LESSONS FROM THE SECOND AND NINTH CIRCUITS: PROTECTING *CY PRES* AWARDS FROM ABUSE IN MODERN CLASS ACTIONS

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ABSTRACT

Class action settlements increasingly include cy pres awards. In the class action context, cy pres relief refers to compensation that does not directly go to the plaintiffs. Cy pres awards allow attorneys to distribute all settlement funds (cy-pres-only) or left-over settlement funds (cy-pres-partial) collected from a defendant to third parties, such as charities. Courts have approved cy pres awards in mandatory and non-mandatory class actions, despite criticism from the legal community.

This Note addresses two predominant critiques of cy pres awards: first, that attorneys and judges abuse cy pres awards; second, that cy pres awards may violate class members' First Amendment rights. The Supreme Court has not reviewed cy pres awards, and the Advisory Committee, which proposes revisions to the Federal Rules of Civil Procedure, has not developed a rule to govern the use of cy pres awards.

These two critiques have significant force, especially in unascertainable class actions where the attorneys have not identified all class members. In response, I suggest the Advisory Committee revise Rule 23 by adopting a nexus standard and by adding a comment that courts should consider cy-pres-only settlements as injunctive relief.

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TABLE OF CONTENTS

I.
BACKGROUND

A. In re Google Street View: The Ninth Circuit Grants Relief Through a Cy Pres Award

When a person taps on a location in Google Maps, Google prompts a "Street View" option, which transforms a two-dimensional map into interactive panoramas that provide the person with a real-life experience of any location across the globe.[1] To accomplish this technological achievement, Google sent out "Street View Vehicles" to take photographs from these locations.[2] However, these vehicles took more than just photographs. They collected private, legally protected data known as payload data—internet users' emails, usernames, passwords, videos, photographs, and documents.[3] After state and federal governments launched investigations, Google met with thirty-eight attorneys general before ultimately issuing a public apology and paying a total of seven million dollars to the states.[4]

What happened to the internet users whose private information was stolen? In November 2010, a class of these internet users brought an action against Google, alleging a violation under the Wiretap Act.[5] After certification hearings, debates about standing, and a report on Google's data collection, the class and Google settled for a class defined as "all persons who used a wireless network device from which Acquired Payload Data was obtained."[6] In the settlement process, the class attorneys did not provide the judge approving the settlement with class members' identities or an administratively feasible way to identify the class members. Rather than directly compensating class members from the thirteen-million-dollar fund, attorneys distributed the funds they obtained from the defendants—for the class members—to third-party recipients (known as *cy pres* recipients) and to themselves in attorney's fees.[7]

1. *See, e.g.*, *In re* Google Inc. St. View Elec. Commc'ns Litig., 21 F.4th 1102, 1107 (9th Cir. 2021); *In re* Google Inc. St. View Elec. Commc'ns Litig., 611 F. Supp. 3d 872 (N.D. Cal. 2020).
2. *In re Google St. View*, 21 F.4th at 1107.
3. *Id.* at 1108.
4. *Id.*
5. *Id.*
6. *Id.* at 1109.
7. *Id.* at 1110.

Google also agreed to other forms of relief. Google offered to stop collecting payload data and to host trainings on privacy.[8] The class attorneys selected "Privacy Protection Centers" in various universities or non-profit organizations as the *cy pres* recipients.[9] The Northern District of California and the Ninth Circuit found the settlement "fair, reasonable, and adequate" even though no money made it into class members' pockets.[10]

B. Hyland v. Navient Corp.: The Second Circuit Grants Relief Through a Cy Pres Award

On the other side of the country, public servants joined together in a separate class action to challenge Navient, a for-profit student loan servicing company. As a for-profit student loan servicing company, Navient allegedly misled class members to believe that they did not qualify for the federal government's Public Service Loan Forgiveness (PSLF) program, even though these class members likely qualified for PSLF.[11] Navient serviced over 205.9 billion dollars in loans.[12] When reviewing Navient's motion to dismiss, the Second Circuit cited the District Court to note that the class had to demonstrate uniformity in the "individual circumstances and needs" of each class member seeking guidance from Navient in loan servicing.[13] The class responded by seeking certification as a mandatory nationwide class (without the ability to opt-out) for non-monetary relief rather than as an opt-out class seeking monetary relief for class members.[14] After the court certified the class as a mandatory class action, the class and Navient settled. The settlement included a 2.25-million-dollar *cy pres* award to a nonprofit that "provide[s] education and student loan counseling to borrowers."[15] Similar to *Google*, the class attorneys did not have to present class members' identities to the judge approving the settlement.

On appeal, in addition to objecting to the *cy pres* award as adequate relief, class members objected that the class attorneys did not disclose that a third party funded the class action—paying six million dollars to class attorneys—and that the *cy pres* award compelled

8. *In re Google St. View*, 21 F.4th at 1110.
9. *Id.* at 1109.
10. *Id.* at 1116.
11. Hyland v. Navient Corp., 48 F.4th 110, 115 (2d Cir. 2022); Hyland v. Navient Corp., 18 Civ. 9031, 2020 WL 6554826, at *9 (S.D.N.Y. Oct. 9, 2020).
12. *Hyland*, 48 F.4th at 115.
13. *Id.*
14. *Id.* at 116.
15. *Id.*

class members' speech and violated their First Amendment rights.[16] Just as the Ninth Circuit did in the *Google* case, the Second Circuit dismissed all objections and approved the settlement, finding this *cy pres* award was "fair, reasonable, and adequate."[17]

II.
DISCUSSION

Even though circuits continue to approve *cy pres* awards in class action settlements, the Supreme Court has yet to review an objection to a *cy pres* award in a class action case, and the Advisory Committee on Civil Rules has yet to create a rule that addresses these type of awards in class actions.[18] Many scholars and legal professionals, including Chief Justice Roberts, have questioned the role *cy pres* awards play in class action settlements and have advocated for eliminating *cy pres* awards in class actions.[19] In his statement accompanying the denial of certiorari in *Marek v. Lane*, Chief Justice Roberts asked "when, if ever, such relief [*cy pres* awards] should be considered" and "how closely the goals of any enlisted organization must correspond to the interests of the class."[20] Chief Justice Roberts criticized *cy pres* awards as not benefiting the class members who do not receive compensation from the award.[21]

Chief Justice Roberts' concerns about *cy pres* awards in class actions reflect common concerns about class action lawsuits. Rule 23 of the Federal Rules of Civil Procedure (Rule 23) sets forth

16. *Id.* at 122.

17. *Id.* at 121.

18. *See* Marek v. Lane, 571 U.S. 1003, 1003–04 (2013); Comm. on Rules of Prac. & Proc., Report of the Advisory Committee on Civil Rules, (Dec. 11, 2015), *available at* https://www.uscourts.gov/sites/default/files/2015-12-11-cv_rules_committee_report_0.pdf [https://perma.cc/J3A5-AAY3] [hereinafter Advisory Committee Report (Dec. 11, 2015)] ("[T]he Subcommittee concluded . . . against adopting a freestanding cy pres provision.").

19. *See* Advisory Committee Report (Dec. 11, 2015), *supra* note 18. *See, e.g.*, 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, 624 (2010) ("Our analysis leads to the ultimate conclusion that resort to cy pres in the class action context contravenes important constitutional and procedural limitations, and must therefore be rejected."). John H. Beisner et al., U.S. Chamber Inst. for Legal Reform, Cy Pres: A Not So Charitable Contribution to Class Action Practice 2–6 (2010) (arguing that "*cy pres* has no place at all in class actions").

20. *Marek*, 571 U.S. at 1003 (denying review to a class member's challenge to the proposed settlement between the class members represented by Lane and the defendant Facebook when Facebook agreed to pay damages to a third-party fund through a *cy pres* award).

21. *Id.*

requirements and procedural steps for class action lawsuits. In a "typical" lawsuit, where one plaintiff sues a defendant, the parties advocate for their interests, and if the plaintiff succeeds, the plaintiff is compensated and may freely use the monetary relief.[22] In a modern class action, Rule 23 allows class representatives, lawyers, and a lead plaintiff to sue on behalf of and speak for all class members, and the attorneys determine how and if the class members are compensated and whether compensation is directed to a third party rather than the class members.[23] Many have critiqued class actions as deviating from the typical lawsuit for allowing lawyers, rather than class members, to determine the litigation's outcome.[24]

Concerns from Chief Justice Roberts have neither led the Supreme Court to rule on *cy pres* awards' constitutionality nor decreased *cy pres* awards' prevalence in class action settlements.[25] Despite criticisms, *cy pres* awards continue to assist parties in reaching settlements and continue to have value to class action attorneys and judges.[26] So, until the Supreme Court reviews or the Advisory Committee rejects them, *cy pres* awards are not going anywhere. Although most literature on *cy pres* awards embraces Chief Justice Roberts' concerns and seeks to limit the awards as a form of relief, this Note will accept that *cy pres* awards serve a practical purpose. I instead propose recommendations that reform rather than eliminate these awards.

First, I recognize the practical uses of *cy pres* awards, especially in unascertainable class actions where attorneys do not identify the class members or set forth an administratively feasible way to locate

22. FED. R. CIV. P. 23. *See* Samuel Issacharoff, *Assembling Class Actions*, 90 WASH. U. L. REV. 699, 702 (2013) (discussing tension between individual actions and class actions where a representative brings an action on behalf of individuals).

23. FED. R. CIV. P. 23(a)(4) ("[T]he representative parties will fairly and adequately protect the interests of the class."). *See, e.g.*, Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1111 (1996).

24. *See, e.g.*, Redish et al., *supra* note 19, at 653 (criticizing *cy pres* awards). *See* Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161 (2015); Myriam Gilles, *Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375 (2005) (discussing critiques of class actions generally). *See also* Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 405 (2014).

25. Redish et al., *supra* note 19, at 661 (noting the rise in *cy pres* awards); *see also* Mark P. Rapazzini, *Trends in Class Action Settlements: Developments in the Application of the Cy Pres Doctrine*, KROLL (May 7, 2021), https://www.kroll.com/en/insights/publications/settlement-administration/cy-pres-trends-in-class-action-settlements [https://perma.cc/633F-3GNG] (discussing the recent trend in circuit courts to scrutinize the charitable organizations selected to receive *cy pres* awards).

26. Redish et al., *supra* note 19, at 661.

class members. Then, I draw from circuit courts' approaches to recommend that the Advisory Committee adopt a rigorous nexus standard and a comment to Rule 23 suggesting that *cy pres* awards can serve as injunctive relief. This approach maintains the practical benefits of *cy pres* awards while addressing the salient concerns that class actions allow attorneys and judges to abuse *cy pres* awards and that *cy pres* awards can violate class members' First Amendment rights.

A. The Rise of Cy Pres Awards in Modern Class Actions

In a class action, after attorneys for the class and defendants agree to a settlement, the attorneys often struggle to find the tens, hundreds, or even thousands of class members who have a claim to the settlement fund. Often class members do not know they are part of a class, and neither class attorneys nor defendants know how to identify absent class members.[27] However, when attorneys do not know how to identify class members, they do not have to terminate the action. Rather, the attorneys can pursue the class action and settle with the defendant without ever identifying class members.[28] Thus, class action settlements increasingly include a *cy pres* award that allows attorneys for the class and defendants to select a third-party recipient to receive some (*cy-pres*-partial) or all (*cy-pres*-only) of the settlement fund from the defendant.[29] Modern class action settlements rely on *cy pres* awards because these awards enable efficient class actions where attorneys do not need to identify all class members. *Cy pres* awards also deter current and potential defendants from committing similar harms, especially in cases where courts do not impose an ascertainability requirement.[30]

1. Modern Class Actions: A Balance Between Function and Form

In 1966, the Advisory Committee revised Rule 23, which revolutionized class actions and the legal system's ability to compensate

27. *See* Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. Cal. L. Rev. 97, 102–03 (2014) (citing Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 786 (7th Cir. 2004)).

28. *Id.* at 103–04 (citing Lane v. Facebook, Inc., 696 F.3d 811, 821 (9th Cir. 2012)).

29. *See* Redish et al., *supra* note 19, at 653 (explaining that *cy pres* awards have increased since 2000).

30. For a discussion of how *cy pres* awards align with class action objectives see Robert G. Bone, *Justifying Class Action Limits: Parsing the Debates over Ascertainability and Cy Pres*, 65 Kan. L. Rev. 913, 944 (2017) ("A judge must be confident that there is a manageable way to deal with any left-over settlement funds before she can grant certification, and cy pres offers a workable solution.").

class members. Revised Rule 23 sets forth three types of class actions, as outlined in Rule 23(b)(1–3).[31] Rule 23(b)(1) and Rule 23(b)(2) create mandatory class actions, and Rule 23(b)(3) creates non-mandatory class actions where members can opt-out.[32] This Note will focus on Rule 23(b)(2) and Rule 23(b)(3) actions. In Rule 23(b)(2) actions, class members receive compensation predominantly through injunctive or declaratory relief.[33] In Rule 23(b)(3) actions, class members may receive monetary damages in addition to injunctive and declaratory relief.[34] Rule 23(b)(3) was designed to give judges power and discretion over remedies to ensure that class actions could remain flexible.[35] Courts have supervisory power over

31. FED. R. CIV. P. 23 (amended 11966).

> [23(b)] (1) prosecuting separate actions by or against individual class members would create a risk of:
>
> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
>
> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.
>
> [23(b)] (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class.
>
> [23(b)] (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions.
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members.
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the forum; and
>
> (D) the likely difficulties in managing a class action.

32. *Id.*

33. *Id.*

34. *Id. See also* Natasha Dasani, *Class Actions and the Interpretation of Monetary Damages Under Federal Rule of Civil Procedure 23(b)(2)*, 75 FORDHAM L. REV. 165, 168 n.15 (2006) (describing Rule 23(b)(3) as the "'damage' class"). FED. R. CIV. P. 23(b)(2) advisory committee's note to 1966 amendment.

35. Arthur Miller, The American Class Action: From Birth to Maturity, Keynote Address at the Tel Aviv University Conference: Fifty Years of Class Actions—A Global Perspective, Fifty Years After the 1966 Amendment of the American Class Action Rule 23 (Jan. 4, 2017), *in* 19 THEORETICAL INQUIRIES L. 1, 5 (2018) (noting that they did succeed in creating a rule that was "flexible and allowed to function beyond the existing boundaries for class actions as changes in substantive law and society might warrant").

class actions, including the power to approve or reject settlements and class certifications based on Rule 23 requirements.[36]

The Advisory Committee prioritized efficiency when revising Rule 23 and sought to develop a functional rule that would allow parties to easily aggregate claims.[37] Prior to the 1966 revision, Rule 23 was confusing.[38] Attorneys could not efficiently aggregate claims to form a class because they did not know the boundaries of the Rule or the criteria for bringing a class action. Rule 23 now provides clear guidance on the criteria for a class action and the relief available for each type of class action.[39] The more functional revised Rule provides class action attorneys with the framework to efficiently aggregate claims and achieve greater collective damages. However, aggregating claims in a class action often results in less compensation for class members than would be expected in an individual action.[40] Scholars, such as Professor Miriam Gilles, argue that the deterrent effect of class actions justifies the decreased compensation for individual class members.[41] Gilles explains that class actions serve as "private attorneys general," because efficiently aggregating claims allows attorneys to demand greater monetary relief. Class actions deter defendants from breaking the law by enforcing the law through private suits; even though class actions may result in less individual

36. Fed. R. Civ. P. 23(e) ("The claims, issues, or defenses of a certified class . . . may be settled . . . *only* with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise . . . ." (emphasis added)).

37. John K. Rabiej, *The Making of Class Action Rule 23 – What Were We Thinking*, 24 Miss. Coll. L. Rev. 323, 329 n.26 (2005).

38. *See* Miller, *supra* note 35, at 5 ("The entire Committee understood and agreed that the confusing categories established by the 1938 Rule were retarding its utility and had to be replaced by more functional language.").

39. *See* Rabiej, *supra* note 37, at 342 (explaining Reporter of the Advisory Committee Benjamin Kaplan's thought process while revising Rule 23: "Combining the aggregation power of the Rule 23 joinder mechanism with settlement procedures could substantially facilitate the disposition of multiple actions, eliminating troublesome choice-of-law issues and reducing transaction costs.").

40. *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1378 (1995) (discussing how class actions are evolving to incentivize quick settlement that benefits attorneys but may not be in the best interest of all class members). *See also* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 104 (2006); Koniak & Cohen, *supra* note 23, at 1113; William B. Rubenstein, *On What A "Private Attorney General" Is—And Why It Matters*, 57 Vand. L. Rev. 2129, 2133–37 (2004) ("[E]ach of [a class action attorney's] clients has so little at stake that her pursuit of their scant interests is justified by the deterrent impact of the class members' cumulative interest.").

41. *See* Gilles & Friedman, *supra* note 40, at 105.

compensation, they result in greater benefits for society by deterring would-be defendants.

Although class actions have practical benefits, such as efficiently litigating claims and deterring defendants, the legal community has criticized class actions for taking away an individual's stake in the litigation.[42] Rule 23 requirements like commonality, typicality, and opportunity to opt-out of Rule 23(b)(3) actions seek to ensure that each class member has a stake in the litigation and wants to participate in the action.[43] However, these requirements are often *pro forma*. Class members rarely opt-out or participate, and courts often set a lenient standard for identifying all class members.[44] This is likely because courts try to balance the objectives of a class action; inquiries should be stringent enough to protect an individual's stake in the litigation, but lenient enough to enable class actions to operate efficiently.[45] Exemplifying this attempt to strike a balance, most circuits do not find that Rule 23 requires ascertainability at the time of class

42. *See* Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 Notre Dame L. Rev. 1057, 1059 (2002) ("The fact that each individual's capacity to recover is dependent on the other plaintiffs means that there no longer can be an individual right of autonomy in pursuing claims against the defendant.").

43. *See* Miller, *supra* note 35, at 6 ("[I]mposing several procedural safeguards . . . would . . . promote notions of due process, protect absent class members, and legitimize giving the resulting judgment binding effect.").

44. *See* Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 Vand. L. Rev. 1527, 1532 (2004) ("The highest mean opt-out rate is 4.6 percent for the four mass tort cases for which data were available. Employment discrimination cases rank second with an opt-out rate of 2.2 percent for the three cases in our sample with the necessary data. The opt-out rate for thirty-nine consumer class action cases is less than 0.2 percent."). Andrew C. Rose, Comment, *Federal Mass Tort Class Actions: A Step Toward Equity and Efficiency*, 47 Alb. L. Rev. 1180, 1183 n.10 (1983) ("Federal Rule 23 is to be given a liberal construction so as to eliminate repetitive and burdensome litigation.").

45. *See* Miller, *supra* note 35, at 17 (noting that federal courts require "'rigorous' examination of the Rule 23 certification prerequisites"); Amchem Prod., Inc. v. Windsor, 521 U.S. 591 (1997); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011). However, the majority view among the courts of appeals is that classes do not need ascertainability, which makes this rigorous analysis more flexible. *See* Sheldon v. Bledsoe, 775 F.3d 554, 562 (3d Cir. 2015) (noting that all circuits that had reviewed ascertainability in 23(b)(2) actions did not impose an ascertainability requirement on the actions). *See also* Barbara J. Rothstein & Thomas E. Willging, Fed. Jud. Ctr., Managing Class Action Litig.: A Pocket Guide for Judges 1 (2005), *available at* https://www.uscourts.gov/sites/default/files/classgde.pdf [https://perma.cc/W8HX-85WK] ("Members of Congress and others who assert class actions' general utility also point, however, to abuses that threaten to undermine their usefulness.").

certification.[46] Circuits have defined ascertainability as the attorneys having the definite criteria for class members and an administratively feasible way to identify those class members.[47] Although ascertainability would increase each class member's stake in the litigation, it would diminish the ability to efficiently aggregate claims into class actions.

2. *Cy Pres* Awards in Modern Class Actions

Attorneys first used *cy pres* awards to solve a problem in modern class actions: what should be done with the funds collected from defendants that attorneys did not distribute? Class attorneys and the legal community sought to maximize recovery from the defendant to ensure defendants were held accountable for their "total" liability to achieve deterrence. However, the attorneys and scholars found it unrealistic to find and distribute funds to every class member entitled to compensation in every class action.[48] This problem persisted, and class attorneys continued to have leftover funds from defendants.[49] In response to this problem, class action attorneys began using the *cy pres* doctrine from trusts and estates.[50]

a. *Cy Pres* Awards Defined

Cy pres, or "as near as possible," relief comes from the French expression *cy près comme possible*.[51] The *cy pres* doctrine has its roots in trust and estates law and allows courts to save the charitable trusts of a settlor or testator.[52] In trusts and estates, when the stated intent

46. A majority of circuits have found that classes do not need to be completely ascertainable to go through certification. *See, e.g.*, *In re* Petrobras Secs., 862 F.3d 250, 264–65 (2d Cir. 2017) (holding no heightened ascertainability required was required by Rule 23); Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1125–26 (9th Cir. 2017) (holding that it was not necessary to show that it was administratively feasible to identify each class member); Mullins v. Direct Dig., Inc., 795 F.3d 654, 672 (7th Cir. 2015) (holding the same as *Briseno*). *Cf.* Byrd v. Aaron's Inc., 784 F.3d 154, 162–63 (3d Cir. 2015) (holding that class ascertainability must be satisfied).

47. *See* Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 355 (3d Cir. 2013).

48. Wasserman, *supra* note 27, at 103–05.

49. Gerson H. Smoger, *The Importance of Cy Pres in Modern Class Action Jurisprudence and the Myths Concerning Its Use*, 24 Lewis & Clark L. Rev. 595, 596 (2020) (noting that situations occur where the cost of distribution was more than class member compensation from the fund, members did not properly file claims, or it was not economically or administratively possible to find all class members).

50. Stewart R. Shepherd, Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. Chi. L. Rev. 448, 452 (1972).

51. *See* Wasserman, *supra* note 27, at 114.

52. *Id.*

of the settlor or testator cannot be realized, the courts use the *cy pres* doctrine to direct the contribution to a "charitable purpose that reasonably approximate[s]" the intent of the settlor or testator.[53] American attorneys and courts adopted the *cy pres* doctrine in class action lawsuits after the Advisory Committee revised Rule 23, even though *cy pres* had no historical basis in class actions.[54]

b. Reaction to *Cy Pres* Awards

Adoption of the *cy pres* doctrine to the class action context has prompted significant criticism. Judge Posner has noted that, unlike in the trust and estate context where *cy pres* operates to effectuate the intent of the settlor or testator, in the class action context *cy pres* operates only to "prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement."[55] Judge Posner takes issue with *cy pres* awards in class action settlements that deprive class members of their monetary relief and thus do not properly effectuate their intent.[56] Since 2010, some scholars have increasingly agreed with Judge Posner.[57] These scholars attack *cy pres* awards in the class action context for adversely impacting class members' interests and violating their constitutional rights.[58]

Organizations, such as The America Law Institute (ALI), provide guidance on *cy pres* awards. The ALI's *Principles of the Law of Aggregate Litigation* (ALI principles) recommend that "[t]he court, when feasible, should require the parties to identify a recipient whose interests reasonably approximate those being pursued by the class" and that *cy pres* awards should only be used after an attempt to provide compensation directly to class members.[59] The ALI principles highlight

53. Restatement (Third) of Trusts § 67 (Am. L. Inst. 2003) ("Unless the terms of the trust provide otherwise, where 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, or to the extent it is or becomes wasteful to apply all of the property to the designated 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.").

54. *See* Shepherd, *supra* note 50, at 452 ("When distribution problems arise in large class actions, courts may seek to apply their own version of cy pres by effectuating as closely as possible the intent of the legislature in providing the legal remedies on which the main cause of action was based.").

55. *See* Wasserman, *supra* note 27, at 116 (quoting Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 784 (7th Cir. 2004)).

56. *Id.*

57. *See* Redish et al., *supra* note 19, at 622.

58. *Id.*

59. Principles of the L. of Aggregate Litig. § 3.07(c) (Am. L. Inst. 2010) [hereinafter ALI Principles]. While scholars occasionally discuss and critique

that *cy pres* awards may have an important role in modern class actions but also suggest that *cy pres* awards should be used with caution, since directing funds to a third party takes away compensation from injured class members.[60] Thus, the ALI principles recommend that *cy pres* should only be used in schemes where the settlement provides class members compensation and the *cy pres* award only comes from unclaimed or not feasibly distributed funds (*cy-pres*-partial).[61] However, in reality, attorneys do not always follow the ALI principles when using *cy pres* awards.[62] As illustrated in Part I, attorneys often break these guidelines by, for example, directing all compensation to a third party in a *cy pres* award (*cy-pres*-only) before distributing compensation to class members.

c. Trends in *Cy Pres* Awards

Despite the pervasive view that *cy pres* awards should have a limited role in class actions, *cy pres* awards continue to be used with increasing prevalence in class action lawsuits.[63] From 1991 to 2000, approximately twenty-five class action settlements had *cy pres* awards. From 2003 to 2008, approximately 135 class actions had *cy pres* awards.[64] That trend accelerated from 2008 to 2013, when approximately 243 class actions included *cy pres* awards.[65] Additionally, as of 2019, courts have reviewed over 500 class action settlements

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the two forms of *cy pres* awards separately, this note will address both *cy pres* awards together.

60. *See* Robert Bone, *In the Defense of the Cy-Pres Only Class Action*, 24 Lewis & Clark L. Rev. 571, 576 n.16 (2020) ("This preference is based on the assumption that 'funds generated through the aggregate prosecution of divisible claims are presumptively the property of the class members.'" (quoting ALI Principles § 3.07 cmt. b)).

61. ALI Principles § 3.07(c).

62. *See* Hyland v. Navient Corp., 48 F.4th 110, 116 (2d Cir. 2022); *In re* Google Inc. St. View Elec. Commc'ns Litig., 21 F.4th 1102, 1109 (9th Cir. 2021); *see also* Bone, *supra* note 60, at 592 ("[A] cy-pres-only distribution is justified as enabling class litigation—the cy-pres-only class action—that helps to produce a fair and efficient error risk distribution.").

63. *See* Redish et al., *supra* note 19, at 620; Smoger, *supra* note 49, at 597 (finding that every circuit has approved *cy pres* settlements and twenty-three states as well as Puerto Rico have adopted specific rules to authorize *cy pres*); 28 U.S.C. § 1712(e) ("The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties.").

64. *See* Jorge Galavis, *Horseshoes and Hand Grenades:* Frank v. Gaos *and the Problem with Class Action Cy Pres Distributions*, 28 U. Mia. Bus. L. Rev. 88, 97–99 (2019) (citing Redish et al., *supra* note 19, at 618) (studying the rise in *cy pres* settlements since Redish's article).

65. *See id.*

with *cy pres* awards.[66] Some scholars suggest the increase in *cy pres* awards simply reflects the weaknesses of alternative mechanisms to distribute the funds. Other scholars embrace *cy pres* awards because they align with modern class action policy objectives.[67]

d. *Cy Pres* Awards and Ascertainability

Cy pres awards have an especially useful role in actions with unascertainable classes. As previously stated, circuits have defined the ascertainability inquiry as whether the class attorneys have definite criteria for class members and an administratively feasible way to identify class members at the class certification stage.[68] When a class is completely ascertainable, attorneys can more readily distribute a settlement fund because attorneys know who should receive a portion of the fund. However, most circuits have held that Rule 23 does not require attorneys to establish ascertainability at the class certification stage.[69] Thus, in many cases with unascertainable classes, *cy pres* awards play a critical role. *Cy pres* awards allow attorneys to seek monetary damages from the defendant, even though the attorneys do not know the class members' identities or plan to distribute funds to those unidentifiable class members.

Because unascertainable class members lack awareness that they have a stake in the class action, critiques of *cy pres* awards have more force in unascertainable class actions than ascertainable class actions. In an unascertainable class action, funds from the defendant go to *cy pres* recipients rather than class members, because attorneys never identify class members. In contrast, in an ascertainable class action, funds from the defendant go to *cy pres* recipients rather than class members, often because class members do not fill out the correct paperwork or lack the incentive to file a claim for their portion of the damages.[70] In only the former set of cases, class members do not have the same ability to object to the settlement and advocate for their interests. Although the following discussion pertains to all class actions with *cy pres* awards, the discussion points out more salient concerns and suggestions to prevent abuse in unascertainable actions, given that most circuits do not require ascertainability.

66. *See id.*

67. Wasserman, *supra* note 27, at 110; *see, e.g.*, William T. Allen, *Commentary on the Limits of Compensation and Deterrence in Legal Remedies*, 60 Law & Contemp. Probs. 67, 67 (1997).

68. *See* Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 355 (3d Cir. 2013).

69. *See supra* note 46.

70. Wasserman, *supra* note 27, at 103–05.

3. Benefits of *Cy Pres* Awards

Cy pres awards benefit class actions because they promote two chief policy objectives set by the Advisory Committee when it revised Rule 23: efficiency and deterrence.

Cy pres awards enable efficient settlement by providing a mechanism to distribute compensation in actions with unascertainable classes. The decision to not require ascertainability leads to both a more efficient class certification and an increase in funds not feasibly distributed.[71] Professor Richard Bone underscores that "[i]f *cy pres* is impermissible or severely limited, and if class recovery must go to class members, then the case for strict ascertainability is much stronger."[72] Bone illustrates how *cy pres* awards have a crucial role under the current scheme where courts do not require ascertainability. With a *cy pres* award, attorneys can assemble classes efficiently, hold defendants accountable for violating the law, demand maximum compensation, and then funnel leftover funds to a third party—without ever identifying the individual class members or making the class ascertainable.[73]

In addition, *cy pres* awards enable class actions to deter defendants. Revised Rule 23 deters defendants by incentivizing class members to bring claims.[74] Just as class actions create greater deterrence by joining many plaintiffs with individually small claims together—many of whom would not bring their independent claim if not for the class action—*cy pres* awards allow attorneys to demand greater compensation from defendants, because the attorneys can bring actions on behalf of more, unidentified class members.[75] Given the reality that classes often do not have complete ascertainability and thus frequently cause leftover funds to arise in class actions, *cy pres* awards become much more palatable.[76] With *cy pres* awards, these leftover

71. *See* Rhonda Wasserman, *Ascertainability: Prose, Policy, and Process*, 50 CONN. L. REV. 695, 721 (2018) ("Burdening the class representative with the cost of proving an administratively feasible method for identifying class members at the *outset* of the litigation may sound the death knell for certain class actions . . . .").

72. *See* Bone, *supra* note 30, at 940.

73. *Id.* at 941.

74. *See* Coffee, *supra* note 40, at 1355. *See also* Wasserman, *supra* note 27, at 106–07.

75. *See* Bone, *supra* note 30, at 915, 945; Hughes v. Kore of Ind. Enter., 731 F.3d 672, 677–78 (7th Cir. 2013) ("[T]he damages sought by the class [through a *cy pres* award] . . . will make the suit a wake-up call for [the defendant] and so have a deterrent effect on future violations of the Electronic Funds Transfer Act by [the defendant] and others.").

76. *See* Astiana v. Kashi Co., 291 F.R.D. 493, 500 (S.D. Cal. 2013) ("If class actions could be defeated because membership was difficult to ascertain at the class

funds could go to third-party recipients that seek to prevent future harm from the defendants in the class action or similarly situated defendants.[77] Alternatives, such as returning leftover funds to the defendant do not create the same deterrent effect as *cy pres* awards, because a defendant under this alternative would not be required to pay as great of a financial penalty and therefore would have less incentive to change their harmful behavior.[78] *Cy pres* awards not only enable efficient class actions but also maximize deterrence.

4. Critiques of *Cy Pres* Awards

Despite these benefits, *cy pres* awards used in class actions are criticized for their potential for abuse and for violating class members' First Amendment rights, especially when the class action involves an unascertainable class. These concerns warrant further discussion.

B. Abuse of Cy Pres Awards by Attorneys and Judges

Cy pres awards increase the likelihood that attorneys and judges will act inconsistently with class members' interests in class actions.[79] In a class action, attorneys and judges have the discretion to determine not only settlement terms but also how and who receives *cy pres* awards.[80] Attorneys abuse *cy pres* awards, especially in unascertainable class actions, when they prioritize settling and collecting their fees over maximizing relief to class members.

First, attorneys may abuse *cy pres* awards when they select a third party unrelated to the class members, such that the *cy pres* award no longer achieves "as near as possible" relief.[81] A third-party recipient's remote connection to class members serves as a typical indicator

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certification stage, there would be no such thing as a consumer class action." (internal quotation marks omitted) (quoting Reis v. Ariz. Beverages USA LLC, 287 F.R.D. 523, 536 (N.D. Cal. 2012))).

77. *Id.*

78. *See* Wasserman, *supra* note 27, at 106–07.

79. *See* Jay Tidmarsh, *Cy Pres and the Optimal Class Action,* 82 Geo. Wash. L. Rev. 767, 782 (2014) ("[T]he fundamental flaw in *cy pres* relief . . . is that it provides no incentive to class counsel to negotiate the optimal class settlement—the settlement that maximizes the net social benefit to a class of optimal size and claim structure."). *See also In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 178 (3d Cir. 2013) (noting that *cy pres* awards provide the opportunity for attorneys to collect fees without delivering class benefits).

80. Bone, *supra* note 60, at 579. *See also* Rothstein & Willging, *supra* note 45, at 16 ("If you decide to certify the proposed class, be aware that courts . . . have ruled that the settlement terms of a settlement class action need careful scrutiny.").

81. *See* Asher A. Cohen, *Settling Cy Pres Settlements: Analyzing the Use of Cy Pres Class Action Settlements,* 32 Geo. J. L. & Ethics 451 (2019).

that an award does not benefit the class.[82] *Cy pres* awards theoretically should provide indirect compensation to class members to serve as "near as possible" relief.[83] Thus, the third party should have a connection to the class members' injury to provide that relief to the class. However, often attorneys select third parties that lack any connection to the underlying injury and may not benefit the class members,[84] such as a nonprofit that serves an area where class members do not live.[85]

Second, attorneys and judges may abuse *cy pres* awards when they select a third party that furthers their own interests over class members' interests. For example, in *Frank v. Gaos*, the attorneys abused *cy pres* awards by appointing their alma maters as three out of six third parties set to receive the *cy pres* award.[86] The alma maters had no connection to the class members or their injuries at issue in the class action. Likewise, judges may abuse their discretion in *cy pres* awards by independently appointing a third party as a *cy pres* recipient and directing funding to third parties they favor, rather than to third parties that benefit the class. In these cases, judges take a participatory role.[87] Not only does this practice violate ALI principles,[88] but it also prevents the judge from acting as an impartial figure in the litigation.

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82. *See* Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1308 (9th Cir. 1990) (declining a *cy pres* award where the award "benefits a group far too remote from the plaintiff class").

83. Cohen, *supra* note 81, at 455.

84. *See* Brief of Objector-Appellant at 19, Nachshin v. AOL LLC, 663 F.3d 1034 (9th Cir. 2011) (No. 10-55129).

85. *See* Houck v. Folding Carton Admin. Comm., 881 F.2d 494, 502 (7th Cir. 1989) (finding it an abuse of discretion to approve two law schools in Chicago as the *cy pres* recipients for a settlement that involved a "nationwide" class).

86. *See* Cohen, *supra* note 81, at 460.

87. *See, e.g.*, *In re* Lupron Mktg. & Sales Pracs. Litig., 677 F.3d 21, 24 (1st Cir. 2012) (explaining that the settlement agreement stated "all unclaimed funds would go into a cy pres fund to be distributed at the discretion of the trial judge"); Wilson v. Sw. Airlines, Inc., 880 F.2d 807, 810 (5th Cir. 1989) (approving a *cy pres* distribution where "[a]ny residual fund may be utilized, after all payment of backpay, as the Court directs"). *See also* Transcript of Oral Argument at 14, Frank v. Gaos, 138 S. Ct. 1697 (2018) (No. 17-961). The full exchange proceeded as follows:

> JUSTICE ALITO: So the parties and the lawyers get together and they choose beneficiaries that they personally would like to subsidize? That's how it works?
> MR. FRANK: That's usually how it works. We've had—I've seen settlements where the judge says I don't like these beneficiaries, pick these beneficiaries.
> CHIEF JUSTICE ROBERTS: Where the judge has designated the beneficiaries?
> MR. FRANK: There are settlements structured where the judge designates the beneficiaries.

88. ALI Principles § 3.07(c) ("The court, when feasible, should require the parties to identify a recipient whose interests reasonably approximate those being pursued by the class.").

When the judge picks the *cy pres* recipients, the judge has an interest in the outcome of the lawsuit, creating a conflict and sense of impropriety.[89] A former judge's comment that "groups would solicit me for consideration as recipients of cy pres awards" shows the enlarged role attorneys and judges have in this settlement process.[90] This is more than a speculative concern. Judges have abused this power by choosing *cy pres* recipients that further their interests and directing *cy pres* awards to fund charities that benefit a cause they care about, rather than provide relief to class members.[91] In some extreme situations, judges have stepped down after ethical inquiries arose concerning their roles in *cy pres* settlements.[92]

Attorney and judicial abuse present a greater problem in *cy pres* class actions. *Cy pres* awards have an especially problematic, yet crucial, role in unascertainable class actions.[93] In these class actions, class members do not know they have a role in the class action, so if they have concerns about the appointment of *cy pres* recipients, they cannot object to attorney and judicial abuse or opt out of the settlement.

C. Cy Pres Awards May Violate the First Amendment

Directing funds to a third party through a settlement that includes a *cy pres* award without class members' affirmative consent may violate class members' First Amendment rights. Donating to a third party is a form of protected speech.[94] Damages collected on

89. *See* Wasserman, *supra* note 27, at 124 (explaining judges often have the discretion to distribute *cy pres* funds (citing *In re Lupron Mktg.*, 677 F.3d at 38)).

90. *See* Adam Liptak, *Doling Out Other People's Money*, N.Y. Times (Nov. 26, 2007), http://www.nytimes.com/2007/11/26/washington/26bar.html [https://perma.cc/9L5Y-S4H8].

91. *See* Wasserman, *supra* note 27, at 124.

92. *See id.* at 124–25 n.119) (noting that a judge approved a *cy pres* settlement and then "directed $20 million in 'excess funds' . . . the judge himself 'accepted the plaintiffs' attorneys' invitation to become a paid director' of the charitable entity and received $48,150 from it" (citing Ky. Bar Ass'n v. Bamberger, 354 S.W.3d 576, 578–79 (Ky. 2011))).

93. *See* Knox v. Serv. Emps. Int'l Union, 567 U.S. 298, 309 (2012) ("Closely related to compelled speech . . . is compelled funding of the speech of other private speakers or groups.").

94. *See* Brief of Center for Individual Rights as Amicus Curiae in Support of Petitioners at 3, Frank v. Gaos, 139 S. Ct. 1041 (2019) (No.17-961) [hereinafter Brief of Center for Individual Rights] ("Damages awarded pursuant to settlement of a class action belong to the class members." (citing Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 474 (5th Cir. 2011))). *See also* Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 789 (1988) ("The solicitation of charitable contributions is protected speech . . . .").

behalf of a class in a class action belong to the class members.[95] Thus, donating damages without class members' consent may be compelled speech and a violation of their First Amendment rights.[96] Although this critique of *cy pres* awards is less common, some class members continue to object and claim *cy pres* awards violate their First Amendment rights.[97]

Objectors to *cy pres* awards argue that these awards compel their speech. In *Frank v. Gaos*, amici briefs supported petitioners' challenge to a class action settlement with a *cy pres* award by underscoring the following rationale: when compensation that belongs to the plaintiff is instead transferred to a third party, that third party will use the funds to speak ("engage in expressive or political activity") and so, compels the class members' speech.[98] While the Supreme Court has not determined whether funding third parties from relief collected in class actions compels speech, in *Janus*, the Court did find that funding a third party in a union collective-bargaining system—a different representative action—compelled speech.[99] The Supreme Court explained that the scheme compels speech because fees were automatically deducted from the wages of workers who did not opt in to the union, and those fees were then used for political activity.[100] The Supreme Court's reasoning in *Janus* lends support for this argument made by the amici in *Frank*. The driving rationale, as set forth in *Janus*, that the First Amendment protects "refrain[ing] from speaking at all" and "eschew[ing] association for expressive purposes," applies in the class action context.[101] Given this rationale, objectors may have success arguing that *cy pres* settlements compel speech in class actions where class members do not opt in to the action.

Additionally, the amici aptly point out that given the Supreme Court's holding in *Janus*, the opt-out requirement does not sufficiently protect class members' First Amendment rights.[102] While the

95. *See* Brief of Center for Individual Rights, *supra* note 94, at 3.

96. *See id.* at 4.

97. *See, e.g.*, *id.*; *In re* Google Inc. St. View Elec. Commc'ns Litig., 21 F.4th 1102 (9th Cir. 2021).

98. *See* Brief of Center for Individual Rights, *supra* note 94, at 3. Sam A. Yospe, Frank v. Gaos, *Cy Pres Gets Its Day at the Supreme Court*, Bloomberg (June 6, 2018, 9:31 AM), https://news.bloomberglaw.com/business-and-practice/frank-v-gaos-cy-pres-gets-its-day-at-the-supreme-court [https://perma.cc/XT9E-GTHL].

99. *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 138 S. Ct. 2448, 2463 (2018).

100. *Id.* at 2461.

101. *Id.* at 2463.

102. *See* Brief of Center for Individual Rights, *supra* note 94, at 9.

opt-out requirement allows each member an opportunity to walk away from the class action,[103] it may not sufficiently insulate *cy pres* awards from First Amendment challenges. Justice Alito, writing for the majority in *Janus*, concluded that allowing a third party to collect employees' money compels employees' speech, "[u]nless employees clearly and affirmatively consent before any money is taken from them."[104] The opt-out requirement in class actions presumes silence as consent because class members must actively reply to a notice to be removed from a class action. If class members do not take any action, they are included in the class. Therefore, the opt-out requirement likely does not satisfy Justice Alito's call for affirmative consent.[105]

Further, the opt-out requirement in Rule 23 does not mitigate concerns that *cy pres* awards violate class members' First Amendment rights. First, the *cy pres* award often aids distribution to an "unascertainable" class, so class members may not even know they have a stake in the litigation or have the opportunity to opt out.[106] Second, in most class actions, even when class members do receive notice, class members rarely opt out.[107] Third, judges continue to approve *cy pres* awards in mandatory class actions where class members do not have the opportunity to opt out.[108]

Therefore, *cy pres* awards present a risk to class members' First Amendment rights, given the ability of attorneys and judges to direct the award to a third party unrelated to the class or with political affiliations that may participate in forms of speech that class members oppose.

D. Benefits and Drawbacks Applied: Circuits' Approaches to Cy Pres Awards

Without an Advisory Committee rule on *cy pres* awards, courts do not have clear standards to apply to determine whether a lower court has abused its discretion by approving a *cy pres* award.[109]

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103. *See id.* at 7–8.

104. *Janus*, 138 S. Ct. at 2468.

105. *See* Knox v. Serv. Emps. Int'l Union, 567 U.S. 298, 312 (2012) ("Once it is recognized, as our cases have, that a nonmember cannot be forced to fund [a third party's activities], what is the justification for putting the burden on the nonmember to opt out of making such a payment?").

106. *See supra* notes 48–49 and accompanying text.

107. *See* Eisenberg & Miller, *supra* note 44, at 1532.

108. *See, e.g.*, Hyland v. Navient Corp., 48 F.4th 110 (2d Cir. 2022); Fed. R. Civ. P. 23(a)(4).

109. *See, e.g.*, *Hyland*, 48 F.4th at 110; *In re* Google Inc. St. View Elec. Commc'ns Litig., 21 F.4th 1102, 1102 (9th Cir. 2021); *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 170 (3d Cir. 2013).

The two cases described in Part I, *Google* and *Hyland*, illustrate how two circuit courts have approached objections to *cy pres* awards and how *cy pres* awards have developed to allow class actions to operate efficiently and deter defendants.[110] These cases suggest the need for a rigorous standard—a standard that requires analyzing the connection between a *cy pres* recipient and the claim in the action, as well as between the *cy pres* award and the type of relief (whether monetary damages or injunctive relief) expected from the class action.

1. *In re Google LLC Steet View Electronics Communications Litigation*

The first case discussed in Part I, *Google*, involved the Northern District Court of California's approval of a class action settlement with Google and the Ninth Circuit's subsequent review of this decision. This settlement followed the class's claim that Google violated the Wiretap Act by intercepting and storing class members' unencrypted information through street view vehicles. After certifying the class under Rule 23(b)(3), as a non-mandatory or opt-out class action, the Court reviewed the attorneys' fees and the settlement's terms. Class members received no money. The attorneys received twenty-five percent from the general fund. The court approved *cy pres* awards to nine third-party recipients.[111]

After the District Court approved the settlement and a class member objected to the settlement, the Ninth Circuit reviewed the settlement for abuse of discretion. Noting that the Supreme Court had not ruled on whether *cy pres* relief satisfied Rule 23(e) requirements, the Ninth Circuit relied on its own precedents.

The Ninth Circuit's approach demonstrates: (i) that efficiency factors greatly into the court's review of a *cy pres* award in a Rule 23(b)(3) class action, (ii) how a nexus standard mitigates attorney and judicial abuse, (iii) that the Ninth Circuit's nexus standard needs further definitiveness to provide consistent protection against *cy pres* abuse, and (iv) that most circuits do not reject *cy pres* awards on First Amendment grounds.

a. The Ninth Circuit Prioritized Efficiency

The Ninth Circuit focused on efficiency. First, the Ninth Circuit discussed that *cy pres* awards only have a place in this settlement because the awards led the class and defendant to efficiently settle; they

110. As the Supreme Court has not reviewed the constitutionality of *cy pres* awards, circuit courts' recent opinions on *cy pres* awards provide a window into the current state of the law on *cy pres* awards.

111. *In re Google St. View*, 21 F.4th at 1113–22.

allowed the class attorneys to seek relief, even though "it was not feasible to distribute funds."[112] In finding it was not feasible to distribute the funds, the Ninth Circuit discussed the inability to identify class members.[113] The Ninth Circuit justified *cy pres* awards to an unascertainable class as indirectly benefiting the class by "diffus[ing] benefit to society at large."[114] Therefore, the Ninth Circuit's order of analysis suggested that Ninth Circuit only moved to Rule 23 inquiries after it found that *cy pres* awards enabled efficient settlement.[115]

The Ninth Circuit reviewed and affirmed the decision as "fair, reasonable, and adequate" without rigorously scrutinizing the District Court's reasoning, because it found the settlement furthered class action policy goals.[116] In the District Court's initial review of the *cy pres* award, the District Court approached a settlement with a *cy pres* award like any other class action settlement—it followed Rule 23(e) to inquire into adequate representation, arms-length negotiations, adequate relief, and class member equitability.[117] The Ninth Circuit only briefly touched on the District Court's approach to say that it appropriately found adequate relief.[118] Both Courts prioritized efficiency over direct compensation to injured parties. As the District Court explained, *cy pres* awards provided greater benefits than alternative methods.[119] Without a *cy pres* award, the attorneys would (1) provide a windfall to the few identifiable plaintiffs without finding the entire plaintiff class, or (2) increase litigation costs and decrease overall compensation through costly efforts to find the entire plaintiff class.[120]

b. The Ninth Circuits' Nexus Standard Mitigated *Cy Pres* Abuse

The District Court in *Google* only deviated from the typical Rule 23(e) framework to include an additional requirement that the *cy pres* settlement must have a "direct and substantial nexus" to the class members' interests.[121] The Ninth Circuit first articulated the

112. *Id.* at 1113.

113. *Id.*

114. *Id.* at 1116 (dismissing Lowrey's assumption that there was a stand-alone ascertainability argument and finding that there was no requirement to identify all class members because *cy pres* awards indirectly benefit silent class members).

115. *Id.* at 1110.

116. *Id.* at 1116.

117. *See In re* Google Inc. St. View Elec. Commc'ns Litig., 611 F. Supp. 3d 872, 890–95 (N.D. Cal. 2020).

118. *In re Google St. View*, 21 F.4th at 1118.

119. *In re Google Inc. St. View Elec. Commc'ns Litig.*, 611 F. Supp. 3d at 893.

120. *Id.* at 891–93.

121. *In re Google Inc. St. View*, 21 F.4th at 1112.

nexus standard in *Nachshin*, where it found that the *cy pres* recipient selection process "answer[ed] to the whims and self-interests of the parties, their counsel, or the court."[122] Unlike in *Nachshin*, where applying the nexus standard led a court to conclude the cy *pres* recipient did not have a sufficient connection to the class members' geographical area or injuries so as to indirectly benefit them,[123] the District Court in *Google* found all *cy pres* recipients to have sufficient nexuses: "[T]he awards to the recipients are appropriate and will best serve the objectives of the Wiretap Act and the *interests* of Absent Class Members."[124] In making this finding, the District Court in *Google* inquired into the relationship between the recipients and the attorneys to ensure that the recipients did not improperly prioritize the attorneys' interests.[125]

The nexus standard helps to curtail attorney and judicial abuse of *cy pres* awards. Consistent with the meaning of *cy pres*, "as near as possible," the nexus standard ensures that a court assesses whether a *cy pres* recipient has a sufficient relation to the class. Thus, it prevents attorneys and judges from selecting whichever third party benefits their interests.[126] This requirement has had some success. For instance, in *Dennis v. Kellogg*, the Ninth Circuit remanded a case where attorneys had not selected specific third-party recipients and rather described the future recipients as "charities that provide food for the indigent."[127] Because class members' injuries related to consumer protection, the Ninth Circuit found it could neither adequately assess the *cy pres* recipients' nexuses nor approve a settlement with uncertain terms.[128] The nexus standard prohibits the Ninth Circuit from "punting down the line" *cy pres* award approval.[129] And with that, the nexus standard puts a spotlight on the recipients' attorneys select and disincentivizes attorneys from funneling *cy pres* awards into charities that benefit their interests. Even more so, in unascertainable

122. Nachshin v. AOL LLC, 663 F.3d 1034, 1039 (9th Cir. 2011).

123. *Id.* at 1040 (rejecting a settlement where a *cy pres* award went to four diverse charities that had no connection to the class members' underlying claim).

124. *In re Google Inc. St. View Elec. Commc'ns Litig.*, 611 F. Supp. 3d at 896 (emphasis added).

125. *Id.* at 895 ("The *cy pres* distributions are limited to independent organizations with a track record of addressing consumer privacy concerns, who will commit to use the funds to promote the protection of Internet privacy.").

126. *See* Dennis v. Kellogg, 697 F.3d 858, 865 (9th Cir. 2012) ("[The nexus standard] avoid[s] the many nascent dangers to the fairness of the distribution process . . . ." (internal quotation marks omitted) (citing *Nachshin*, 663 F.3d at 1038)).

127. *Id.* at 866–67 (internal quotation marks omitted).

128. *Id.*

129. *Id.* at 867.

classes, the nexus standard requires judges to protect absent class members by reviewing the connection between a recipient and the class.

c. The Nexus Standard Did Not Go Far Enough

While the nexus standard addresses the potential abuse of *cy pres* awards, the Ninth Circuit's review of *Google* demonstrated that the nexus standard lacks definition. This lack of definition allows attorney and judicial misconduct to slip through the cracks. The Ninth Circuit dismissed the objection that the *cy pres* recipients do not have sufficient nexuses to the class without delving into the District Court's conclusion that the *cy pres* recipients had a proper connection to the class.[130] Responding to the claim that the recipients had improper or insufficiently-explained relationships with the attorneys in the action, the Ninth Circuit reasoned that courts have previously granted *cy pres* awards in cases where the recipients and attorneys have closer relationships than they did in this case.[131] The Ninth Circuit specified the recipients and provided a blanket claim that all recipients have a connection to the class members but did not review each connection between the recipient and the class members to ensure that the class members would indirectly benefit from the distribution of funds to those recipients.[132] Because the Ninth Circuit did not have a definitive standard to review the *cy pres* award, the Ninth Circuit did not scrutinize the District Court's decision to approve the *cy pres* recipients.[133]

Given critiques that attorneys and judges have abused *cy pres* awards in the past, the Ninth Circuit's approach to defer to the District Court on the nexus standard does not sufficiently protect against abuse at the District Court level.

d. The Ninth Circuit Dismissed the First Amendment Objection Too Quickly

In *Google*, the Ninth Circuit dismissed without addressing the objector's First Amendment concern on appeal and thus failed to

130. *In re* Google Inc. St. View Elec. Commc'ns Litig., 21 F.4th 1102, 1120 (9th Cir. 2021) ("The district court's approval of the *cy pres* recipients comported with those standards . . . .").

131. *Id.* at 1119 ("We have never held that merely having previously received *cy pres* funds from a defendant, let alone *other* defendants in unrelated cases, disqualifies a proposed recipient for all future cases.").

132. *Id.* at 1109, 1119.

133. *See generally id.*; *In re* Google Inc. St. View Elec. Commc'ns Litig., 611 F. Supp. 3d 872, 893 (N.D. Cal. 2020).

see the merit in their First Amendment objection. The District Court concluded that the *cy pres* award did not compel speech because simply approving a settlement did not constitute "state action."[134] While the District Court cited lower court cases that supported this conclusion, the Supreme Court has held that court action, such as enforcing a private restrictive agreement created by two private parties, constitutes state action in *Shelley v. Kraemer*.[135] For both class action settlements and private agreements, the court's approval and enforcement of the agreement bind parties to that agreement. Additionally, given the burden placed on judges to review and inquire into both the class under Rule 23(a) and Rule 23(b), as well as the terms of the settlement itself under Rule 23(e), the judge's approval of a class action settlement arguably constitutes state action.[136] The Advisory Committee specially referred to the judiciary as having a supervisory role in class actions.[137]

Unlike the District Court, the Ninth Circuit did not address the state action question and dismissed the First Amendment objection by underscoring that class members' opportunities to opt out sufficiently protected their First Amendment rights.[138] However, *Google* had an unascertained class, so class members lacked the awareness to opt out. Further, opt-out rights operate by considering class members' silence as consent, and, thus likely do not meet the "affirmative consent" requirement from *Janus*.

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134. *In re Google St. View*, 21 F.4th at 1118.

135. Shelley v. Kraemer, 334 U.S. 1, 20 (1948) ("[I]n granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand."). *See also id.* at 17 ("[E]nforcement by state courts of the common-law policy of the State . . . was held to be state action . . . ." (citing Am. Fed'n of Lab. v. Swing, 312 U.S. 321 (1941)).

136. *See supra* note 36 and accompanying text (discussing the court's supervisory role in class actions).

137. *See id.*; *Shelley*, 334 U.S. at 19 ("It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint."); Comm. on Rules of Prac. & Proc., Report of the Advisory Committee on Civil Rules, (May 2, 2015), *available at* https://www.uscourts.gov/sites/default/files/cv05-2015_0.pdf [https://perma.cc/X7BK-A3E9] [hereinafter Advisory Committee Report (May 2, 2015)] ("[T]he binding effect of a settlement class action judgment is dependent on the exercise of judicial power, and that the court has a considerable responsibility to ensure the appropriateness of that arrangement before backing it up with judicial power.").

138. *See In re Google St. View*, 21 F.4th at 1118.

2. *Hyland v. Navient Corp.*[139]

The second case discussed in Part I, *Hyland*, involved the Second Circuit's review of a settlement between a class and Navient Corporation, a loan servicing company.[140] This settlement followed the class's claim that Navient violated tort, contract, and state law by deceiving borrowers.[141] The class and Navient moved to settle after the Southern District of New York (SDNY) informed them that individual variations for each class member, in this case, created a hurdle in certifying this class for damages under Rule 23(b)(3).[142] Thus, the class and Navient settled as a Rule 23(b)(2) class—a mandatory class action for injunctive relief—because Rule 23(b)(2) requires less stringent inquiries into class members' individual variations.[143] As in *Google*, class members in *Hyland* did not walk away with any money. However, unlike in *Google*, the attorneys did not receive compensation from the general fund, following the finding that a third party had subsidized the litigation.[144] The SDNY and the Second Circuit approved the *cy pres* award to Public Service Promise, an organization that "assists all class members in navigating PSLF [public service loan forgiveness program]."[145]

After the SDNY approved the settlement and a class member objected to the settlement, the Second Circuit reviewed this settlement for abuse of discretion.[146] In contrast to the Ninth Circuit's focus on efficiency in *Google*, the Second Circuit instead focused on deterrence, since this settlement involved a Rule 23(b)(2) class action where the Second Circuit determined "the named plaintiffs were likely to suffer future harm.]"[147]

Hyland demonstrated that: (i) deterrence factors greatly into a court's review of a *cy pres* award in a Rule 23(b)(2) class action, (ii) courts do not apply a rigorous or consistent standard to review attorney abuse, and (iii) courts should view *cy pres* awards in *cy-pres*-only settlements as injunctive relief to prevent the awards from violating class members' First Amendment rights.

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139. Hyland v. Navient Corp., 48 F.4th 110 (2d Cir. 2022); Hyland v. Navient Corp., 18 Civ. 9031, 2020 WL 6554826 (S.D.N.Y. Oct. 9, 2020).

140. *Hyland*, 48 F.4th at 115.

141. *Id.*

142. *Id.* at 116.

143. *Id.*

144. *Id.* at 117.

145. *Id.* at 120 n.3 ("[O]ne of the functions of Public Service Promise is to advise class members of their litigation options and refer them to outside organizations for further assistance . . . .").

146. *Hyland*, 48 F.4th at 117.

147. *Id.* at 118.

a. The Second Circuit Prioritized Deterrence

The Second Circuit's review of the *cy pres* award in *Hyland* started with deterrence. The Second Circuit explained that, unlike Rule 23(b)(3) actions where a judge certifies a class with the expectation that class members each receive monetary damages to remedy previous harm, in Rule 23(b)(2) cases, a judge only certifies a class for declaratory or injunctive relief to prevent future harm.[148] As class members do not expect monetary damages in a Rule 23(b)(2) action, their individual stakes in the action have less weight.[149] Therefore, ascertainability is not an issue in a Rule 23(b)(2) action, because the relief goes to the class as a whole to prevent generalized future harm.[150]

With direct compensation, the feasibility of distribution, and ascertainability removed from the equation in a Rule 23(b)(2) action, the Second Circuit focused on the *cy pres* award's deterrent effect in *Hyland*.[151] Here, the Second Circuit found that the class met the initial requirements of a Rule 23(b)(2) action because "the named plaintiffs were likely to suffer future harm" [152] from Navient, and the sum collected from Navient through a *cy pres* award benefited class members because it penalized Navient for breaking the law and thus deterred future harm. Rather than address the feasibility of distribution or ascertainability as the Ninth Circuit did in *Google*, the Second Circuit further echoed Professor Gilles in emphasizing that compensation works differently in Rule 23(b)(2) class actions.[153] The Second Circuit held that the SDNY properly certified the class under Rule 23(b)(2), because all class members benefited—in some way—from

148. *Id.* at 116.

149. *Id.* at 122. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 362–63 (2001) ("When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute.").

150. *Hyland*, 48 F.4th at 117. Following the approach of most circuits, 23(b)(2) class actions do not have to be ascertainable; class attorneys do not need to have an administratively feasible way to identify class members. *See, e.g.*, Shelton v. Bledsoe, 775 F.3d 554 (3d Cir. 2015).

151. *Hyland*, 48 F.4th. at 121. This is much like Professor Gilles's discussion of class actions as "private attorneys" that enforce the law and prevent future harm. *See* Gilles & Friedman, *supra* note 40.

152. *Hyland*, 48 F.4th. at 119. This is also the standing requirement in a Rule 23(b)(2) class action, which suggests that deterrence and standing go hand-in-hand in a Rule 23(b)(2) class action.

153. *Id.* at 120. *See* Myriam Gilles, *Can John Coffee Rescue the Private Attorney General? Lessons from the Credit Card War*s, 83 U. Chi. L. Rev. 1001, 1007, 1023 n.90, 1032 (2016).

the settlement.[154] Additionally, the Second Circuit approved the settlement as "fair, reasonable, and adequate" and underscored that, without this settlement, there would be no finding of liability and thus no deterrence.[155] The Second Circuit, like the Ninth Circuit, did not scrutinize the District Court's finding that the settlement was "fair, reasonable, and adequate." However, the Second Circuit did underscore a specific factor, that there is "[the] grave risk that there would have been no recovery at all."[156] As class members did not expect direct compensation, the Second Circuit determined that deterrence was a sufficient reason to approve the settlement.[157]

b. Examining *Cy Pres* Awards in *Hyland* for Attorney Abuse

In reviewing the *cy pres* award in *Hyland*, the Second Circuit did not define whether or what standard it used to review the *cy pres* award for abuse. It did not expressly adopt a nexus standard.[158] Without a nexus standard, the court did not investigate or consider the attorneys' plan to distribute the *cy pres* award. Rather, only after the court initially approved the settlement and after the class attorneys had already received funding from a third party did the attorneys fully disclose their plan to distribute the *cy pres* award.[159] The objector's brief describes:

> Judge Cote was, however, surprised to learn—for the very first time at the Final Approval Hearing—that AFT [American Federation of Teachers] had been paying Named Plaintiffs' attorneys' fees for the preceding two years: "[AFT] has paid counsel's bills, as we learned today . . . As plaintiffs' counsel describe in their papers, they spent over 11,000 hours on this litigation, and the attorney's fees have been close to $6 million—$5,915,000 roughly—and today is the day I learned that that sum had been paid in its entirety."[160]

Although AFT and the attorneys in *Hyland* may have had the proper objective—to aid the class and provide deterrent value to society in their fee arrangement—their lack of fee disclosure opens the *cy pres* award up for potential abuse and creates an appearance of

154. *Hyland*, 48 F.4th at 119.
155. *Id.*
156. *Id.* at 121.
157. *Id.* at 122, 119 n.2.
158. *Id.* at 123.
159. Brief of Objector-Appellant at 25, Hyland v. Navient Corp., 48 F.4th 110 (2d Cir. 2022) (Nos. 20-3765, 20-3766), 2021 WL 538250; *Hyland*, 48 F.4th at 119.
160. *Hyland*, 48 F.4th at 123.

impropriety.[161] Courts have rejected settlements where *cy pres* recipients did not benefit the class because the recipients did not have a connection to the entire class or primarily served the lawyers' or judges' interests. In *Hyland*, the SDNY lacked the information to determine whether the attorney's distribution plan for the *cy pres* award benefitted the class. The SDNY could not ensure that the award's distribution did *not* flow from the "whims and self-interests" of the attorneys that sought a portion of the *cy pres* award in fees but did not disclose that they already received litigation funding from AFT.[162]

Thus, *Hyland* indicates the need for a definitive nexus standard that would not only show the connection between the class and recipient, but also comprehensively describe the award and its distribution in both Rule 23(b)(2) and Rule 23(b)(3) actions.

c. Reframing First Amendment Objections to *Cy Pres* Awards

Neither the SDNY nor the Second Circuit saw any merit in the First Amendment objections in *Hyland*.[163] Both courts found that the settlement did not constitute state action. In turn, the courts did not recognize that Rule 23 requires state action (*i.e.*, a court's approval) for the settlement to bind the parties.[164]

Despite dismissing the First Amendment objection, the Second Circuit's approach to *cy pres* awards in *Hyland* sets forth a new way to conceptualize these awards.[165] The Second Circuit did not view *cy pres* awards as taking away individual members' direct compensation that they would have received as damages in a typical lawsuit. Rather, the Second Circuit explained that *cy pres* awards may be seen as injunctive relief: "The award is more accurately described as a mandatory injunction to establish or contribute to a selected organization than as a refashioning of monetary relief."[166] Because in Rule 23(b)(2) actions class members bring an action to change a policy or practice that continuously injures the class, the class can use *cy pres* award to deter defendants in two ways: *cy pres* awards can punish defendants for breaking the law by "ensur[ing] that the defendant is disgorged

161. *See supra* Part II.B.

162. *See* Nachshin v. AOL LLC, 663 F.3d 1034, 1039 (9th Cir. 2011).

163. *Hyland*, 48 F.4th at 122; Hyland v. Navient Corp., 18 Civ. 9031, 2020 WL 6554826, at *1 (S.D.N.Y. Oct. 9, 2020).

164. *Hyland*, 48 F.4th at 122; *Hyland*, 2020 WL 6554826, at *1.

165. *Hyland*, 48 F.4th at 122, 119 n.2.

166. *See id.* (explaining that the award increased the deterring effect of the action).

of a sum certain"[167] and can fund third parties that mitigate harms imposed by similar defendants.[168]

The Second Circuit's approach in *Hyland* demonstrates that a *cy-pres*-only award likely does not compel speech when that award is viewed as injunctive relief. The class members never had an individual claim to compensation under Rule 23(b)(2), so the attorneys could not have, and did not, give away the class members' money.[169] As compelled speech in *Janus* hinges on distributing money that belongs to a plaintiff to a third party,[170] the court did not compel class members to speak in *Hyland* because the class members never had a claim to money from the action.

E. Recommendations

Given that using *cy pres* awards furthers the efficiency and deterrent objectives in class actions following the Advisory Committee's revisions to Rule 23, the legal community should accept *cy pres* awards as a practical reality in class actions. However, criticisms regarding abuse and First Amendment right violations demonstrate that *cy pres* awards require safeguards, especially where the class is unascertainable. Judges in lower courts must have a standard to follow in reviewing *cy pres* awards. Attorneys must know how much discretion they have in including a *cy pres* award in a settlement and in selecting recipients for those awards.

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167. *See* 4 Newberg and Rubenstein on Class Actions § 12:26 (6th ed. 2022) ("[*Cy pres* awards] ensure that the defendant is disgorged of a sum certain, even if that money does not compensate class members directly. This disgorgement furthers the deterrence goals of the class suit."); Hughes v. Kore of Ind. Enter., 731 F.3d 672, 676 (7th Cir. 2013) ("When there's not even an indirect benefit to the class from the defendant's payment of damages, the 'cy pres' remedy . . . is purely punitive. But we said in *Mirfasihi* that the punitive character of the remedy would not invalidate it." (citing Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 784 (7th Cir. 2004))).

168. *Hyland*, 48 F.4th at 124, 119 n.2 (2d Cir. 2022) ("[T]he *cy pres* award funds Public Service Promise and thereby assists all class members in navigating PSLF and determining whether they have a viable individual monetary claim against Navient."). *See also In re* Google Inc. Cookie Placement Consumer Priv. Litig., 934 F.3d 316, 328 (3d Cir. 2019) ("[The *cy pres* award] enhances the settlement's deterrent effect by funding data privacy institutions that will work to prevent similar potential privacy invasions from occurring in the future.")

169. *Hyland*, 48 F.4th at 119 n.2.

170. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 138 S. Ct. 2448, 2457 (2018).

1. The Advisory Committee Previously Considered Rules Addressing *Cy Pres* Awards

The Advisory Committee's previous decision to not adopt a rule addressing *cy pres* awards demonstrates this Note's central argument: *cy pres* awards have practical benefits but create concerns that the legal community has yet to address.[171] Over the past decade, the Advisory Committee mentioned *cy pres* awards in three committee meetings—in 2012, 2015, and 2017.[172] In these meetings, the Advisory Committee proposed codifying the ALI principles referring to *cy pres* awards in Rule 23.[173] Support for this revision came from findings that addressing *cy pres* in Rule 23 would provide greater consistency, given the varied approach in circuits.[174] Additionally, federal courts cite the ALI principles on *cy pres* awards more than any other ALI principles, making it a natural next step for the ALI principles to be adopted as a rule.[175] Thus, in 2015, the Advisory Committee considered ALI's three-prong approach to *cy pres* awards, which suggests: (1) "settlement funds be distributed to class members if they can be identified through reasonable effort"; (2) "that even after the first distribution is completed there must be a further distribution to those class members"; and (3) *cy pres* awards "only . . . [occur in the] rare case in which individual distributions to class members are not economically viable."[176]

Even though adopting the ALI principles would not revolutionize *cy pres* awards or severely limit attorney or judicial discretion to create *cy pres* awards, the Advisory Committee could not agree on a

171. Comm. on Rules of Prac. & Proc., Report of the Advisory on Civil Rules, (Dec. 4, 2018), *available at* https://www.uscourts.gov/sites/default/files/cv12-2018_0.pdf [https://perma.cc/GP9Q-PWTG] [hereinafter Advisory Committee Report (Dec. 4, 2018)] ("[T]he early stages of Committee work on Rule 23 included provisions addressing cy pres remedies; those provisions were deleted . . . ."); Advisory Committee Report (May 2, 2015), *supra* note 137 (discussing that there must be an alternative provision to address that "residue will be left once distributions are made . . .").

172. Advisory Committee Report (Dec. 4, 2018), *supra* note 171 ("[T]he early stages of Committee work on Rule 23 included provisions addressing cy pres remedies; those provisions were deleted . . . ."); Advisory Committee Report (May 2, 2015), *supra* note 137 (discussing that there must be an alternative provision to address that "residue will be left once distributions are made . . .").

173. Advisory Committee Report (Dec. 11, 2015), *supra* note 18.

174. *Id.*

175. *Id.*

176. Advisory Committee Report (May 2, 2015), *supra* note 137 (discussing that there must be an alternative provision do address that "residue will be left once distributions are made . . .").

revision.[177] Attendants at the committee meeting expressed concern that changes to the *cy pres* rules would jeopardize the practical benefits of *cy pres* awards.[178] For example, a plaintiff-side lawyer was "very much on the fence . . .[explaining] [i]t is good to have clarity. But these are really tough issues."[179] Additionally, a legal aid organization mentioned they relied on funding from *cy pres* awards and foresaw a rule as lessening that funding.[180] These comments reveal that many objections to *cy pres* rules stem from dependency of attorneys and third-party recipients on the status quo.

The ALI principles for *cy pres* awards are a proper starting point for regulating *cy pres* awards, but they could be strengthened through an amendment to Rule 23. The following recommendations result from this Note's findings that although *cy pres* awards enable efficient class actions and effectively deter defendants, *cy pres* awards require rigorous review. The Advisory Committee should adopt a rule and a comment to ensure *cy pres* awards have a direct connection to the class members and that the award benefits the class members. These additional recommendations embrace the approach of the ALI principles while addressing *cy pres* award abuse.

2. A More Rigorous Nexus Standard to Prevent *Cy Pres* Abuse

The Advisory Committee should revise Rule 23 to include a nexus standard that addresses *cy pres* awards. The standard should apply to both Rule 23(b)(2) and Rule 23(b)(3) actions and should include the following language: "The court must require full disclosure from attorneys on their plan to distribute the entire *cy pr*es award and ensure that recipients have a direct and substantial nexus to the class that benefits class members." This nexus standard aligns with the Ninth Circuit's standard and the ALI principles.

Additionally, the nexus standard in Rule 23 should have greater definition and thus be more rigorous than the Ninth Circuit's standard and the ALI principles' nexus standards. Without a definitive and rigorous rule, attorneys and judges will continue to abuse and not fully disclose their plan for *cy pres* awards. So, while the Ninth Circuit requires a court to find a "direct and substantial nexus" and the ALI principles nexus standard directs "a *cy pres* award to a recipient whose interests closely approximate those of the class,"[181] the

177. *Id.*
178. Advisory Committee Report (Dec. 11, 2015), *supra* note 18.
179. *Id.*
180. *Id.*
181. ALI Principles § 3.07(c).

Advisory Committee's rule should go further. By using the language above *and* requiring full disclosure, the Advisory Committee would require judges to review the identity of the proposed recipients, how the attorneys selected the recipients, and whether attorneys' compensation from the award presents a conflict of interest.

Opponents may reiterate concerns from the Advisory Committee's previous considerations of revising Rule 23 to address *cy pres* awards. For instance, opponents may posit that the Advisory Committee does not need to adopt a new rule because it may spur concerns about violating the Rules Enabling Act by increasing class members' substantive rights.[182] However, without a formal revision to Rule 23, circuits will continue to take inconsistent approaches. My specific recommendation for an amendment—implementing a nexus standard with a full disclosure requirement—directly addresses concerns about the improper relationship between attorneys, judges, and *cy pres* recipients, as well as the lack of disclosure of attorneys' connections to third parties receiving the award.[183] *Cy pres* awards have practical benefits and should not be eliminated. My recommendations do not seek to limit the discretion of judges to find *cy pres* awards proper or improper; rather, my recommendations obligate judges to consistently ensure that when *cy pres* awards are used, they benefit the class.

By adopting a rigorous nexus standard, the Advisory Committee would regulate *cy pres* awards by creating a clear rubric for analysis and a more stringent standard to ensure that the awards benefit the class as much as possible and have minimal ambiguity. In an unascertainable class action, this recommendation would further protect unidentified class members who do not know that they have a stake in the litigation.

3. Reframing *Cy Pres* to Protect Class Members' First Amendment Rights

In addition, the Advisory Committee should add a comment to the revised Rule 23 to suggest judges view *cy-pres*-only awards as injunctive relief rather than compensatory damages. This comment would apply to both Rule 23(b)(2) and Rule 23(b)(3) actions where class members do not receive monetary damages in addition to the

182. Advisory Committee Report (May 2, 2015), *supra* note 137 (discussing that there must be an alternative provision to address that "residue will be left once distributions are made . . .").

183. Other scholars have noted concerns about whether *cy pres* awards violate the Rules Enabling Act by increasing class members' substantive rights. *See, e.g.*, Andrew Rodheim, *Class Action Settlements, Cy Pres Awards, and the Erie Doctrin*e, 111 Nw. U. L. Rev. 1097 (2017); Smoger, *supra* note 49, at 599.

cy pres award (*cy-pres*-partial). This comment will serve an even more critical role in Rule 23(b)(2) and Rule 23(b)(3) actions when the attorneys do not ascertain the class.[184] This comment will also help assuage concerns that *cy pres* awards violate class members' First Amendment rights, especially in actions where they do not have the opportunity to opt out.

Courts possess the authority to view relief as injunctive relief when a class meets the requirements for a Rule 23(b)(2) action (a class certified for predominantly injunctive relief).[185] As exemplified by the Second Circuit's discussion in *Hyland*, for a class to meet the requirement of a Rule 23(b)(2) action and for the court to view the relief as injunctive, the court must find: (1) that the lead plaintiffs have standing because they will likely suffer future injury from the defendant, and (2) that the defendants "acted or refused to act on grounds that apply generally to the [whole] Settlement Class."[186] In a class action seeking a *cy pres* award, attorneys will successfully establish the first requirement, standing, because attorneys must show that class members face continued injury to demand a *cy pres* award.[187] Further, attorneys will successfully establish the second requirement, that the class is similarly situated, because these class actions for *cy pres* awards often have unascertainable classes where class members lack identities and so do not have individual differences. Thus, in cases seeking a *cy-pres*-only award with an unascertainable class, the court will often find the class meets these two requirements for a Rule 23(b)(2) action; the court consequently often has the power to view the *cy pres* award as injunctive relief.

Furthermore, *cy-pres*-only awards resemble injunctive relief because both forms of relief focus on the group's "indivisible" harm and seek "injunctive or declaratory" relief that applies to the entire class.[188] In class actions for predominantly injunctive relief, attorneys need not identify the class members nor provide them with monetary damages. The relief's principal purpose is to prevent further

184. This comment would only pertain to *cy-pres*-only awards.

185. *See, e.g.*, Hyland v. Navient Corp., 48 F.4th 110 (2d Cir. 2022); RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. a (AM. L. INST. 2003) ("The judicial power of cy pres has evolved in this country along lines generally similar to the equity power under English common law.").

186. *See Hyland*, 48 F.4th at 120 (citing Hyland v. Navient Corp., 18 Civ. 9031, 2020 WL 6554826, at *2 (S.D.N.Y. Oct. 9, 2020)); FED. R. CIV. P. 23(b)(2).

187. *Hyland*, 48 F.4th at 117.

188. *See id.* at 119 n.2 (noting that "[in the trust and estates context] cy pres has evolved . . . along lines generally similar to the equity power under English common law" (citing RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. a (AM. L. INST. 2003))).

injury to the class, and other individuals, by deterring the defendant.[189] Similarly, cases with a *cy-pres*-only award certified under Rule 23(b)(3)—like *Google*, where class members could but do not receive individual damages—operate much like a Rule 23(b)(2) action for injunctive relief—like *Hyland*, where class members could not and do not receive individual damages. In both cases, attorneys could not feasibly identify or distribute funds to the class.[190] This led the attorneys to view the harm as indivisible amongst the entire group and ostensibly choose *cy pres* recipients that would help prevent the defendants from committing future harm. In turn, these *cy-pres*-only awards achieved the same goals as injunctive relief in both Rule 23(b)(2) and Rule 23(b)(3) actions: deterrence. The *cy pres* awards punished the defendants for breaking the law by "ensur[ing] the defendant is disgorged a sum"[191] and funded third parties that mitigate harms imposed by similar defendants.[192]

Recasting *cy-pres*-only awards as a form of injunctive relief combats the argument that *cy pres* awards compel speech. When certified in a Rule 23(b)(2) class action, class members do not typically receive damages, and the money in the *cy pres* fund does not belong to class members.[193] Therefore, the court does not compel speech by directing money to the *cy pres* recipient in a class action for injunctive relief, because the court is not giving away class members' money. The money going to the *cy pres* recipient is not considered the class members "speaking;" rather, it serves as equitable relief that prevents future harm.

Opponents may suggest that there is no difference between *cy pres* in an injunctive class action and a damages class action. However,

189. Bone, *supra* note 30, at 957, 961; 19 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 47:3 (L. ed. 2023) ("An injunction is a vehicle for preventing injury. It is inherently prospective in nature and its purpose, to forestall future violations, is remedial rather than punitive.").

190. *In re* Google St. View Elec. Commc'ns Litig., 21 F.4th 1102, 1110 (9th Cir. 2021); Brief for Plaintiff-Appellees at 38, Hyland v. Navient Corp., 48 F.4th 110 (2d Cir. 2022) (Nos. 20-3765-cv(L), 20-3766-cv(CON)), 2021 WL 1966810.

191. *See* 4 Newberg and Rubenstein on Class Actions § 12:26 (6th ed. 2022) ("[*Cy pres* awards] ensure that the defendant is disgorged of a sum certain, even if that money does not compensate class members directly. This disgorgement furthers the deterrence goals of the class suit."); Hughes v. Kore of Ind. Enter., 731 F.3d 672, 676 (7th Cir. 2013) ("When there's not even an indirect benefit to the class from the defendant's payment of damages, the 'cy pres' remedy . . . is purely punitive. But we said in *Mirfasihi* that the punitive character of the remedy would not invalidate it." (citing Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 784 (7th Cir. 2004))).

192. *See supra* note 168.

193. *See supra* note 34.

after considering the implications of a more rigorous nexus standard, judges may ensure that *cy pres* recipients connect to class members and prevent future harm from defendants. Thus, the *cy pres* award primarily accomplishes deterrence, the goal of a Rule 23(b)(2) action for injunctive relief, rather than indirect compensation.[194]

Additionally, framing *cy pres* as injunctive relief would not bar or prohibit damages from class actions. Rather, when attorneys can identify class members, they should comply with the ALI principles to distribute those funds. However, when attorneys do wish to use a *cy-pres*-only settlement, the award should serve as a deterrent and optimize collective benefits. Thus, Rule 23 should have judges review *cy-pres*-only settlements as injunctive relief rather than as class members' money redistributed to a third party.

III.
CONCLUSION

The Advisory Committee should revise Rule 23 by adopting a rigorous nexus standard and by adding a comment that courts should consider settlements with *cy-pres*-only awards as injunctive relief. While opponents may argue that the rule and comment from the Advisory Committee are unnecessary and may curtail *cy pres* awards, these revisions are necessary to mitigate attorney and judge abuse and First Amendment rights violations stemming from *cy pres* awards.

194. Hyland v. Navient Corp., 48 F.4th 110, 122 n.2 ("We disagree that a *cy pres* award cannot be characterized as injunctive, or equitable, relief. . . . [T]he award is more accurately described as a mandatory injunction to establish or contribute to a selected organization than as a refashioning of monetary relief." (citing *In re* Google Inc. Cookie Placement Consumer Priv. Litig., 934 F.3d 316, 328 (3d Cir. 2019))).