No. 21-2292

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Lisa Jones; Horacio Torres Bonilla; Kristoffer Yee,
Plaintiffs-Appellees,
v.

Monsanto Company,
Defendant-Appellee

Anna St. John,
Objector-Appellant

On Appeal from the United States District Court
for the Western District of Missouri
Case No. 19-cv-00102
District Chief Judge Beth Phillips

Brief of 10 State Attorneys General as *Amici Curiae* Supporting Objector-Appellant and Reversal

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF AMICI CURIAE

The Attorneys General of Montana, Arkansas, Indiana, Louisiana, Mississippi, Nevada, North Dakota, South Carolina, Texas, and Utah are their respective States' chief law enforcement officers. Their interest here arises from two responsibilities. First, the Attorneys General have a responsibility to protect their States' consumers. Second, the undersigned have a responsibility to protect consumer class members under CAFA, which envisions a role for state Attorneys General in the class action settlement approval process. *See* 28 U.S.C. § 1715*; see also* S. Rep. No. 109-14, 2005 U.S.C.C.A.N. 3, 6 (requirement "that notice of class action settlements be sent to appropriate state and federal officials" exists "so that they may voice concerns if they believe that the class action settlement is not in the best interest of their citizens."); *id.* at 34 ("notifying appropriate state and federal officials ... will provide a check against inequitable settlements"; "Notice will also deter collusion between class counsel and defendants to craft settlements that do not benefit the injured parties.").

The Attorneys General make this submission as *amici curiae* to further these interests.[1] The proposed settlement improperly distributes the class members' portion of the settlement to *cy pres* organizations when those funds could be distributed to the class members.

SUMMARY OF THE ARGUMENT

A settlement that prioritizes third-party organizations and class counsel over the class members themselves cannot be fair, adequate, or reasonable under Federal Rule of Civil Procedure 23. The district court erred when it approved the $39.55 million settlement agreement that only allocated 30% of the fund to harmed class members and awarded the remainder of the fund to class counsel and *cy pres*. This type of settlement agreement violates Rule 23 and threatens class members' First Amendment rights as it compels class members to fund and endorse viewpoints of third-party organizations selected by class counsel and the parties.

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[1] The Attorneys General take no position on the merits of the underlying claims, and this submission is without prejudice to any State's ability to enforce its consumer protection laws or otherwise investigate claims related to this dispute. The Attorneys General certify that no party's counsel authored this brief, and no person or party other than named *amici* or their offices made a monetary contribution to the brief's preparation or submission.

The Attorneys General, together in a bipartisan coalition, urge the Court to reverse the settlement approval and prioritize the interests of the class members over the interests of class counsel and class counsel's chosen beneficiaries of the *cy pres* award.

ARGUMENT

Class action settlements have the potential to misalign incentives and priorities, often to the detriment of the class members. Class members cannot meaningfully supervise class counsel, and it is up to the court—rather than the parties themselves—to approve settlement agreements. *Cy pres* awards exacerbate this problem by allowing attorneys to act to benefit themselves and charitable organizations *they* support—all under the guise of benefitting the class. *See* Redish, Julian, & Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 623 (2010) (noting that *cy pres* distribution only "creates the illusion of class compensation").

Although *cy pres* awards are prominent features in many class action settlements, their legitimacy has been called into question. Chief Justice Roberts noted that "the use of [*cy pres*] remedies in class action litigation" raise "fundamental concerns," including whether this type of relief should

ever be considered, how courts should assess their fairness, how recipients should be selected, and how closely the goals of the recipient organizations must correspond to the class's interests. *Marek v. Lane*, 571 U.S. 1003, 1006 (2013) (Roberts, C.J., respecting the denial of certiorari). Justice Thomas likewise expressed concern, noting that "c*y pres* payments are not a form of relief to the absent class members and should not be treated as such (including when calculating attorney's fees)." *Frank v. Gaos*, 139 S. Ct. 1041, 1047 (2019) (Thomas, J., concurring). And these are not abstract musings. Circuit courts have criticized *cy pres* distributions for similar reasons. *See Oetting v. Green Jacobson, P.C. (In re BankAmerica Corp. Sec. Litig.)*, 775 F.3d 1060, 1063 (8th Cir. 2015) ("*BankAmerica*") (citing circuit court decisions calling the practice into questions).

The settlement agreement here, which includes a large *cy pres* distribution, violates Federal Rule of Civil Procedure 23 and threatens class members' First Amendment rights. This Court should accordingly reverse the district court and reject the proposed settlement agreement.

I. This Settlement Violates Rule 23

The approved $39.55 million settlement in this case violates Federal Rule of Civil Procedure 23. It allocates only 30% of the fund to the actual claimants—the harmed individuals seeking to vindicate their legal rights. The remaining 70% of the fund goes to class counsel, the fund administrator, and non-class third-party organizations.

Rule 23(e)(2) requires settlements to be "fair, reasonable, and adequate." This rule "protects unnamed class members from unjust or unfair settlements … when the representatives become fainthearted … or are able to secure satisfaction of their individual claims by a compromise." *Amchem Prods. v. Windsor*, 521 U.S. 591, 623 (1997) (internal quotations omitted). Class counsel must adequately represent the class, and this duty of adequate representation is owed to each class member at every stage of the proceeding, including settlement. *See* Fed. R. Civ. P. 23(g)(4); *Mandujano v. Basic Vegetable Prods., Inc.*, 541 F.2d 832, 834–35 (9th Cir. 1976); *see also Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 812 (1985) (noting that adequate representation is a due process requirement).

Although judges exercise some discretion when determining that Rule 23's fairness, reasonableness, and adequacy requirements are satisfied,

both the Federal Rules and this Court have articulated clear standards courts must apply in this rigorous inquiry. Rule 23(e) itself provides several factors to guide courts in determining whether a settlement is, in fact, "fair, reasonable, and adequate." Courts must consider, among other things, whether class counsel adequately represented the class, whether the proposal was negotiated at arm's length, and whether the distribution of relief to the class is effective. Fed. R. Civ. P. 23(e). The Eighth Circuit further instructs district courts to consider "(1) the merits of the plaintiff's case weighed against the terms of the settlement, (2) the defendant's financial condition, (3) the complexity and expense of further litigation, and (4) the amount of opposition to the settlement." *Marshall v. Nat'l Football League*, 787 F.3d 502, 508 (8th Cir. 2015) (citation and internal quotation marks omitted). This "inquiry…protects unnamed class members from unjust or unfair settlements" agreed to by self-interested class representatives. *Amchem Prods.*, 521 U.S. at 623 (internal quotations omitted).

A settlement that sets aside nearly three-quarters of the fund for non-class non-parties cannot be fair, reasonable, or adequate. Of particular concern is the 40% allocated to third-party organizations. This type of *cy*

pres award is only permissible in limited circumstances, such as when further distributions to class members would be impossible or "too small to make individual distributions economically viable." *BankAmerica*, 775 F.3d at 1064 (quoting *Principles of the Law of Aggregate Litigation* § 3.07 (Am. Law Inst. 2010)). Any remaining funds after initial distributions should go to the claimants—the ones who were harmed—unless an additional distribution "would provide a windfall to class members with liquidated-damages claims that were 100 percent satisfied by the initial distribution." *Id.* Thus, *cy pres* is only appropriate as a last resort. It is not permitted where it is simply the easier or preferred method of distribution. *See, e.g., Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir. 2014) ("A *cy pres* award is supposed to be limited to money that can't feasibly be awarded to the intended beneficiaries."); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011) (*Cy pres* arises as an option "only if it is not possible to put those funds to their very best use: benefitting the class members directly").

Here, additional distributions are possible and would not constitute a windfall to class members. As the court noted in *BankAmerica*, *cy pres* distribution is not appropriate just because class counsel and the district

court declare that "all class members submitting claims have been satisfied in full." 775 F.3d at 1065 (internal quotations and citation omitted). In other words, just because the claimants have received the amount allocated under the terms of the settlement does not mean they have been fully compensated. *See Klier*, 658 F.3d at 479 ("[T]he fact that the members of [one subclass] have received the payment authorized by the settlement agreement does not mean that they have been fully compensated."). "[I]t is unlikely in most cases that further distributions to class members would result in more than 100 percent recovery for those class members." *Principles of the Law of Aggregate Litigation* § 3.07 cmt. b. In fact, claimants here requested compensation equivalent to the price paid for a product they would not have otherwise purchased but for the false statement. *See* Complaint, Dkt. 1 at 3. They sought restitution, disgorgement, punitive damages, and monetary damages. *Id.* at 26. The fact that they only received half of the purchase price suggests that they were not fully compensated for their individual losses. The district court's declaration to the contrary that claimants have been "satisfied in full" does not make it so. *See BankAmerica*, 775 F.3d at 1065.

The district court incorrectly suggests compensation beyond 50% of the purchase price is unjust enrichment. But unjust enrichment occurs when a person retains a benefit "which in justice and equity belong[s] to another." *Unjust Enrichment*, Ballentine's Law Dictionary (3d ed. 1969). In a settlement involving *cy pres* distribution, though, the claimants cannot be unjustly enriched by receiving compensation above 50% of their losses. The money is part of the settlement agreement based on a harm perpetrated by the defendant. Regardless of whether the funds are distributed to individual persons, corporate entities, or non-party organizations, the defendant has already paid into the fund. The question is not whether the defendant must pay, but how the payment is distributed. It is not unjust to make the claimants *more* whole, neither does that work to the defendant's detriment. The only parties who might conceivably suffer are non-party organizations otherwise awaiting their own windfalls.

II. Cy Pres Awards Threaten Class Members' First Amendment Rights

The First Amendment mandates that "Congress shall make no law … abridging the freedom of speech." U.S. CONST. AMEND. I. "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*, 533 U.S. 405, 411 (2001); *see also Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012) ("The government may not … compel the endorsement of ideas that it approves."). Judicial approval of a *cy pres* award likely force class members to fund "the speech of other private speakers or groups" with whom they may disagree, and that "presents the same dangers as compelled speech." *Harris v. Quinn*, 573 U.S. 616, 647 (2014).

Individuals have the right to make charitable contributions to groups of their choice. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). Conversely, individuals also have the right to refrain from making charitable contributions to groups and messages they oppose. *See, e.g.*, *Janus v. AFSCME*, 138 S. Ct. 2448, 2464 (2018); *Knox*, 132 S. Ct. at 2288. Forced charitable contribution is compelled speech:

> In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is *always demeaning*, and for this reason, one of our landmark free speech cases said that a law commanding involuntary affirmation of objected-to beliefs would require even more immediate and urgent grounds than a law demanding silence.

Janus, 138 S. Ct. at 2464 (internal citations and marks omitted). "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical." *A Bill for Establishing Religious Freedom*, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950) (emphasis deleted and footnote omitted). *Cy pres* distributions to third parties—like the distributions in this case—likely constitute compelled speech because they force class members to involuntarily affirm the beliefs of the charitable organizations selected by class counsel. It is ironic and unacceptable that this further insult is packaged as a remedial benefit for claimants who are only parties because they have suffered an injury in the first place.

The district court incorrectly stated that the First Amendment is not implicated because the *cy pres* award is created by a private agreement between private parties. *Jones v. Monsanto Co.*, No. 19-0102-CV-W-BP, 22021 WL 2426126, at *21 (W.D. Mo., May 13, 2021). But this agreement is reached between *class counsel* and *defendants* and then approved *by the court*. Individual claimants in class action settlements do not negotiate directly with defendants. They are instead dependent on class

counsel to represent their interests and on the court to direct the funds accordingly.

The district court also incorrectly stated that the remaining funds after the initial distribution did not belong to any single class member, so no single member could dictate how it was distributed. *Id.* at *22. This is incorrect. The settlement funds belong to class members and the class members alone. *Klier*, 658 F.3d at 474. So when funds are rerouted from the class members to charitable organizations, the class members are deprived of their funds, which are then used to fund various forms of speech. It is the court—rather than the class members—that decides whether or not to approve this diversion of funds, meaning it is the court that ultimately exercises the power to compel the class members to support the charitable organizations. *See Knox*, 132 S. Ct. at 2288 ("Closely related to compelled speech … is compelled funding of other private speakers or groups"); *see also Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014) ("[T]he government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves"). These selected charitable organizations will unsurprisingly mirror the views of class counsel and the defendants—the parties who selected the *cy pres*

distributions.[2] But not so for class members, who are frozen out of the *cy pres* process and left to foot the bill to fund organizations they do not support.

CONCLUSION

The increased use of *cy pres* in class-action settlements is problematic because it fails to compensate injured class members. The settlement in this case violates Rule 23 and threatens class members' First Amendment rights, benefitting class counsel and defendants at the expense of the claimants. The undersigned Attorneys General respectfully request that this Court reverse the District Court's settlement approval.

DATED the 6th day of August, 2021.

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[2] Federal Rule of Civil Procedure 23(a)(1) requires that a class be "so numerous that the joinder of all members is impracticable." The only requirement for these members is that they have common legal issues—there is no requirement that they have similar political or social viewpoints. *Cy pres* distributions will therefore always be problematic, for there will always be class members who disagree with the designated recipients of their property. These decisions are made without the input of the class, and as a result of a court order approving the settlement terms.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) and 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,581 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook text of 14 points; is double-spaced except for footnotes and for quoted and indented material.

/s/ Kathleen L. Smithgall
Kathleen L. Smithgall

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2021, I electronically field the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Kathleen L. Smithgall
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