NO. 21-1616

In the
United States Court of Appeals
For The Fourth Circuit _____

THOMAS H. KRAKAUER, on behalf of a class of persons, Plaintiff-Appellee,

v.

DISH NETWORK, LLC
Defendant-Appellant.

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

_____

BRIEF OF LAWYERS FOR CIVIL JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF DISH NETWORK, LLC

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STATEMENT OF IDENTITY OF AMICUS CURIAE, ITS INTEREST IN THE CASE, AND SOURCE OF ITS AUTHORITY TO FILE[1]

Lawyers for Civil Justice ("LCJ") is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. LCJ's primary purpose is to advocate for fairness and balance in the administration of civil justice, often by proposed changes to the Federal Rules of Civil Procedure ("FRCP") through the Rules Enabling Act process. Since its founding in 1987, LCJ has become a leading voice on FRCP reform. LCJ has submitted written comments to the Judicial Conference Advisory Committee on Civil Rules related to Rule 23 and filed amicus briefs on issues related to Rule 23 and its interpretation.

The question of cy pres in class actions is a central concern of LCJ's membership. LCJ's members have testified at various hearings about the abuses that arise out of the use of cy pres in the class action context. LCJ also filed an amicus brief with the Supreme Court in *Frank v. Gaos,* 139 S. Ct. 1041,

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[1] Pursuant to FRAP 29(a)(4)(E), amicus curiae LCJ certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have given consent to the filing of this amicus brief pursuant to FRAP 29(a)(2).

1045 (2019), urging the Court to hold that a cy pres award of class action

proceeds that provides no direct relief to class members violates Rule 23's requirement that settlements must be fair, reasonable, and adequate. This case raises the same fundamental issues albeit in the context of a judgment, rather than a settlement. As amicus curiae, LCJ requests this Court reverse the district court's order and hold that the Constitution, the Rules Enabling Act, and the Federal Rules of Civil Procedure do not empower a court to order unclaimed judgment funds to be distributed to uninjured non-parties including advocacy groups and others over the objection of the party that owes the judgment.

STATEMENT OF THE ISSUE PRESENTED

WHETHER THE CONSTITUTION, THE RULES ENABLING ACT, OR ANY RULE OF CIVIL PROCEDURE ALLOWS A DISTRICT COURT, IN A CLASS ACTION, TO ORDER A CY PRES DISTRIBUTION OF UNCLAIMED JUDGMENT FUNDS TO ADVOCACY GROUPS AND OTHER UNINJURED NON-PARTIES OVER THE OBJECTION OF THE PARTY THAT OWES THE JUDGMENT?

ARGUMENT

ARTICLE III DOES NOT ALLOW THE DISTRICT COURT TO ORDER A CY PRES DISTRIBUTION OF UNCLAIMED CLASS ACTION JUDGMENT FUNDS TO UNINJURED NON-PARTIES INCLUDING ADVOCACY GROUPS OVER THE OBJECTION OF THE PARTY THAT OWES THE JUDGMENT, AND NEITHER DO THE RULES ENABLING ACT OR THE RULES OF CIVIL PROCEDURE

A. INTRODUCTION

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*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring[2]) (quoting *Lewis v. Casey*, 518 U.S. 343, 349 (1996)). These concerns are strong in the

[2] Chief Justice Roberts has elsewhere identified several "fundamental concerns" with the practice of distributing funds to entities other than class members through cy pres, "including when, if ever, such relief should be considered…." *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (statement of Roberts, C.J., respecting denial of certiorari).

context of voluntary settlements; they are even stronger in the context of a court order to a defendant to pay non-parties to the lawsuit.[3]

Because a cy pres award of unclaimed class action judgment funds is an award of "'damages' to an uninjured third party," 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, 642 (2010), it flouts Article III's case or controversy requirement and the separation of powers doctrine. "Article III of

[3] See *In re Baby Prod. Antitrust Litig*., 708 F.3d 163, 172 n.7 (3d Cir. 2013) ("In contrast with cy pres distributions agreed to by the parties as part of a settlement, courts of appeals have greeted with more skepticism cy pres distributions imposed by trial courts over the objections of the parties."); *In re Pharm. Indus. Average Wholesale Price Litig*., 588 F.3d 24, 34 (1st Cir. 2009) ("Court-mandated cy pres distributions, as opposed to court-approved settlements using cy pres, are controversial.").

the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). Requiring a party to demonstrate an "actual injury redressable by the court . . . tends to assure that the legal questions presented to the court will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Id*.

The award of damages to the uninjured non party through use of a cy pres distribution "is purely punitive." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004). The court's function is thereby "effectively transform[ed] . . . into a fundamentally executive role, because no longer is the court functioning as a judicial vehicle by which legal injuries suffered by those bringing suit are remedied. Instead, the court presides over the administrative redistribution of wealth for social good." Redish et. al., 62 Fla. L. Rev. at 641-

42. "As a result, the practice violates both the constitutional separation of powers and the case-or-controversy requirement of Article III." *Id*. at 642.[4]

[4] "Courts should be troubled that a cy pres distribution to an outsider uninvolved in the original litigation may confer standing to intervene in the subsequent

B. INCORPORATING CY PRES INTO CLASS ACTIONS IS AN INAPT USE OF THE DOCTRINE AND AN IMPROPER EXERCISE OF ARTICLE III POWER

Cy pres is an equitable doctrine arising under trust law, unrelated, if not antithetical, to the adversary system. The Supreme Court has recognized that the doctrine of cy pres arises when courts are thwarted in the administration of property that has been committed to charitable use:

> where property has been devoted to a public or charitable use, which cannot be carried out on account of some illegality in or failure of the object, it does not, according to the general law of charities, revert to the donor or his heirs, or other representatives, but is applied under the direction of the courts, or of the supreme power in the state, to other charitable objects, lawful in their character, but corresponding, as near as may be, to the original intention of the donor. . . . [T]he authority thus exercised arises in part from the ordinary power of the court of chancery over trusts, and in part from the right of the government or sovereign, as parens patriae, to supervise the acts of public and charitable institutions . . . .

Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 56 (1890). See also Restatement (Third) of Trusts § 67, Failure of Designated Charitable Purpose: The Doctrine of Cy Pres (2003) ("[W]here

proceedings should the distribution somehow go awry." *Klier*, 658 F.3d at 481 (Jones, J., concurring).

property is placed in trust to be applied to a designated charitable purpose and it is or becomes unlawful, impossible, or impracticable to carry out that purpose . . . the charitable trust will not fail but the court will direct application of the property or appropriate portion thereof to a charitable purpose that reasonably approximates the designated purpose.")

The attempt to co-opt the doctrine's historical purpose under trust law into class actions is inapt, offers no benefit to the absent class members, and in effect, becomes a punitive device. As Judge Richard Posner observes:

> The doctrine [of cy pres], or rather something parading under its name, has been applied in class action cases, but for a reason unrelated to the reason for the trust doctrine. That doctrine is based on the idea that the settlor would have preferred a modest alteration in the terms of the trust to having the corpus revert to his residuary legatees. So there is an indirect benefit to the settlor. In the class action context the reason for appealing to cy pres is to prevent the defendant from walking away from the litigation scotfree because of the infeasibility of distributing the proceeds of the settlement (or the judgment, in the rare case in which a class action goes to trial) to the class members. There is no indirect benefit to the class from the defendant's giving the money to someone else. In such a case the "cy pres" remedy . . . is purely punitive.

Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 784 (7th Cir. 2004). See also *Klier v. Elf Atochem N. Am., Inc*., 658 F.3d 468, 480 (5th Cir. 2011) (Jones, J., concurring) ("I]t is inherently dubious to apply a doctrine associated with the

voluntary distribution of a gift to the entirely unrelated context of a class action . . . .").

This case demonstrates why. Of the 18,066 class members in this case, 13,197 have been identified, representing over $50 million of the over $60 million judgment. Only 4,869 remain unascertained, representing $10,759,922.65, approximately one-sixth of the judgment. And the court is not bereft of options. For one, it could return the money to the defendant, reflecting the fact that the civil judgment exceeded the amount of damages ultimately claimed by the plaintiffs. Or it could allow the remaining funds to escheat to the state. But instead, citing its "general equitable powers" (R.E. 620, 4/29/21 Memorandum Opinion and Order, p 4), the district court, over the objection of Defendant-Appellant DISH Network, LLC, ordered a cy pres distribution of judgment funds to entities that lack any connection to this lawsuit, including advocacy groups that the defendant objects to supporting.[5]

Meanwhile, the district court's order provides no benefit to the class.

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[5] The 12 entities slated to receive the first round of funds through cy pres distribution include the National Legal Aid and Defender Association ($3,454,238), the National Consumer Law Center ($1,708,810), Consumer Reports, Inc. ($1,000,000), the National Association of Consumer Advocates Charitable Fund ($450,000), and the Public Justice Foundation ($369,000). (See RE 620, 4/29/21 Memorandum Opinion and Order, p 7).

The identified class members have been or will be paid and therefore have

their full remedy. The unidentified class members are people who, despite having prevailed in the lawsuit and having been served notice, have opted not to claim their remedy, either because they do not feel they suffered an injury, or because they do not want the remedy, or think obtaining it is not worth the bother. Whatever the reason, the idea that this particular group of people will benefit from the court's order to fund the recipient organizations (especially entities that will use the funds to bring further litigation of the type that this group has participated in but chosen not to collect their portion of the judgment) is bankrupt.

The district court's process was one of grantmaking, or even legislative appropriating, rather than judicial decisionmaking. The court "appointed a special master to help it evaluate potential cy pres recipients" and noted that "[t]he special master selected the organizations based on criteria developed from the Court's previous orders and principles of sound grantmaking based

on the special master's extensive experience in the field ...." (R.E. 620, 4/29/21 Memorandum Opinion and Order, pp 1, 5-6). As one court recognized "[w]hile courts and the parties may act with the best intentions, the specter of judges and outside entities dealing in the distribution and solicitation of large sums of money creates an appearance of impropriety." *Securities & Exchange Comm'n v. Bear, Stearns & Co., Inc*., 626 F.Supp.2d 402

(S.D.N.Y. 2009). See also *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011) (same); *In re Lupron Mktg. & Sales Pracs. Litig*., 677 F.3d 21, 38 (1st Cir. 2012) ("[H]aving judges decide how to distribute cy pres awards both taxes judicial resources and risks creating the appearance of judicial impropriety.") The process employed here strays far beyond any proper understanding of the judicial power.

It is of particular concern when the recipients of cy pres distributions are "organizations only tangentially related to the subject of the lawsuit." Richard Marcus, Revolution v. Evolution in Class Action Reform, 96 N.C. L. Rev. 903, 925 (2018), quoting Adam Liptak, Doling Out Other People's Money, N.Y. Times, Nov. 26, 2007, at A14. As is the case here, when funds are distributed to "an organization that initiates new litigation ... cy pres helps to promote the industry of non-economic litigation. In many instances, cy pres distributions

go to consumer-interest, litigation-related charities that may then use the distribution to finance new litigation of the same type." Jennifer Johnston, 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, 296 (2013), citing *In re Wells Fargo Sec. Litig.*, 991 F. Supp. 1193, 1198 (N.D. Cal. 1998).

The district court has no authority to redistribute money between a defendant and an uninjured private entity – even if the recipients are chosen

based on "principles of sound grantmaking." The district court stepped far outside its judicial power over cases and controversies when it undertook to perform an act of grantmaking, essentially operating as an executive, legislative, or non-government organization soliciting and evaluating funding requests, and conferring funding awards on those it deems "worthy" for political or policy reasons. The judiciary is not authorized and ill-suited for that mission. And judicial efforts in this area threaten to undermine the courts' institutional credibility and to enmesh them in policy-making political judgments of the sort that are not appropriate for the judicial branch of government. The more the judiciary embarks on such efforts, the more the public will see it as a political institution.

This Court should reverse the district court's order because "general equitable powers" do not permit the court to disregard the constraints of Article III by ordering payments to uninjured non-parties.

C. CY PRES VIOLATES THE RULES ENABLING ACT BY IMPOSING A FINE ON DEFENDANTS NOT AUTHORIZED BY THE UNDERLYING SUBSTANTIVE LAW

In addition to being an improper use of Article III power, ordering payment of unclaimed class action judgment funds to non-parties is not allowable under the Federal Rules of Civil Procedure. Cy pres distributions "arguably violate the Rules Enabling Act by using a wholly procedural

device—the class-action mechanism as prescribed in Rule 23—to transform substantive law from a compensatory remedial structure to the equivalent of a civil fine." *Klier*, 658 F.3d at 481 (Jones, J., concurring) (citation and punctuation omitted). This is because the Rules Enabling Act provides that procedural rules "shall not abridge, enlarge or modify any substantive right. . . ." 28 U.S.C. § 2072, and the Supreme Court has instructed that, "Rule 23's requirements must be interpreted in keeping . . . with the Rules Enabling Act . . . ." *Amchem Prod., Inc. v. Windsor,* 521 U.S. 591, 613 (1997). And that same principle governs construction of the rules governing entry of judgments, including Rule 58.

A rule of procedure must "really regulate[] procedure," which is "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach v. Wilson & Co*., 312 U.S. 1, 14 (1941). If a rule "governs only the manner and the means by which the litigants' rights are enforced, it is valid; if it alters the rules of decision by which the court will adjudicate those rights, it is not." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co*., 559 U.S. 393, 407 (2010) (citations and punctuation omitted).

When addressing Rule 23 generally, the Supreme Court has observed that, "rules allowing multiple claims (and claims by or against multiple

parties) to be litigated together are . . . valid," because "[s]uch rules neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter only how the claims are processed. For the same reason, Rule 23. . . like traditional joinder … leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Id*. at 408 (opinion of Scalia, J.). Neither Rule 23 nor Rule 58 (entering judgment) contains a provision authorizing distribution of judgment monies to nonparties. See *Nance v. Miser*, No. CV 1400500-PHX-SMM, 2018 WL 10667052, at *2 (D. Ariz. Apr. 3, 2018), aff'd, 768

F. App'x 742 (9th Cir. 2019), quoting *Wilson v. Eberle*, 18 F.R.D. 7, 8 (D. Alaska 1955) (a judgment should reflect "the pleadings, the evidence, and the charge of the Court"). But using Rule 23 as a means of requiring a defendant in a civil lawsuit to pay judgment monies to a non-party—and in so doing, incorporating "principles of sound grantmaking" into the judicial power—changes the substantive rights of both the parties and non-parties.The substantive law at issue here, the Telephone Consumer Protection Act, 47 U.S.C. § 227, already includes provisions for a forfeiture penalty to the United States and permits treble damages for injured parties, but it does not require violators to compensate third parties that they have not injured. Accordingly, "[i]f existing substantive remedies are deemed inadequate . . . the task of altering the remedial framework is one for the authority that created the

substantive law in the first place. Resort to cy pres when existing remedies cannot effectively be invoked by use of the class action device, then, improperly distorts the remedial structure through use of a nakedly procedural device." Redish et. al., 62 Fla. L. Rev. at 640.

D. CY PRES DISTRIBUTION OF UNCLAIMED JUDGMENT FUNDS IMPLICATES DUE PROCESS

The cy pres distribution of unclaimed judgment funds also implicates the Due Process rights of class members. As Professor Redish explains, in this

context, "use of cy pres . . . threatens the absent individual claimants' right to due process by judicially revoking their substantive right to compensatory relief." Redish et. al., 62 Fla. L. Rev. at 645. Indeed, the district court expressly justified the use of cy pres over escheat to the state as a means of depriving unascertained class members of their right to compensation. The court noted that escheat "lacks the permanence of cy pres, as the relevant federal statute establishes procedures for claimants whose funds have escheated to seek recovery of those funds at a later date. See 28 U.S.C. § 2042." (RE 620, 4/29/21 Memorandum Opinion and Order, p 9).

E. CY PRES INFRINGES ON DISH'S FIRST AMENDMENT RIGHTS

The order for cy pres distribution of unclaimed judgment funds is problematic because it violates the First Amendment. "[T]he right of freedom of thought protected by the First Amendment against state action includes

both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Thus, "the government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves." *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014) (citation and punctuation omitted). The Supreme Court recognizes that the "compelled funding of the speech of other private speakers or groups presents the same dangers as compelled speech." *Id*. (citation and punctuation

omitted). *See also United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001) ("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 . . . ."); *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) (state law which forces public employees "to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities," is a violation of "the free speech rights of nonmembers" because it compels them —to subsidize private speech on matters of substantial public concern.").

Here, the cy pres distribution of judgment funds – over DISH's objection – violates the First Amendment because it requires DISH to make court-

mandated payments to advocacy organizations that may engage in speech or litigation directly antithetical to DISH's interests.

CONCLUSION

The Court should reverse the district court's order because Article III does not give the court power to order a party in a civil case to pay damages to an uninjured non-party—even in the context of an unclaimed judgment in a

class action case. The doctrine of cy pres is inapt to class actions and incompatible with the judicial role in civil litigation. The district court's order is akin to confering standing to entities that otherwise are not entitled to it, and to imposing a punitive fine on a civil defendant when no statute or rule authorizes it. To construe Rule 23 and Rule 58 as allowing for such cy pres distributions violates the Rules Enabling Act by changing the substantive rights of the parties (and non-parties). Equally important, the order implicates the Due Process rights of absent class members by terminating any access to compensatory relief, and violates the First Amendment by forcing a defendant to fund the political speech of organizations it does not agree with and objects to supporting. For these reasons, amicus curiae LCJ respectfully requests this Court reverse the decision of the district court.

Respectfully submitted,

/s/ Mary Massaron

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CERTIFICATE OF COMPLIANCE

STATE OF MICHIGAN
)
) SS.
COUNTY OF OAKLAND)

MARY MASSARON, being first duly sworn, certifies and states the following:

1. She is a shareholder with the firm Plunkett Cooney, and is in principal charge of the above-captioned cause for the purpose of preparing the attached brief on appeal;

2. The Amicus Brief prepared by her office complies with the typevolume limitation;

3. Plunkett Cooney relies on the word count of their word processing system used to prepare the brief, using Cambria size 14 font; and 4. The word processing system counts the number of words in the brief as 3,661.

Dated: August 16, 2021

/s/ Mary Massaron
Mary Massaron

Attorney for Amicus Curiae

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the bar of the United States Court of Appeals for the Fourth Circuit.

Dated: August 16, 2021

/s/ Mary Massaron
Mary Massaron

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of August, 2021, the foregoing Brief of *Amicus Curiae* in Support of Defendant-Appellant was filed electronically on the Court's ECF filing system and was served by Notice of Docket Activity upon the following, each of who is a "Filing User" with an email address of record with the Court:

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This 16th day of August, 2021

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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