funds to AARP to engage in advocacy with which Petitioners disagreewould violate their First Amendment rights. Accomplishing the same thing by way of a *cy-pres*-only settlement does not obviate the First Amendment problem.

II. Allowing Class Counsel and the District Court to Redirect Class Members' Remedial Settlement Funds to Non-Parties Favored by Them Raises Serious Due Process Concerns.

The Ninth Circuit's interpretation of Rule 23(e)(2) to permit the type of *cy-pres*-only settlements at issue here raises two significant Due Process concerns. First, it creates (or exacerbates) an inherent conflict of interest between class counsel and the members of the class they supposedly represent. *See, e.g.*, *Radcliffe v. Hernandez*, 818 F.3d 537, 545 (9th Cir. 2016); *cf. Wood v. Georgia*, 450 U.S. 261, 271 (1981). Second, to the extent the court itself participates in the designation of the of the *cy pres* award recipients, class members are deprived of a neutral adjudicator—a

core requirement of due process. *See, e.g.*, *In re Murchison*, 349 U.S. 133, 136 (1955); *see also* Henry J. Friendly, "*Some Kind of Hearing,"* 123 Univ. Penn L. Rev. 1267, 1279 (1975).

Regarding the conflict of interest between class counsel and class members, it is commonplace that the interest of the class counsel and the members of the class do not always coincide. Ted Frank, *Cy Pres Settlements*, Center for Class Action Fairness LLC.[2] In a Sears class action case, for example, the "plaintiffs' attorneys received about $1 million, while the 1.5 million member class redeemed claims at under a 0.1% rate for a total of $2,402." *Id.* A similar situation arises in this case. The few named class plaintiffs received "incentive awards" totaling $15,000 and the rest of the 129 million members of the class received nothing, while the attorneys were awarded $2.125 million. Pet. App. 54-55. Furthermore, the class counsel assisted in selecting the organizations that would be the recipients of the the recipients of the *cy pres* awards and chose the following: World Privacy Forum; Carnegie Mellon University; the Center for Information, Society and Policy at Chicago-Kent College of Law; the Berkman Center for Internet and Society at Harvard University; the Stanford Center for Internet and Society; and AARP. Pet. App. 5. The three schools selected (Chicago-Kent College of Law, Harvard University, and Stanford) were all *alma maters* of the class counsel, Pet. App. 25-26, raising a significant appearance that class counsel had negotiated a settlement that benefit their own charitable purposes

[2] Available at https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2016_sac/written_materials/6_cy-pres_settlement.authcheckdam.pdf.

to the detriment of remedial compensation claims by the class members they represented.

As for the concern about a non-neutral adjudicator, "[i]t is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). For there to be a fair tribunal, the judge must be neutral, for "'no man can be a judge in his own case,' and 'no man is permitted to try cases where he has an interest in the outcome." *Caperton*, 556 U.S. at 876 (quoting *Murchison*, 349 U.S. at 136).

A news account from the New York Times about a decade ago highlights the problem. "Judges all over the country have gotten into the business of doling out leftover class-action settlement money," the Times reported, "sometimes to an organization only tangentially related to the subject of the lawsuit." Adam Liptak, *Doling Out Other People's Money*, N.Y. TIMES, A14 (Nov. 26, 2007).[3] For example, there was $6 million of unclaimed settlement funds left from an antitrust class action lawsuit brought by a group of models against their modeling agencies. *Id.* The federal judge overseeing the case interviewed applicants for the excess funds and gave such funds to organizations only "tangentially related to the subject of the lawsuit." *Id.* There has also been a case of "a newly created charity where the judges who approved the settlement and three of the plaintiff's attorney sat as board members, each receiving tens of thousands of dollars for their services." Ted Frank, *Cy Pres Settlements,* Center for

[3] Available at http://www.nytimes.com/2007/11/26/washington/26bar.html.

Class Action Fairness LLC, (D-15), *supra* n. 2. Indeed, in what the Times described as an "unseemly" development, various charities organizations now lobby judges in order to get funds from class settlements. Litpak, supra, n. 3. And as a result, there is now a significant risk that the supposedly neutral adjudicator will be tempted to approve *cy-pres*-only settlements that benefit his or her preferred charities, to the detriment of the interests of class members who receive nothing from the settlement the judge approves.

These are not isolated incidents; they are becoming more prevalent with class action settlements. Whether Rule 23(e)(2) can be interpreted to permit such settlements, despite the significant Due Process concerns raised by them, is an issue that should be addressed by this Court.

III. The Ninth Circuit's Interpretation of Rule 23(e)(2) Also Raises Significant Article III Case or Controversy Concerns.

Article III "confines the federal courts to adjudicating actual 'cases' and 'controversies.'" *Allen v. Wright,* 468 U.S. 737, 750 (1984) (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 471-76 (1982)). To determine whether there is actual case or controversy, courts look to standing doctrine to determine "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' "as to warrant his invocation of federal-court jurisdiction to justify exercise of the court's remedial power *on his behalf*." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (*Baker v. Carr*, 369 U.S. 186, 204 (1962). Furthermore, standing will only be found if "[plaintiff] can

show that he himself has suffered or will suffer injury whether economic or otherwise." *Sierra Club v. Morton*, 405 U.S. 727, 728 (1972).

The class action settlement approved by the Ninth Circuit below does not involve the exercise of the court's remedial power on "behalf" of unnamed class members, because it provided no relief to them. Nor did the *cy pres* recipients of the settlement funds have a "personal stake in the outcome" of the litigation, because they were not even parties to it and had alleged no injury. The Ninth Circuit's interpretation of Rule 23(e)(2) to allow such a settlement therefore raises serious questions about whether that court has exceeded its Article III authority.

The Ninth Circuit is not alone here. For example, in a class action suit brought on behalf of purchasers of various chemicals against a chemical company, the District Court for the District of Columbia approved a motion to distribute a *cy pres* award to the George Washington University Law School. *Diamond Chemical Co. v. Akzo Nobel Chemical. B.V.,* 517 F.Supp.2d 212 (D.D.C 2007). Similarly, the "Illinois Institute of Technology got $5 million from a settlement in a case involving a diabetes drug in Illinois." Liptak, *Doling Out Other People's Money*, N.Y. TIMES at A14, *supra* n. 3. None of the entities that received the *cy pres* settlements had any injury caused by the defendant that would justify relief. None of them were parties in the litigation, nor were their rights being adjudicated in the litigation. They were awarded *cy pres* funds merely because they had a loose connection with the issues involved in the litigation, with the courts applying a nexus test developed in the entirely different context of *cy pres* distribution of *excess* settlement

funds. Because the low threshold for that test falls well beneath the legal requirements for standing, use of it by those courts, as by the Ninth Circuit in this case, to affirm settlement agreements under Rule 23(e)(2) raises serious enough Article III concerns as to warrant this Court's review.

In addition, as Judge Edith Jones has noted, because *cy pres* award distributions "likely violate Article III's standing requirements," the courts "should be troubled that *cy pres* distribution to an outsider uninvolved in the original litigation may confer standing to intervene in the subsequent proceedings should distribution somehow go awry." *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468, 480 (5th Cir. 2011) (Jones, J., concurring). In other words, these *cy pres* award settlements violate the adversarial model of adjudication and the requirements of Article III by granting relief to nonparties who have suffered no injury. As Northwestern University Law Professor Martin Redish has correctly observed, the distribution of *cy pres* awards to nonparties transforms the "judicial process from a bilateral private rights adjudicatory model into a trilateral process." Martin H. Redish, *et al.*, *Cy Pres & the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L.Rev., 617, 641 (2010).

This trend toward *cy-pres*-only awards, based on the dubious authority of a federal rule of civil procedure, thus raises serious questions about the federal court's constitutional authority to approve, much less participate in, such settlements. The issue warrants this Court's attention now, before the trend gets even further out of control.

CONCLUSION

The petition for writ of certiorari should be granted, and the decision of the Ninth Circuit below should be reversed.

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Respectfully submitted,

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