[ARGUED JANUARY 13, 2017; DECIDED MAY 16, 2017]

Nos. 16-5189, 16-5190

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARILYN KEEPSEAGLE, et al.,

Plaintiffs-Appellees,

KEITH MANDAN,

Appellant,

DONIVON CRAIG TINGLE,

Appellant,

v.

SONNY PERDUE, Secretary,
The United States Department of Agriculture,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

DEFENDANT-APPELLEE SONNY PERDUE'S RESPONSE TO THE PETITIONS FOR REHEARING EN BANC

CHAD A. READLER
Acting Assistant Attorney General

CHANNING D. PHILLIPS
United States Attorney

CHARLES W. SCARBOROUGH
CARLEEN M. ZUBRZYCKI
Attorneys, Appellate Staff
Civil Division, Room 7260
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-3388

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Other Authorities:

GLOSSARY

USDA	United States Department of Agriculture

INTRODUCTION AND SUMMARY

As part of a recent re-examination of settlements requiring payments to third parties, the Department of Justice is reviewing this case and others with similar *cy pres* provisions—i.e., settlements that direct funds, absent a specific congressional appropriation, to third parties who have no claims against the government—and the Attorney General has adopted a policy generally prohibiting the Department from entering into such *cy pres* settlements.[1] These settlements have come under close scrutiny in recent years, and this case—with more than $300 million at stake—can fairly be said to justify the scrutiny.

Cy pres settlements can create the appearance of end-running the congressional appropriations process through use of the Department's broad authority under the Judgment Fund. *See Keepseagle v. Perdue*, 856 F.3d 1039, 1070 (D.C. Cir. 2017) (Brown, J., dissenting) ("Cy pres distributions, given their range of potential beneficiaries, their attenuated relationships to actual class members, and their focus on fulfilling a general 'purpose' rather than remediating monetary damage, resemble legislative appropriation."). The *Keepseagle* settlement exemplifies this problem. Out of a $680 million settlement that was offered to compensate a class of Native American farmers and ranchers who alleged discrimination, roughly $300 million will instead be diverted

[1] Memorandum from Jefferson B. Sessions, U.S. Att'y Gen., to All Component Heads and U.S. Att'ys regarding prohibition on settlement payments to third parties (June 5, 2017)

to third parties with no claims against the Government. There are only loose controls on how this money will be spent, and no allowance for public input or oversight concerning expenditure choices in order to ensure compliance and accountability. These realities have caused some to question this settlement, even leading one Judge of this Court to conclude that "political calculations explain the settlement." *Id.* at 1064 (Brown, J., dissenting). The mere perception of such problems is deeply troubling to the Department of Justice, and the Department now views this settlement as regrettable. If this settlement were proposed to the Department today, it would not be approved and, as noted, the Department has now taken steps to ensure that a settlement of this nature will not occur again.

Nonetheless, in its current posture, this case does not warrant en banc review. The general legal question of the validity of *cy pres* settlements with the Government is not a question of continuing importance because of the aforementioned new policy against such settlements, and the particular question of whether the appellants in this case (two class members who successfully asserted claims in the settlement process) forfeited and waived their objection to the *cy pres* distribution is a narrow and fact-bound inquiry. Thus, rehearing en banc should be denied.

STATEMENT

1. In 1999, a putative class of Native-American farmers filed this lawsuit under, *inter alia*, the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f, alleging that USDA discriminated against them and failed to investigate their administrative

discrimination complaints. The class was certified, *see Keepseagle v. Veneman*, No. 99-3119, 2001 WL 34676944 (D.D.C. Dec. 12, 2001), and the parties engaged in litigation and class-wide discovery for more than a decade. In 2010, the parties reached a settlement agreement. Class members were permitted to opt out of the settlement, and four people did so. *See* ECF No. 607 at 1.

In addition to programmatic relief and debt relief for individual class members, the settlement agreement required the United States to create a compensation fund totaling $680 million and established a two-track non-judicial claims process for class members to apply for distributions from that fund. *See* JA403, 405-17. Class members could seek either a $50,000 damage award (plus "tax relief") by submitting "substantial evidence" that they met certain criteria, or they could seek actual damages up to $250,000 under a higher evidentiary standard. *See* JA398, 412-16.

There existed considerable uncertainty and disagreement about the size of the class and the number of potential claimants. *See* JA909-11. Under the settlement agreement, if the $680 million fund proved insufficient to pay all claims, successful claimants' damage awards would be reduced *pro rata*. *See* JA419-20. If, on the other hand, there were funds remaining at the close of the process, they would be distributed, pursuant to the agreement's *cy pres* provision, to non-profit entities that have historically served the interests of Native American farmers and ranchers. Class counsel would choose, with court approval, existing organizations that served the

class, and *cy pres* funds would be distributed to those entities in equal shares. *See* JA422; JA393.

In 2011, the district court approved the Settlement Agreement, *see* JA589-91, and entered a Final Order and Judgment dismissing the case with prejudice, *see* JA592-93. The dismissal order provided that, "[i]n accordance with the terms of the Settlement Agreement," the district court "retain[ed] continuing jurisdiction for a period of five years from the date of entry of" the order for the purposes described in the Agreement. JA593. Although various class members had objected to the settlement, neither of the class members now seeking rehearing en banc did (Keith Mandan and Donivon Tingle), and no one appealed from the final order. *See Keepseagle v. Perdue*, 856 F.3d 1039, 1044 (D.C. Cir. 2017).

2. The parties then implemented the agreement. After the class-administered claims process concluded in 2012, approximately $380 million remained unclaimed, largely because far fewer individuals successfully applied for awards than was accounted for in the settlement amount. *See* JA1114 n.3. In response to this situation, the parties initially negotiated a supplemental agreement under which most of the unclaimed funds would be paid into a trust to be paid out over 20 years, rather than being distributed immediately in equal shares to the existing organizations provided for by the settlement. *See* ECF No. 709-11 at 1. However, the lead plaintiff (Marilyn Keepseagle), other class representatives, and many other class members objected to that approach, generally arguing that all of the remaining funds should be

distributed to the individual successful claimants, even though they had already been paid. With district court approval, Mrs. Keepseagle and her husband obtained independent counsel and eventually moved for a different modification of the Agreement under which the entire $380 million would be distributed to class members who had been successful in the claims process. *See* ECF No. 709.

In July 2015, after briefing and a substantial hearing, JA1452, the district court denied both of the competing motions to modify the settlement agreement and directed the parties to resume negotiations. JA1098-1167. The parties (including the Keepseagles) engaged in extensive additional negotiations in an effort to reach a compromise that could be implemented before the district court's continuing jurisdiction expired in April 2016 under the terms of the settlement agreement.

3. In December 2015, the parties reached a compromise between class counsel's original proposal and the Keepseagles' proposal, which they adopted in an Addendum to the settlement agreement. The deal provided for additional payments of $18,500 to class members who prevailed in the original claims process, along with $2775 in payments to the IRS on their behalf. *See* JA1170. But the remaining funds—roughly $300 million—would be distributed to non-profit organizations: $38 million would be distributed quickly to existing organizations, and the rest would be placed in a trust to be distributed over twenty years. *See* JA1172, 1177-1188.

Under the trust, a wide range of non-profit organizations are potentially eligible grant recipients and can use the funds for broadly and vaguely worded purposes ("to

fund the provision of business assistance, agricultural education, technical support, and advocacy services to Native American farmers and ranchers to support and promote their continued engagement in agriculture"). *See* JA1178. Class counsel selected (subject to court approval) the initial members of the Board of Trustees as well as the Executive Director, and the Trustees may appoint any replacements. *See* JA1170, 1183, 1186. There are no provisions allowing for public input or oversight concerning how the funds are spent.

The class was notified of the proposed modification and encouraged to submit written comments, and the district court held a second day-long hearing at which it heard from many class members. As the court summarized, "[m]any class members expressed their support for the proposed Addendum, but many did not." JA1457. Those who disagreed with the Addendum generally argued either that all of the funds should be distributed to those who had been successful in the original claims process, or that the claims process should be re-opened to allow those who were unsuccessful to submit new claims. *Id.* Among those who expressed disagreement with the Addendum was Class Representative Keith Mandan, who argued that all of the funds should have been distributed solely to the successful claimants who had already been awarded their agreed-upon shares of the settlement proceeds. *See* ECF No. 833.

On April 20, 2016, the district court approved the Addendum. *See* JA1447-75. Mandan and Donivon Tingle, another class member who had recovered through the

claims process, filed separate appeals, which this Court consolidated. Both argued that the entire *cy pres* fund should be distributed to individual claimants.

4. This Court affirmed the district court's decision approving the modification agreed to by the parties. It rejected Mandan's argument that the terms of the agreement only permitted modification with his consent, emphasizing that such an interpretation would be inconsistent with the parties' intentions and the representational nature of class actions. *Keepseagle*, 856 F.3d at 1047-48. It further ruled that the district court had not abused its discretion in upholding the modified settlement agreement and finding that the negotiated modification was "fair, reasonable, and adequate." *Id.* at 1048-50. It also rejected Tingle's arguments regarding the conduct of class counsel, explaining that his allegations were unsupported by any evidence. *Id.* at 1055.

Most relevant here, this Court held that Mandan had repeatedly forfeited and waived his belated argument on appeal that the settlement agreement's *cy pres* provision was inconsistent with the Judgment Fund Act and the statute authorizing the Attorney General to settle litigation. *Keepseagle*, 856 F.3d at 1053-54. This Court noted that Mandan did not challenge the legality of the *cy pres* provision in 2011, when final judgment was entered; during the first set of proceedings to modify the settlement agreement; or in the district court proceedings regarding the second proposal to modify the settlement agreement. To the contrary, as this Court further emphasized, Mandan's counsel expressly declined to press an argument that the *cy pres*

agreement was unlawful during the district court proceedings regarding the second proposal.[2] In addition to noting that Mandan's arguments "appear[ed] to be misguided" and were based on "policy concerns" rather than statutory text, the Court concluded that this case "does not come close to establishing exceptional circumstances" that would militate in favor of addressing a forfeited and waived issue. *Id.* at 1056.

5. Judge Brown dissented. She contended that *cy pres* settlements with the Government violate the Appropriations Clause of the Constitution, the Judgment Fund Act, and the Settlements Authority statute, *Keepseagle*, 856 F.3d at 1073-77; that the factual context of this settlement and the legal question it presents provided sufficiently extraordinary circumstances that Mandan's failure to properly raise the question should be excused, *id.* at 1066-73; and that the *cy pres* funds must revert to the U.S. Treasury, *id.* at 1077-78.

Judge Wilkins issued a separate concurrence that disagreed with Judge Brown's characterization of the facts underlying the settlement negotiations and emphasized that Mandan's *cy pres* challenge was not properly before the Court. *Keepseagle*, 856 F.3d at 1056-58.

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[2] Mandan's counsel also filed a separate lawsuit on behalf of a different class member, William Smallwood Jr., arguing that the Keepseagle settlement agreement's *cy pres* provision was unlawful. That case was dismissed for lack of standing, and Smallwood voluntarily dismissed his appeal from that dismissal. *See Smallwood v. Perdue*, D.C. Cir. No. 17-5070 (stipulation of voluntary dismissal filed July 27, 2017).

ARGUMENT

As noted above, and for many of the reasons Judge Brown expressed, the Government has reviewed the *Keepseagle* settlement, now views it as regrettable, and has taken steps to ensure that something like this does not happen again. Nevertheless, given the posture of this case, en banc review is not warranted. The general legal question of whether *cy pres* provisions exceed the Attorney General's broad authority is no longer of continuing importance in light of his recent policy memorandum, and the particular question of whether the appellants failed to preserve their objection to the *cy pres* distribution is a narrow and fact-bound inquiry.

Rehearing En Banc Should Be Denied Because The Attorney General Has Adopted A Policy Prohibiting *Cy Pres* Settlements With The Government, Whether Or Not They Are Unlawful

Courts have consistently held that the Attorney General is vested "with virtually absolute discretion to determine whether to compromise or abandon claims made in litigation." 6 Op. O.L.C. 47, 60 (1982) (citing authorities). And, "[e]xcept as otherwise provided by law," "compromise settlements of claims" by the Attorney General (or his delegees) "shall be * * * paid in a manner similar to judgments" pursuant to the permanent appropriation in the Judgment Fund. *See* 28 U.S.C. § 2414; *see also* 31 U.S.C. § 1304. This Court need not go en banc to decide whether *cy pres* provisions fall outside this broad settlement authority as a matter of law, because the Attorney General has now instructed that the Department of Justice generally will not agree to such provisions going forward in any event.

A. Upon review of this case, it has become starkly obvious that *cy pres* settlements with the Government can raise serious concerns.

First, the application of a *cy pres* provision with the Government necessarily means that taxpayer funds will be paid to third parties who "possess no claims against the United States." *Keepseagle*, 856 F.3d at 1074 (Brown, J., dissenting). Although such third-party payments can "in fact settle claims against the United States * * * [by] the members of the class," *id.* at 1058 (Wilkins, J., concurring); *see also id.* at 1055 (majority opinion), it is nevertheless problematic for the Government to enter into a settlement where, even after all the claimants who satisfy the settlement conditions have received their agreed-upon compensation, any remaining unclaimed funds will go to certain third parties who have *not demonstrated any injury*, rather than reverting to the federal treasury. *Id.* at 1059 (Brown, J., dissenting). Those concerns are amplified when the amount of taxpayer dollars diverted is $300 million. *Id.*

Second, there is no guarantee that *cy pres* payments will at least indirectly benefit injured class members who for whatever reasons failed to successfully invoke the settlement claims process. Instead, *cy pres* distributions often have a broad "range of potential beneficiaries," an "attenuated relationship[ ] to actual class members," and a more "general 'purpose' * * * than remediating monetary damage." *Keepseagle*, 856 F.3d at 1070. Here, for example, the settlement and addendum identify a wide range of permissible recipients and expenditures, and they also potentially give class counsel significant influence over how the money is spent. *See id.* at 1064. This creates a real

risk that, rather than indirectly "compensating injured Native-American farmers," taxpayer funds will be used by the trust "to ensure [that] favored 'nonprofits' and 'charities' [are] flushed with cash." *See id.* at 1061-62. And there would be an even greater opportunity and potential for *cy pres* payments to be routed to favored projects in situations where the Executive Branch shared class counsel's general policy goals but had been unable to obtain a specific appropriation from Congress. *See id.*

Finally, and perhaps most problematically, *cy pres* settlements with the Government could give rise to a public perception that the parties have settled for an inflated amount in order to fund *cy pres* distributions. *See Keepseagle*, 856 F.3d at 1069 (citing cases recognizing "this potential for conflicting interests"). Here, in particular, some commentators have alleged that "political calculations explain the settlement," given that (among other factors) there were serious defects in plaintiffs' legal theories, the settlement nevertheless was for "nearly 90%" of plaintiffs' estimated total damages, and the underlying estimates of the number of injured class members "were wildly off-base." *See, e.g.*, *id.* at 1062-65. The mere perception of such impropriety presents a threat to the administration of justice and the public trust.

B. For these reasons and others, the Attorney General recently established a Department of Justice policy against *cy pres* provisions and other third-party settlement payments. In particular, on June 5, 2017, the Attorney General issued a memorandum entitled "Prohibition on Settlement Payments to Third Parties" to all Department of Justice component heads and all United States Attorneys. *Supra* at 1

n.1. With limited exceptions, the memorandum prohibits Department attorneys from entering into settlement agreements that "direct[ ] or provide[ ] for a payment or loan to any non-governmental person or entity that is not a party to the dispute," including "*cy pres* agreements or provisions." *See id.*

This Policy will prevent the recurrence of the use of taxpayer dollars to go to third parties who have no claim against the government, as in the *Keepseagle* settlement agreement. The absence of continuing use of such *cy pres* agreements is sufficient reason for this Court to deny rehearing en banc on the question of their legal validity.

Moreover, this case is a poor vehicle for the en banc Court to address that question because the panel held only that Appellants had forfeited and waived the question, and that holding does not itself meet the standards for en banc review. Mandan does not dispute the general rule that "[t]he doctrines of waiver and forfeiture apply to constitutional objections," *Keepseagle*, 856 F.3d at 1054, and the cases he invokes for an exception to that rule (Pet. 8-11) are inapposite because they involved *Article III jurisdictional* objections to *adjudication by non-Article III tribunals*. Whether an exception should also be recognized for an objection that the Attorney General allegedly exceeded statutory limits on his settlement authority is a narrow issue that does not warrant en banc review here. Likewise, although Mandan makes various arguments (Pet. 11-15) for why his *cy pres* objection was neither waived nor forfeited, those contentions do not warrant en banc review, because they are intensely

fact-bound and Mandan would need to prevail on both waiver and forfeiture in order for this Court to reach the merits of his *cy pres* objection

CONCLUSION

The petitions for rehearing should be denied.

Respectfully submitted,

CHAD A. READLER
Principal Deputy Assistant Attorney General

CHANNING D. PHILLIPS
United States Attorney

CHARLES W. SCARBOROUGH
s/ Carleen M. Zubrzycki
CARLEEN M. ZUBRZYCKI
Attorneys, Appellate Staff
Civil Division, Room 7260
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530
(202) 514-3388
Carleen.M.Zubrzycki@usdoj.gov

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit established by this Court's Order dated July 18, 2017 because it contains 3,056 words. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in Garamond, a proportionally spaced font, using Microsoft Word 2013.

s/Carleen M. Zubrzycki
Carleen M. Zubrzycki

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Appellants are Keith Mandan and Donivon Craig Tingle. Defendant-appellee is Sonny Perdue, in his official capacity as the Secretary of the United States Department of Agriculture. Plaintiff-Appellees are the class that was certified by the district court.

B. Rulings Under Review

Mr. Mandan and Mr. Tingle have appealed the April 20, 2016 Order (Dkt. #871) granting Plaintiff-Appellees' unopposed motion to modify the settlement agreement previously entered in this action (*see* Dkt. No. 576 (Nov. 1, 2010 settlement agreement); August 1, 2012 Minute Order (approving previous unopposed motion to modify the settlement agreement)). The reasons for the Order are set forth in a Memorandum Opinion (Dkt. No. 872), also issued on April 20, 2016. The Order and Memorandum Opinion were issued by the Honorable Emmet G. Sullivan in No. 1:99-cv-03119 (EGS) (D.D.C.).

C. Related Cases

There are no additional related cases pending before this Court. This Court previously denied Defendant-Appellee's petition for interlocutory review of the district court's class certification decision, *In re Veneman*, 309 F.3d 789 (D.C. Cir.

2002), and petition for a writ of mandamus, *In re Veneman*, 2004 WL 434032 (D.C. Cir. No. 04-5031, Mar. 3, 2004). This Court also previously denied a plaintiff class member's appeal from a denial of his motion to intervene. *Keepseagle v. Vilsack*, 815 F.3d 28 (D.C. Cir. 2016).

s/ Carleen M. Zubrzycki
Carleen M. Zubrzycki

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2017, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. The participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

s/Carleen M. Zubrzycki
Carleen M. Zubrzycki