No. 17-___

IN THE

Supreme Court of the United States

KEITH MANDAN,

Petitioner,

v.

SONNY PERDUE, SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court Of Appeals for the District Of Columbia

PETITION FOR A WRIT OF CERTIORARI

WILLIAM A. SHERMAN
Counsel of Record
DINSMORE & SHOHL LLP
801 Pennsylvania Ave., N.W.
Suite 610
Washington, D.C. 20004
(202) 372-9100
william.sherman@dinsmore.com

Counsel for Petitioner
Keith Mandan

December 19, 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

In 2010, the United States Department of Agriculture ("USDA"), represented by the Department of Justice ("DOJ"), obtained $680,000,000 from the Judgment Fund to settle discrimination claims filed by a class of Native American farmers and ranchers under the Equal Credit Opportunity Act ("ECOA"). The settlement approved by the district court included *cy pres* provisions allowing for distribution of any remaining settlement proceeds to entities that in the past had supported Native American farmers and ranchers. At the conclusion of the claims process, over half of the $680,000,000 (approximately $380,000,000) remained undistributed and subject to *cy pres* distribution. A subsequent court-approved addendum to the settlement agreement ("Addendum") results in over $300,000,000 still being subject to distribution via *cy pres* to uninjured non-parties without claims against the United States. This invasion of Congress' exclusive Appropriations power by both the Executive and Judicial Branches requires this Court to address the following questions presented:

1. Is it a violation of the Appropriations Clause of the United States Constitution and the separation of powers doctrine, for the Executive Branch to pay, and for the Judicial Branch to approve the payment of, over $300,000,000 from the Judgment Fund appropriation to uninjured non-parties with no claims against the United States?

2. Can a structural constitutional challenge to Executive and Judicial Branch actions be waived or forfeited when those actions violate the Appropriations Clause and separation of powers doctrine?

PARTIES TO THE PROCEEDING

The petitioner here is Keith Mandan (plaintiff-appellant below).

D. Craig Tingle, Esq. (plaintiff-appellant below) has petitioned this Court for certiorari separately.

Respondents are Sonny Perdue, Secretary of the United States Department of Agriculture (defendant-appellee below); H. Porter Holder and Claryca Mandan, on behalf of themselves and the *Keepseagle* certified class (plaintiff-appellees below); and Marilyn Keepseagle (plaintiff-appellee below).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the District of Columbia is reported at 856 F.3d 1039 and reprinted in Appendix A. The opinion and order of the United States District Court for the District of Columbia is reprinted in Appendix B.

JURISDICTION

The decision of the Court of Appeals was entered on May 16, 2017. A timely petition for rehearing was denied on September 20, 2017. *See* Order, Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The pertinent portions of Art. I, § 9, cl. 7 and Art. III, § 1 appear in Appendix D. The text of 31 U.S.C. § 1304 and 28 U.S.C. § 2414 appear in Appendix E. The text of Rule 23 of the Federal Rules of Civil Procedure and Rule 40.5 of the Local Rules of the United States District Court for the District of Columbia appear in Appendix F.

STATEMENT OF THE CASE

At issue in this case is whether over $300,000,000 taken from the Judgment Fund appropriation for the settlement of discrimination claims against USDA may be diverted to uninjured non-parties with no claims against the United States via *cy pres* provisions in a class action settlement agreement.[1] Neither the

[1] The district court had jurisdiction over the case pursuant to 28 U.S.C. §§ 1331, 1343, and 2201, as well as by virtue of the provisions in the *Keepseagle* settlement agreement which allowed for subsequent amendments upon agreement of the parties. On

Executive Branch by agreeing to the *cy pres* settlement terms, nor the Judicial Branch by approving the settlement under FED. R. CIV. P. 23(e), have the constitutional authority to appropriate over $300,000,000 for payment to uninjured non-parties with no claims against the United States. The courts below chose to ignore this egregious encroachment upon Congress' exclusive appropriations authority, leaving this Court as the final arbiter of this fundamental constitutional issue.

A. The *Keepseagle* Settlement

Under a 2010 settlement reached in *Keepseagle v. Vilsack*, No. 1:99-cv-03119-EGS (D.D.C.) ("*Keepseagle*"), a class of Native American farmers and ranchers settled their discrimination claims against USDA under the ECOA, 15 U.S.C. § 1691. (App.-5a). The settlement included: a cash payment of $680,000,000 from the Judgment Fund; debt forgiveness for eligible class members; and programmatic relief. *Id*. The settlement agreement provided that any money remaining at the conclusion of the claims process would be distributed via *cy pres* to entities that in the past had supported Native American farmers and ranchers. (App.-6a). These organizations would be chosen by class counsel and approved by the district court. *Id*.

In 2011, before the claims process was completed, the district court granted final approval of the settlement, awarded attorneys' fees, and dismissed the case with prejudice. (App.-7a). There were no appeals.

June 20, 2016, Keith Mandan timely filed his notice of appeal from the district court's April 20, 2016, order granting Plaintiffs' Unopposed Motion to Modify the Settlement Agreement *Cy Pres* Provisions. The appellate court below had jurisdiction pursuant to 28 U.S.C. § 1291.

Id. The claims process proceeded, and upon its completion over half of the settlement money remained undistributed – approximately $380,000,000 or 56% of the total cash amount – enough money to send a man to the moon, twice.[2] (App-8a).

B. An Initial Failed Attempt To Amend The Settlement Agreement

In 2013, class counsel informed the district court of the huge remainder and their unsuccessful attempts to persuade DOJ to agree to additional payments to the claimants who prevailed under the settlement claims process. *Keepseagle v. Vilsack,* 118 F. Supp. 3d 98, 108 (D.D.C. 2015); Response to Letter of George and Marilyn Keepseagle at 1-2, *Keepseagle v. Vilsack*, No. 99-3119 (D.D.C. March 21, 2014). Class counsel subsequently moved to amend the settlement agreement to more specifically address the *cy pres* distribution of the $380,000,000 to uninjured non-parties with no claims in the litigation. *Keepseagle,* 118 F. Supp. 3d at 108-09. Many class members objected to the proposed amendment, including lead class representative, Marilyn Keepseagle. *Id*. at 108-12. She hired separate counsel and filed a competing motion under FED. R. CIV. P. 60(b). *Id*. at 112-13.

---

[2] Under the settlement agreement's two-track claims process, claimants had to choose between Track A payments of $50,000 or Track B payments of up to $250,000. Track B claimants faced a higher evidentiary standard, and if unsuccessful, could not pursue Track A claims. (App.-6a). Although many claimants experienced losses in excess of $50,000, they chose Track A so as to avoid the risk of receiving nothing should Track B claims prove unsuccessful. Of the 3,601 Native Americans who prevailed under the claims process, only 14 received Track B awards. Status Report at 2, *Keepseagle v. Vilsack*, No. 99-3119 (D.D.C. Aug. 30, 2013).

The district court denied both motions, encouraged the parties to negotiate a solution, and *sua sponte* observed that $380,000,000 of taxpayer funds was set to be distributed inefficiently to third party groups that had no legal claim against the government. *Id.* at 113. Doubting that "the judgment fund from which this money came was intended to serve such a purpose," the district court stated "[t]he public would do well to ask why $380,000,000 is being spent in such a manner." *Id.* at 104.

C. A Second Attempt To Amend The Settlement Agreement

In 2015, following additional negotiations with USDA, class counsel proposed new *cy pres* provisions in what it termed an "unopposed" Addendum to the settlement agreement. (App.-9a).[3] The new *cy pres* provisions replaced those in the original agreement. (App-129-30a). The Addendum provided for disbursement of the $380,000,000 remainder as follows: payment of an additional $18,500 to each prevailing claimant (with corresponding individual IRS payments of $2,775); and payment of over $300,000,000 to *cy pres* beneficiaries. (App.-9-10a, 89a). $265,000,000 of the over $300,000,000 would be disbursed by payment to a *cy pres* trust for distribution to unidentified recipients over the next twenty years; and the remaining $38,000,000 would be disbursed to a second group of *cy pres* beneficiaries. (App.-9-10a). Thus, only $77,000,000 of the $380,000,000 would go to the prevailing claimants. (App.-89a).

[3] The Addendum is reprinted in Appendix G.

The Addendum constituted a new agreement subject to Rule 23(e) approval.[4] (App.-3a). Accordingly, class members were permitted to file written comments on the proposed Addendum and to speak at a scheduled February 4, 2016, fairness hearing. (App.-10a).

On January 20, 2016, undersigned counsel appeared in the case and filed a written objection to the Addendum on behalf of Keith Mandan, a class representative and prevailing claimant under the settlement claims process ("Petitioner"). *Id.* Petitioner objected to any *cy pres* distribution of remaining settlement funds on the basis that payment should not be made to "third parties who have not suffered any injury and who have no claims against the United States." *Id.* This objection echoed the district court's earlier-voiced concern that hundreds of millions of dollars from the Judgment Fund were going to *cy pres* beneficiaries "that had no legal claim against the government." *Keepseagle,* 118 F. Supp. 3d at 104.

D. The *Smallwood* Class Action

On February 1, 2016, Petitioner's counsel also filed a separate putative class action, S*mallwood v. Vilsack, et al.*, No. 1:16-cv-0161-RBW (D.D.C. 2016) ("*Smallwood*"), on behalf of the *Keepseagle* prevailing claimants against DOJ and USDA under the Administrative Procedures Act ("APA"). (App.-11a, 23a). The case sought declaratory relief that the *cy pres* provisions of the *Keepseagle* settlement agreement and

---

[4] The *cy pres* provisions of the Addendum replaced those in the original *Keepseagle* settlement agreement. (App.-129-30a) ("The purpose of this Addendum is to modify the *cy pres* provisions set forth in the Settlement Agreement. Thus, the provisions of this Addendum will govern in place of the following portions of the original and revised Agreement . . . .").

the proposed Addendum violated the Appropriations Clause and the Judgment Fund Act. (App.-23-24a).

Counsel was required to indicate on the civil cover sheet whether *Smallwood* was related to any other case. To be related, *Smallwood* had to involve the same parties and relate to the same subject matter as another case in the district. LCvR 40.5(a)(4); (App.-118a). Despite the *Smallwood* parties and subject matter differing from those in *Keepseagle*, out of an abundance of caution and to give notice to the court and parties in *Keepseagle*, counsel checked the box listing *Smallwood* as related to *Keepseagle.* (App.-148a).

Initially, *Smallwood* was assigned to the *Keepseagle* court as a related case. (App-11a). The district court, however, reviewed the complaint, determined *Smallwood* was unrelated, and sent it to the court's calendar committee which then randomly assigned the case to another judge on February 3, 2016.[5] LCvR 40.5(c)(1); (App.-11a, 119a).

E. The *Keepseagle* Fairness Hearing

At the February 4, 2016, *Keepseagle* fairness hearing,[6] three of the four class representatives expressed their support for the Addendum.[7] (App.-

---

[5] On January 30, 2017, while the *Keepseagle* appeal was pending, the government's motion to dismiss *Smallwood* was granted. (App.-11a). Mr. Smallwood filed a notice of appeal, but thereafter dismissed the appeal.

[6] Pertinent excerpts from the February 4, 2016, fairness hearing are reprinted in Appendix H.

[7] $100,000 service awards were sought for each of the acquiescing class representatives for their contributions to the post-judgment settlement process. (App.-90a). These awards

143a). Petitioner did not. *Id.* He reiterated his objections both through his personal statement on the record and through the statement of his counsel. (App.-146-51a). Petitioner also advocated for a *pro rata* distribution of the entire remainder to the prevailing claimants who had been the victims of USDA's discriminatory conduct. (App.-152-53a).

During the course of the fairness hearing, the district court discussed its pre-hearing ruling regarding *Smallwood*:

> On Monday, February the 1st, Mr. Smallwood filed what appears to be a class action complaint against Secretary Vilsack and Attorney General Lynch arguing that – or alleging that the payment of $380 million by way of the cy-pres provision is an unconstitutional *ultra vires* action. That's Complaint Number 16, Civil Action 161. It came to this Court – it was assigned to me as a related case to the *Keepseagle* case. *The Court determined initially that it's not related within the meaning of our local rules because the merits of this case were determined a couple of years ago when the Court approved the agreement that resolved the claims set forth in the plaintiffs' complaint; and, therefore, the Court sent it back to return the case to the calendar committee.* It was reassigned to one of my colleagues, Judge Walton. He and I have not discussed this, and maybe I should have heard from counsel first as to

---

were granted and were roughly equivalent to what each prevailing claimant would receive if the entire $380 million were distributed *pro rata*.

> whether the Court should keep the case and resolve it itself or not. I'm interested in your views about that. If it appears that in hindsight the Court should resolve the case itself, I'll give that further consideration. *But it does not appear to be related within the meaning of our local rules because the merits have long since been determined.* This case, this active case, has been closed for a couple of years, at least.

(App.-143-44a) (emphasis added).

Petitioner's counsel attempted to explain why he designated *Smallwood* as a related case:

> MR. SHERMAN: It comes to my attention, and the Court asked the question concerning the lawsuit, the proposed class action that we filed where Billy Smallwood, who's also a prevailing claimant in the *Keepseagle* case, has filed a class action, and *whether or not it was a related case*. To our understanding, Your Honor, and the reason we applied for related case status was, according to the local rule, a related case on a dismissed matter – and this is a dismissed matter -- is one that involves the same parties and the same subject party. Your Honor, we are completely satisfied with where the case sits at this particular point, but our reasons for doing so was first –
>
> THE COURT: You mean with Judge Walton?
>
> MR. SHERMAN: Yes.
>
> THE COURT: All right. Go ahead.

> MR. SHERMAN: – our reasons for doing so was out of an abundance of caution in complying with the rules.
>
> THE COURT: That's fine, that's fine.
>
> MR. SHERMAN: But more importantly because our allegations in that lawsuit potentially have a direct impact on whether what is being proposed here can actually be done lawfully. And so we served, not only the government, we served an early courtesy copy – we also served a courtesy copy on –

(App.-147-48a).

At that point, the court stopped counsel from further commenting on *Smallwood*:

> THE COURT: I don't want to get too much involved on a related case that's not even before me. I sent it back to the calendar committee. In my opinion, it's not related within the meaning of the local rule. It's before Judge Walton, and so you can make your arguments to him.

(App.-148a).

F. The District Court's Approval Of The *Keepseagle* Addendum And Petitioner's Subsequent Appeal

On April 20, 2016, the district court granted class counsel's motion to modify the settlement agreement using the Addendum which included *cy pres* provisions allowing for distribution of over $300,000,000 to uninjured non-parties with no claims against the government. (App.-108-09a). Petitioner appealed that ruling.

(App.-3a). He fully briefed and argued his Appropriations Clause argument before a three-judge panel of the D.C. Circuit Court of Appeals consisting of Judges Edwards, Wilkins, and Brown. (App.-24a).

Petitioner urged that absent specific congressional appropriation, the *Keepseagle* settlement remainder could not be redirected to uninjured non-parties without claims against the United States. *Id.* The appellate court, nevertheless, declined to reach the merits of Petitioner's structural constitutional challenge. (App.-25a). The panel majority, Judges Edwards and Wilkins, concluded that the constitutional argument had been forfeited and waived. *Id.* They reasoned that the alleged forfeiture occurred because Petitioner had not objected to the *cy pres* provisions at the time of the original settlement approval, and again during class counsel's first attempt to modify the agreement. (App.-22-23a). Furthermore, they concluded Petitioner's objection was insufficient because it supposedly challenged only the distribution of the money via *cy pres*, not the legality of the *cy pres* provisions themselves. (App.-23a). Next, they determined that Petitioner's challenge had been waived when his counsel did not object during the fairness hearing to the district court's ruling that *Keepseagle* and *Smallwood* were unrelated, despite the fact that no party argued that such failure constituted a waiver. (App.-23-24a). That issue was raised *sua sponte* by the panel majority.

G. Judge Brown's Dissent

Judge Brown dissented, concluding that Supreme Court precedent on structural constitutional arguments dictated that Petitioner's constitutional challenge could not be waived or forfeited. (App.-40a). She noted that congressional control over appropriation of taxpayer funds is a structural limit on both the

Executive and Judicial Branches, which neither can agree to waive. (App.-37a). When the Constitution's structural principles limiting judicial power are implicated, notions of consent and waiver simply cannot be dispositive. (App.-40a). Judge Brown noted that neither authorizing nor policing a *cy pres* distribution scheme in a government class action settlement is consistent with constitutional limitations. (App.-41a).

Judge Brown further insisted that waiver could not apply because this case presents exceptional circumstances and raises structural jurisdictional limitations on judicial power that cannot be waived. (App.-52-66a). The *Keepseagle cy pres* payment to uninjured non-parties with no claims permits the Executive Branch to circumvent checks on its power with the imprimatur of the Judicial Branch. (App.-54a). The "acceptability of circumventing the congressional appropriations process under the guise of Article III is 'extraordinarily important and deserves a definitive answer.'" (App.-55a). She further noted that the structural issue is the district court's power to approve and police the *cy pres* distribution scheme without congressional appropriation. (App.-56a). Ultimately, she concluded that the judiciary should not have allowed the consent of the parties to override its obligation to withhold approval of an agreement that was outside its Article III limitations, and the appellate court should not have hidden behind waiver to legitimize the unlawful action of the district court. (App.-65-66a).

H. DOJ's Policy Change

On May 25, 2017, following the issuance of the appellate court's decision, U.S. House of Representatives Judiciary Chairman Bob Goodlatte urged the Attorney General to challenge the *cy pres* distribution

of the *Keepseagle* settlement funds.[8] On June 5, 2017, DOJ issued a departmental policy change prohibiting DOJ employees from agreeing to *cy pres* payments in future class action settlements with the government.[9] When Petitioner filed his petition for rehearing *en banc*, DOJ responded on behalf of USDA acknowledging that while the *Keepseagle* settlement was "regrettable," *en banc* review was not warranted because DOJ had taken "steps to ensure that a settlement of this nature will not occur again." Defendant-Appellee Sonny Perdue's Response to the Petitions for Rehearing *En Banc* at 5-6, *Keepseagle v. Perdue*, No. 16-5189 (D.C. Cir. Aug. 16, 2017). The petition for *en banc* review was denied and Petitioner now seeks redress before this Court. (App.-110-11a).

REASONS FOR GRANTING THE WRIT

The first question in this case is whether the Appropriations Clause permits the Executive and Judicial Branches to agree to and approve, respectively, a settlement which includes the payment of over $300,000,000 from the Judgment Fund to uninjured non-parties without claims against the United States. This Court should grant certiorari to resolve this question.

First, the court-approved Addendum clearly violates the Appropriations Clause which grants Congress the exclusive power to appropriate funds. The Executive Branch exceeded its authority under the Constitution,

---

[8] May 25, 2017 Goodlatte Letter to Attorney General Jeff Sessions, available at https://judiciary.house.gov/wp-content/uploads/2017/05/05.25.2017-Letter-to-Jeff-Sessions.pdf?

[9] The DOJ newly enacted *cy pres* policy is reprinted in Appendix I.

the Judgment Fund Act, and the Settlements Authority Statute by agreeing to *cy pres* distribution of Judgment Fund money. The Judicial Branch exceeded its authority under Article III of the Constitution by approving the *cy pres* terms of the original settlement and those in the subsequent Addendum. The district court's approval permits the unlawful distribution to uninjured non-parties with no claims against the United States and undermines the separation of powers between the coordinate branches of government.

Second, the sanctity of the Appropriations Clause and the constitutional separation of powers should not be left to the vagaries of political fortune. Throughout *Keepseagle*, DOJ insisted on *cy pres* distribution of the remaining settlement funds. Recently, however, the government has made a complete about-face on the issue, currently prohibiting *cy pres* provisions in class action settlements with the government. While DOJ's recent shift is a welcome return to a constitutionally-appropriate method for funding settlements from the Judgment Fund for those with claims against the government, the sanctity of the Appropriations Clause should not be left to the whims of the DOJ.

Notably, the panel majority performed mental gymnastics to conclude that a waiver and forfeiture had occurred regarding the first question. By ignoring the actions of both the Executive and Judicial Branches, the panel majority facilitated the aggrandizement of these two branches over the Legislative Branch, which alone possesses the power to appropriate funds from the Treasury. This Court should recognize that no waiver or forfeiture occurred by granting certiorari on Petitioner's Appropriations Clause challenge, or alternatively, summarily reversing the Court of Appeals and remanding the case for a decision on the merits.

But even if this Court were to conclude that Petitioner failed to adequately preserve his Appropriations Clause challenge below, this Court should grant certiorari to resolve the second question presented: whether the doctrines of waiver and forfeiture allow an appellate court to ignore a fundamental violation of the constitutional separation of powers—namely the unconstitutional appropriation of Judgment Fund money by the Executive Branch, in agreeing to the *cy pres* terms in the *Keepseagle* settlement, and by the Judicial Branch, in approving the settlement under FED. R. CIV. P. 23(e).

The panel majority's decision conflicts with Supreme Court precedent. The doctrines of waiver and forfeiture simply do not preclude a decision on the merits where the challenge is of a structural jurisdictional nature.

Even if this Court were to conclude that the doctrines of waiver and forfeiture could be applied here, Petitioner's Appropriations Clause challenge is of such importance that this Court must utilize its discretion to decide this argument on the merits.

I. THE DECISION BELOW VIOLATES THE APPROPRIATIONS CLAUSE.

The Addendum, agreed to by USDA, approved by the district court, and left undisturbed on appeal, redirects via *cy pres* over $300,000,000 of Judgment Fund money appropriated by Congress to settle claims against the United States to uninjured non-parties with no claims against the United States. The Judgment Fund cannot be used in this manner regardless of the agreement of the parties or the approval of the district court. Such a brazen grab of the Legislative Branch's exclusive appropriations power by both the

Executive and Judicial Branches begs reversal by this Court.

A. The Appropriations Clause Grants Exclusive Appropriations Authority To The Legislative Branch.

The Appropriations Clause provides in pertinent part that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ." U.S. CONST. art. I, § 9, cl. 7. This plain language prevents the Executive and Judicial Branches from taking actions which result in the payment of money from the Treasury absent Congressional approval. *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937); *Office of Pers. Management v. Richmond*, 496 U.S. 414, 425 (1990). The plain language of the Appropriations Clause also prohibits an assumption in *favor* of a Congressional appropriation. Instead, *the settled rule is that* "the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." *United States v. MacCollom,* 426 U.S. 317, 321 (1976).

This exclusive grant of appropriations authority is a fundamental underpinning of America's democracy and is arguably the Constitution's most important check on Executive and Judicial power as, "any exercise of the power granted by the Constitution to one of the other Branches of Government is limited by a valid reservation of congressional control over funds in the Treasury." *Office of Pers. Management*, 496 U.S. at 425.[10] Justice Joseph Story remarked:

---

[10] *See also* Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 BYU L. REV. 327, 329 (2009) (misuse

> . . . the [legislature] has, and must have a controlling influence over the executive power, since it holds at its own command all the resources by which a chief magistrate could make himself formidable. It possesses the power of the purse of the Nation and the property of the people. It can grant or withhold supplies; it can levy or withdraw taxes; it can unnerve the power of the sword by striking down the arm that wields it.

Joseph L. Story, *Commentaries on the Constitution of the United States*, 384 (1873).

B. Neither The Judgment Fund Act Nor The Settlements Authority Statute Authorizes Payment From The Judgment Fund To Uninjured Non-Parties Without Claims Against The United States.

The Judgment Fund Act is a permanent indefinite appropriation made by Congress pursuant to the Appropriations Clause. The Act provides in pertinent part:

> (*a) Necessary amounts are appropriated to pay final judgments, awards, compromise*

---

of DOJ's settlement authority "can…subvert the Constitution's grant of appropriations authority to Congress"); U.S. Gov. Accountability Office, Principles of Federal Appropriations Law at 1-6 (4th ed. 2016) (" . . . the Constitution vests in Congress the power and duty to affirmatively authorize all expenditures. Regardless of the nature of the payment—a salary, a payment promised under a contract, a payment ordered by a court—a federal agency may not make such a payment and, indeed, may not even incur a liability for such a payment, unless Congress has made funding authority available.").

> *settlements, and interest and costs specified in the judgments or otherwise authorized by law when* – (1) payment is not otherwise provided for; (2) payment is certified by the Secretary of the Treasury; and (*3) the judgment, award, or settlement is payable – (A) under section 2414, 2517, 2672, or 2677 of title 28*; (B) under section 3723 of this title; (C) under a decision of a board of contract appeals; or (D) in excess of an amount payable from the appropriations of an agency for a meritorious claim under section 2733 or 2734 of title 10, section 715 of title 32, or section 20113 of title 51.

31 U.S.C. § 1304 (emphasis added).

The Settlements Authority Statute, 28 U.S.C. § 2414, referenced in the text of the Judgment Fund Act, further limits payment from the Judgment Fund. It provides:

> Except as otherwise provided by law, compromise settlements of *claims* referred to the Attorney General *for defense of imminent litigation or suits* against the United States, or against its agencies or officials upon obligations or liabilities of the United States, made by the Attorney General or any person authorized by him, *shall be settled and paid in a manner similar to judgments in like causes* and appropriations or funds available for the payment of such judgments are hereby made available for the payment of such compromise settlements.

28 U.S.C. § 2414 (emphasis added). While Congress enacted the Judgment Fund Act to simplify and speed up the payments of claims and judgments against the

United States, it placed numerous restrictions and conditions precedent on its use. *See* U.S. Gov. Accountability Office, GAO Decision B-249060 (April 5, 1993) ("[B]efore payment may be made from the Judgment Fund, the purposes and requirements of that appropriation must be satisfied.") (citations omitted) available at http://www.gao.gov/products/436676#mt=e-report.

A plain reading of both the Judgment Fund Act and the Settlements Authority Statute reveals that the Executive Branch's authority is limited to the settlement of *actual* or *imminent* litigation with persons having *claims against the United States*, and those claims must be settled and paid in a manner *similar to judgments in like causes*.[11] It follows, that the Judicial Branch cannot approve a settlement where the Executive Branch has exceeded its limited authority granted by Congress.

Actual or imminent litigation is understood as "a genuine disagreement or impasse . . . Litigation is not imminent for purposes of this provision merely because a claimant will sue if the agency does not pay.

---

[11] The Department of the Treasury, which is the Executive agency tasked with administering the Judgment Fund, incorporates the plain language of the Settlement Authorities Statute into its interpretive regulations:

> a) The Judgment Fund is a permanent, indefinite appropriation which is available to pay many judicially and administratively ordered monetary awards against the United States. In addition, amounts owed under compromise agreements negotiated by the U.S. Department of Justice in settlement of *claims* arising under *actual* or *imminent* litigation are normally paid from the Judgment Fund, *if a judgment on the merits would be payable from the Judgment Fund*.

31 C.F.R. § 256.1(a) (emphasis added).

There must be a legitimate dispute over either liability or amount." U.S. Gov. Accountability Office, Principles of Federal Appropriations Law at 14-34 (3d ed. 2008). *Claim* is understood to mean a "cause of action or a demand for money or property as a right."[12] Decision of Gen. Counsel Kepplinger, 1993 U.S. Comp. Gen. LEXIS 486, *6 (Comp. Gen. Apr. 5, 1993); *Hobbs v. McLean*, 117 U.S. 567, 575 (1886) ("What is a claim against the United States is well understood . . . [the] right to demand money from the United States"). "Concededly, the nonprofit organizations that will receive *cy-pres* distributions out of leftover settlement funds [in *Keepseagle*] may not possess any claims against the United States," and have not been engaged in imminent litigation against the United States. (App.-36a).

Judge Wilkins' concurrence suggests that the "question of whether this settlement was supported by a congressional appropriation turns on whether providing for cy-près distribution of unclaimed settlement funds is '*similar to judgments in like causes.*'" *Id.* He incorrectly concludes that the answer is not purely legal, and thus not within the appellate court's ambit to decide.

Use of the Judgment Fund appropriation is a legal question. Its use is limited to payment of judgments in like causes. As Judge Brown explained:

> A *cy pres* distribution is not an 'award' the *Keepseagle* class claimants could have received by prevailing at trial. Had they proceeded to trial and prevailed on their

[12] This definition is consistent with the use of "claim" throughout Title 31 of the United States Code. Compare 31 U.S.C. §§ 3724, 3729 (claim related to demand or right to money).

> claims for monetary damages, they would have received compensation for their damages. This compensation is, by definition, a money judgment payable from the Judgment Fund. But, had the Keepseagle class claimants prevailed at trial, they could not, by definition, receive '*cy pres* damages'—payments that do not compensate them directly but fulfill a 'purpose' 'as near as possible' to compensating them. A *cy pres* distribution is thus not equivalent to a money judgment at trial. This renders the Judgment Fund Act appropriation unavailable for *cy pres* distributions.

(App.-71a) (citations omitted); Paul F. Figley, *The Judgment Fund: America's Deepest Pocket & Its Susceptibility to Executive Branch Misuse*, 18 U. PA. J. CONST. L. 145, 163 (2015) ("Accordingly, settlements . . . could be paid from the Judgment Fund if a judgment *on that claim* would have been paid from the Fund. . . .").

The government ignored the plain language of 28 U.S.C. § 2414 in agreeing to the *cy pres* distribution of Judgment Fund money to uninjured non-parties with no claims. Uninjured non-parties with no claim and no actual or imminent litigation against the United States do not, and cannot, meet the statutory criteria for payments from the Judgment Fund.

Moreover, nothing in the legislative history of the Judgment Fund Act supports the government's reading of the statute. Congress intended the Judgment Fund Act to serve as an administrative mechanism to pay persons with judgments against the United States, or with claims that could ripen into judgments, without the necessity of a specific Congressional appropriation in each case. *United States v. Varner*,

400 F.2d 369, 372 (5th Cir. 1968); U.S. Gov. Accountability Office, Principles of Federal Appropriations Law Vol. III at p. 14-31 (3d ed. 2008). There is no indication that Congress intended the Act, as exercised through 28 U.S.C. § 2414, to be a blanket delegation of appropriations authority endowing the Executive or Judicial Branches with the power, authority, or ability to redirect taxpayer money to uninjured nonparties with no claims against the United States under the pretext of a litigation settlement.

Although there may be some discretion in DOJ's settlement authority under 28 U.S.C. § 2414, that discretion is not so broad as to overcome the prohibition against inferring appropriations authority. And it certainly is not so broad as to alter statutory and constitutional reality. *See MacCollom*, 426 U.S. at 321; *Executive Business Media, Inc. v. U.S. Department of Defense*, 3 F.3d 759, 762-63 (4th Cir. 1993) (Attorney General's settlement authority stops at the wall of illegality). Absent specific congressional appropriations language permitting uncapped payments to entities if the payments are incident to settlement of a claim, such a backdoor appropriations authority "cannot be inferred." *MacCollom,* 426 U.S. at 321; *United States House of Representatives v. Burwell,* 185 F. Supp. 3d 165, 168 (D.D.C. 2016).

C. A Recent Executive Policy Shift Underscores The Need For A Ruling On The Merits Of This Case.

While the Addendum's $300,000,000 *cy pres* payment clearly violates the conditions provided in the Judgment Fund Act and begs reversal, DOJ's recent policy change further underscores that necessity. On June 5, 2017, Attorney General Sessions issued a memorandum announcing that DOJ would no longer:

> . . . enter into any agreement on behalf of the United States in settlement of federal claims or charges, including agreements settling civil litigation, accepting plea agreements, or deferring or declining prosecution in a criminal matter, that directs or provides for a payment or loan to any non-governmental person or entity that is not a party to the dispute.
>
> * * *
>
> This policy applies to all civil and criminal cases litigated under the direction of the Attorney General and includes civil settlement agreements, *cy pres* agreements or provisions, plea agreements, non-prosecution agreements, and deferred prosecution agreements.

(App.-155a).[13]

---

[13] This DOJ Memorandum should not be read to indicate that historically DOJ has agreed to violate the Appropriations Clause by sending Judgment Fund money to uninjured non-parties without claims against the United States. In fact, typically DOJ has followed the Judgment Fund prohibition against sending settlement money to uninjured non-parties with no claims in the litigation. This was done by either obtaining post-settlement Congressional approval for payments to non-parties, or by using a claims process preventing *cy pres* distributions. *See Cobell v. Salazar*, 573 F.3d 808, 811 (D.C. Cir. 2009) (specific, post-settlement Congressional approval for a settlement agreement containing payments to some persons without claims that could ripen into judgments against the United States); *Pigford v. Glickman*, 185 F.R.D. 82, 85–88 (D.D.C. 1999), *aff'd*, 206 F.3d 1212 (D.C. Cir. 2000), *enforcement denied sub nom.*, *Pigford v. Shafer*, 536 F. Supp. 2d 1(D.D.C. 2008) (specific, post-settlement Congressional appropriation to settle claims of late-filing claimants who were not anticipated under the original *Pigford* settlement agreement); *Garcia v. Veneman*, 211 F.R.D. 15 (D.D.C.

In response to Petitioner's request for *en banc* review, DOJ confirmed the policy shift, "[t]his 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." Defendant-Appellee Sonny Perdue's Response to the Petitions for Rehearing En Banc at 9, *Keepseagle v. Perdue*, No. 16-5189 (D.C. Cir. Aug. 16, 2017) (emphasis added).

This after-the-fact policy change clearly was aimed at curing constitutionally infirm *cy pres* payments like those in *Keepseagle*. While Petitioner is heartened that the current administration intends to follow the plain language of the Judgment Fund Act in future settlements, this policy shift underscores the necessity of a decision from this Court on the merits of Petitioner's appeal. Subsequent administrations, or even the current administration, can just as easily reverse current policy and return to settlement practices that violate the Appropriations Clause. Finally, DOJ's assurance that this practice "generally" will not occur going forward does nothing to cure the violation of the Appropriations Clause here. Adherence to separation of powers, perhaps the most vital underpinning of

---

2002) and *Love v. Johanns*, 439 F.3d 723 (D.C. Cir. 2006) (creation of administrative claims programs where each claimant submitted a claim and subsequently met an evidentiary threshold specified in the settlement in order to receive payment from the Judgment Fund, thereby ensuring no subsequent *cy pres* distributions). In short, the Executive Branch knows how to tailor a settlement agreement to the constitutional requirements of the Judgment Fund. It just chose not to do so in the instant case.

American democracy, is not a decision that should be left to the vagaries of political fortune.

Apparently, the panel majority was not impressed by the magnitude of the *cy pres* giveaway. But $300,000,000 is a lot of money, and the Executive and Judicial Branches' trampling of the Appropriations Clause on their way to diverting this money to uninjured non-parties with no claims against the United States cannot be ignored. The recently changed DOJ policy neither cures this violation nor redirects the money back to the proper recipients – those Native Americans who prevailed under the *Keepseagle* claims process.

II. WAIVER AND FORFEITURE DO NOT PRECLUDE A DECISION ON THE MERITS OF PETITIONER'S APPROPRIATIONS CLAUSE CHALLENGE.

The appellate court incorrectly invoked the doctrines of waiver and forfeiture to avoid reaching Petitioner's Appropriations Clause challenge. The record below underscores that Petitioner neither waived nor forfeited his Appropriations Clause challenge to the Addendum. The Court should recognize that no waiver or forfeiture occurred by accepting certiorari on Petitioner's Appropriations Clause challenge, or alternatively, summarily reversing the Court of Appeals on waiver and forfeiture and remanding the case for a decision on the merits.

If this Court were to conclude, however, that Petitioner failed to adequately preserve his Appropriations Clause challenge below, the doctrines of waiver and forfeiture do not preclude a decision on the merits. Petitioner's challenge is both structural and jurisdictional, and therefore cannot be waived or forfeited.

And even if this Court were to conclude that waiver and forfeiture may be applied here, Petitioner's Appropriations Clause challenge is so important that this Court should utilize its discretion to decide the merits.

This Court should grant certiorari on both questions presented to resolve these issues and the merits of Petitioner's constitutional challenge, or alternatively, summarily reverse the circuit court on the question of waiver and forfeiture and remand the case to the Court of Appeals for consideration of the merits.

A. Petitioner Did Not Waive Or Forfeit His Appropriations Clause Challenge.

The panel majority erroneously concluded that there had been a forfeiture and waiver of Petitioner's constitutional challenge to the Addendum.[14] Regarding forfeiture, the panel majority observed that Petitioner could have raised his constitutional challenge at the time of the initial settlement agreement approval, and again during class counsel's first failed attempt to modify the agreement. (App.-22-23a). Instead, Petitioner only provided written comments at the time of the proposed Addendum, forfeiting his argument by only contesting the *cy pres* distribution itself and not the legality of the *cy pres* provisions. (App.-23a).

The fact that no party challenged the *cy pres* provisions on constitutional grounds at the time of the original settlement approval or at the time of class counsel's first failed attempt to modify the agreement

[14] Justice Scalia previously observed in *Freytag v. Commissioner*, 501 U.S. 868 (1991) courts often use the terms "forfeiture" and "waiver" interchangeably." 501 U.S. at 894 n.2, (Scalia, J., concurring in part and concurring in the judgment, joined by O'Connor, Kennedy, & Souter, JJ.) ("our cases have so often used them interchangeably that it may be too late to introduce precision.").

is of no consequence because the subsequent Addendum replaced the *cy pres* provisions of the original agreement thereby giving the parties a new opportunity to file timely objections, which Petitioner did.

The Addendum constituted a new agreement subject to Rule 23(e) approval. (App.-3a, 129-30a). Petitioner, in his objection to the Addendum, adequately preserved the Appropriations Clause challenge explaining that payments should not be made to "third parties who have not suffered any injury and who have no claims against the United States" (App.-10a) – precisely the argument Petitioner made before the appellate panel below.

In contrast to the panel majority's conclusion, the district court never considered Petitioner's objection forfeited. Forfeiture is "the failure to make the timely assertion of a known right . . . [.]" *U.S. v. Olano*, 507 U.S. 725, 733 (1993). The district court specifically considered and rejected Petitioner's argument in its opinion approving the Addendum. (App.-101a). Petitioner timely asserted his constitutional challenge when he filed his comment objecting to the constitutionality of the *cy pres* provisions prior to the fairness hearing.

Moreover, the panel majority's holding that Petitioner somehow waived his constitutional challenge based on an impromptu exchange between Petitioner's counsel and the district court at the fairness hearing is unsupported by the record. The referenced exchange involved the relatedness of *Smallwood* and *Keepseagle*. The panel majority posited that, by not challenging the district court's determination on relatedness, Petitioner essentially "told the District Court Judge that he did not wish to pursue any challenges to the *cy-pres* provision." (App.-26a).

This reading of the exchange is curious and appears to be an attempt by the panel majority to avoid a decision on the merits. The exchange must be viewed in the context of LCvR 40.5, the purpose of which is to promote judicial economy, not to eliminate a party's claims. *See John Doe #1 v. Von Eschenbach*, No. 06-2131, 2007 U.S. Dist. LEXIS 41221, at *2 (D.D.C. June 7, 2007). LCvR 40.5 is an exception to the general rule of random assignment of newly filed cases. *Id.* Under the rule, in order for cases to be related they must: (1) involve the same parties; and (2) relate to the same subject matter. The rule does not require the cases to involve the same legal issues. LCvR 40.5(a)(4). There is nothing in LCvR 40.5 to suggest that a party waives a legal issue raised in the earlier filed suit if he fails to challenge the court's determination that the later filed case with a similar legal issue is unrelated. There was nothing about the exchange with counsel that could be viewed as an "intentional relinquishment or abandonment" of the Petitioner's constitutional challenge. *Olano*, 507 U.S. at 733. "Waiver of a legal right or interest must be clear and unambiguous." *McKinney v. U.S. Postal Serv.*, 75F. Supp. 3d 266, 278 (D.D.C. 2014) (*citing People for the Ethical Treatment of Animals v. Gittens*, 396 F.3d 416, 426 (D.C. Cir. 2005)). "[C]ourts indulge every reasonable presumption against waiver." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

More importantly, neither the parties nor the district court considered Petitioner's constitutional objection to the Addendum's *cy pres* provisions to be waived or forfeited as a result of the related case ruling. Undercutting the panel majority's disingenuous reading of that exchange, the district court specifically considered and rejected the objection in its opinion approving the Addendum without addressing waiver. It was the panel majority that first raised the issue

after briefing and oral argument regarding the constitutional issue had concluded in the appellate court. Under the principle of party presentation, the panel majority should not have raised waiver *sua sponte*. *Greenlaw v. U.S.*, 554 U.S. 237, 243-44 (2008).

B. The Doctrines Of Waiver And Forfeiture Are Inapplicable To Jurisdictional Constitutional Challenges Concerning Article III Courts.

Even if this Court were to conclude that Petitioner failed to adequately preserve his Appropriations Clause challenge below, that challenge is jurisdictional and the doctrines of waiver and forfeiture cannot preclude a decision on the merits. Article III, § 1 of the Constitution provides in pertinent part that "[t]he judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." While this provision gives the "Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy,"[15] the "Constitution prohibits one branch from encroaching on the central prerogatives of another." *Miller v. French*, 530 U.S. 327, 341 (2000). The Constitution, therefore, prohibits the Judicial Branch from encroaching upon the Legislative Branch's exclusive appropriations power granted in Art. I, § 9, cl. 7.

The Judicial Branch exceeded its jurisdiction under Article III, § 1 and encroached on the Legislative Branch's exclusive appropriations power by approving the *cy pres* provisions in the *Keepseagle* settlement

[15] *Plaut v. Spendthrift Farm*, 514 U.S. 211, 218-19 (1995).

agreement and Addendum. (App.-62a) ("Yet Congress made no such appropriation here, and no part of the appropriations process is within the judicial power."). Rule 23(e) of the Federal Rules of Civil Procedure provides that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). The court, however, cannot lend its approval to any settlement agreement which violates the Constitution or federal laws. *Se. Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316, 1321 (D.C. Cir. 2008) ("[T]he district court could hardly approve a settlement agreement that violates a statute . . . ."); *Grunin v. Int'l House of Pancakes,* 513 F.2d 114, 123 (8th Cir. 1975) (*citing Kelly v. Kosuga*, 358 U.S. 516, 520 (1959) and *Continental Wall Paper Co. v. Louis Voight & Sons Co*., 212 U.S. 227, 261-67 (1909)) (a court cannot approve a contract or agreement that violates federal antitrust laws); *Rolland v. Cellucci*, 191 F.R.D. 3, 6 (D. Mass. 2000) ("The court must establish . . . that no term of the settlement violates federal law."); *see also* (App.-64a) ("[T]he district court should have never allowed the parties' consent to override its independent obligation to not approve agreements that transgress Article III's limits.") (citations omitted).

In *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414 (1990), this Court held that the Judicial Branch cannot order payment of funds from the Treasury absent statutory authorization because doing so would violate the Appropriations Clause. *Office of Pers. Mgmt.*, 496 U.S. at 426. Yet the district court below did just that by approving both the original agreement and the subsequent Addendum thereby granting its imprimatur to the Executive Branch's unlawful agreement to pay Judgment Fund money to uninjured non-parties

with no claims against the United States. Jurisdictional defects such as this are not subject to waiver or forfeiture.

In *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), this Court stated that "when the statute claimed to restrict authority is not merely technical but embodies a strong policy concerning the proper administration of judicial business, this Court has treated the alleged defect as 'jurisdictional' and agreed to consider it on direct review even though not raised at the earliest practicable opportunity." *Glidden Co. v. Zdanok*, 370 U.S. at 536 (*citing American Construction Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 387-88 (1893)). Here, the jurisdictional nature of the instant claim is even clearer where the Constitution – specifically the Appropriations Clause – explicitly excludes appropriation authority from the Judicial Branch's purview.

Nine months prior to approving the Addendum, the district court doubted that "the judgment fund from which this money came was intended to serve such a purpose" and commented that "[t]he public would do well to ask why $380,000,000 of taxpayer funds was set to be distributed inefficiently to third party groups that had no legal claim against the government." *Keepseagle,* 118 F. Supp. 3d at 104. The district court improperly placed the onus on the public to ask the very question it was obligated to consider before approving the *Keepseagle* Addendum.

Contrary to the panel majority's view, the doctrines of waiver and forfeiture can have no bearing on jurisdictional constitutional challenges to Article III courts.

C. The Doctrines Of Waiver And Forfeiture Are Not Dispositive Of Article III Non-Jurisdictional, Structural Arguments.

Even if this Court were to construe Petitioner's Article III structural challenge as non-jurisdictional, that challenge still cannot be waived or forfeited. The panel majority's holding that waiver and forfeiture can be dispositive of a structural, constitutional challenge is in direct conflict with Supreme Court precedent which affirms that not all constitutional challenges are viewed through the same lens. In *Commodity Futures Trading Com v. Schor,* 478 U.S. 833, 850-51 (1986), this Court held that waiver and forfeiture cannot be dispositive of structural constitutional challenges. Writing for the majority, Justice O'Connor articulated the basis for a heightened waiver and forfeiture standard in relation to structural claims:

> Article III, § 1, safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts, and thereby preventing 'the encroachment or aggrandizement of one branch at the expense of the other.' To the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2. When these Article III limitations are

> at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.

Id. (citations omitted).

Schor forbids parties from "using consent to excuse an actual violation of Article III." *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1945 n. 10 (2015).

DOJ's agreement in *Keepseagl*e to make an appropriation from the Judgment Fund via *cy pres* payments to uninjured nonparties, followed by the district court's approval of that agreement, amounts to an aggrandizement of the Executive (and, through its approval of the Addendum, the Judicial) at the expense of the Legislative. Petitioner's objection strikes at the very heart of an Article III courts' structural jurisdiction and the separation of powers.

As in *Schor*, here neither class counsel nor the government would have benefited from protecting the institutional interests served by the limitations on the district court's authority imposed by Article III. Applying *Schor* and *Sharif*, the parties' consent to Article I and Article III violations, and the Petitioner's alleged waiver and forfeiture of his challenge to these violations cannot be dispositive of the structural constitutional argument.

D. This Court Should Exercise Its Discretion To Decide Petitioner's Constitutional Challenge.

Even if Petitioner's structural constitutional challenge is deemed non-jurisdictional and is considered waived or forfeited, this Court should exercise its dis-

cretion and stop the unconstitutional *cy pres* appropriation. This Court has chosen to hear structural constitutional objections despite appellate courts' decisions avoiding them under the doctrines of waiver and forfeiture. *See, e.g., Freytag*, 501 U.S. at 872-73 (1991) (granting certiorari even though the constitutional objection was first raised on appeal); *Lamar v. United States*, 241 U.S. 103, 117-18 (1916) (hearing an objection not raised until a supplemental brief filed before the Supreme Court).

Petitioner's constitutional objection to the $300,000,000 *cy pres* giveaway is significant because it involves the structural integrity of our tripartite system of government. Chief Justice Roberts has already questioned the efficacy of using *cy pres* provisions in settlement agreements, raising many of the same questions presented in this case. *Marek v. Lane*, 134 S. Ct. 8 (2013), *cert. denied*.

Moreover, this structural constitutional violation is recognized by the government. Specifically, the government stated that:

> *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. 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 to third parties with no claims against the Government.

Defendant-Appellee Sonny Perdue's Response to the Petitions for Rehearing *En Banc* at 5-6, *Keepseagle v.*

Perdue, No. 16-5189 (D.C. Cir. Aug. 16, 2017) (*citing* (App.-61a) ("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 . . .")).

In *Freytag*, for example, this Court decided whether the appointment of a special trial judge by the Chief Judge of the Tax Court violated the Appointments Clause. *Freytag,* 501 U.S. at 872. Before concluding that the appointment did not transgress separation of powers under the Appointments Clause, the Court explained why such structural constitutional objections raised for the first time on appeal necessitate review before the Court:

> [W]e are faced with a constitutional challenge that is neither frivolous nor disingenuous . . . [T]he disruption to sound appellate process entailed by entertaining objections not raised below does not always overcome what Justice Harlan called 'the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers.'

Freytag, 501 U.S. at 879 (*quoting Glidden*, 370 U.S. at 536).

Even though in *Freytag* the structural, constitutional challenge was raised for the first time on appeal, the Supreme Court granted certiorari to resolve the important question. *Id*. at 872. Here, where Petitioner raises a constitutional challenge that even the government recognizes is neither frivolous nor disingenuous, this Court should use its discretion to decide the merits of the issue presented.

CONCLUSION

The Addendum's *cy pres* appropriation is constitutionally infirm. Petitioner knows it. The district court suspected it. DOJ conceded it. Judge Brown explained it. The panel majority avoided it. This Court should stop it. Certiorari should be granted and argument scheduled to consider this critical constitutional question and the massive unlawful appropriation at issue in this case. Alternatively, this Court may wish to consider summarily reversing the Court of Appeals on the question of waiver and forfeiture and remanding with instructions to the Court of Appeals to consider the merits of Petitioner's challenge.

Respectfully submitted,

WILLIAM A. SHERMAN
Counsel of Record
DINSMORE & SHOHL LLP
801 Pennsylvania Ave., N.W.
Suite 610
Washington, D.C. 20004
(202) 372-9100
william.sherman@dinsmore.com

Counsel for Petitioner
Keith Mandan

December 19, 2017