No. 17-961

IN THE

Supreme Court of the United States

THEODORE H. FRANK AND MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF RESPONDENTS

RAE T. VANN
JOHN R. ANNAND
Counsel of Record
NT LAKIS, LLP
1501 M Street, N.W.
Suite 1000
Washington, DC 20005
jannand@ntlakis.com
(202) 629-5600

Attorneys for *Amicus Curiae* Center for Workplace Compliance

September 2018

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

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

FEDERAL CASES Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 17-961

THEODORE H. FRANK AND MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF RESPONDENTS

The Center for Workplace Compliance respectfully submits this brief as *amicus curiae*.[1] The brief supports the position of Respondents before this Court and thus urges that the decision below be affirmed.

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Its membership includes more than 240 major U.S. corporations, collectively providing employment to millions of workers. CWC's directors and officers include many of industry's leading experts in the field of equal employment opportunity and workplace compliance. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment policies and requirements.

All of CWC's members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended; the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*; the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*; and other federal employment-related laws and regulations. Collectively, CWC's member companies routinely make and implement millions of employment decisions each year, including hires, promotions, transfers, disciplinary actions, terminations, compensation, and other employment actions. They devote extensive resources to training, awareness, and compliance programs designed to ensure that all of their employment actions comport with these and other applicable legal requirements.

Nevertheless, each employment transaction is a potential subject of a discrimination charge and/or

lawsuit. As large employers, CWC's members are particularly likely targets for broad-based class action litigation. Consequently, CWC has an ongoing, substantial interest in the issue presented in this case regarding the availability of the *cy pres* device in class action settlements, where there exists no better alternative to distribute the settlement fund.

CWC has participated in numerous cases before this Court raising important questions relating to class and collective action litigation in the federal courts. *See, e.g.*, *E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395 (1977); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016). Because of its experience in these matters, CWC is especially well-situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

When a Google user conducts an Internet search by entering terms into the search engine, the results are displayed on a separate search results page. Pet. App. 4. Each search results page has a unique Uniform Resource Locator (URL) that includes the search terms entered by the user. *Id.* This URL, including the search terms that the user entered, is then transmitted by the user's web browser to the third-party website to which the user navigates from the search results page. *Id.*

In *In re Google Referrer Header Privacy Litig.*, three Google users filed a putative class action in the U.S. District Court for the Northern District of California, on behalf of themselves and "all persons in the United States who submitted a search query to Google" at any

time between October 25, 2006 and the date of notice to the class of certification (April 25, 2014), a class composed of approximately 129 million people, including Petitioners Theodore H. Frank and Melissa Ann Holyoak, as well as Respondent Paloma Gaos. Pet. App. 45. In essence, the plaintiffs alleged that the transmission of their search terms to third-party websites violated their privacy rights under the Stored Communications Act of 1986 and various state laws. Pet. App. 3. They did not allege that they suffered any harm as a result of the alleged violations. Pet. App. 8.

Following mediation, Google and the plaintiffs agreed to a settlement of $8.5 million, $3.2 million of which would go toward attorney's fees, administrative costs, and payments to the named plaintiffs. Pet. App. 5. Rather than divide the remaining $5.3 million among the approximately 129 million class members – which would have resulted in each individual receiving about $0.04 – the settlement divided the remaining money among six *cy pres* recipients, which would use the money to further projects related to Internet privacy. *Id.* As a condition of receiving a portion of the settlement fund, each of these organizations committed "to devote the funds to promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet." *Id.* In other words, instead of distributing negligible sums to each of the class members, the parties agreed to allocate the entire settlement fund, after fees and costs, to recipients who would promote Internet privacy and therefore benefit the class members. *Id.*

The district court preliminarily approved the settlement, and certified the class for settlement purposes. Pet. App. 6. The parties gave notice to the class by,

among other things, setting up a website and issuing advertisements and press releases, which resulted in thirteen class members opting out of the settlement, and five class members filing objections. *Id.* The district court nonetheless granted final approval of the settlement, finding that the funds were non-distributable given that "sending out very small payments to millions of class members would exceed the total monetary benefit obtained by the class." Pet. App. 9.

Two of the objectors, Theodore H. Frank and Melissa Ann Holyoak, appealed the district court's approval of the settlement to the Ninth Circuit Court of Appeals. Pet. App. 6. Although the objectors did not claim that they had been personally injured, they did argue among other things that a *cy pres*-only settlement was not permissible. Pet. App. 8. Instead, the objectors said, the monetary settlement should have been divided among a small portion of the class members, either by lottery or by offering token amounts under the assumption that few class members would make claims. Pet. App. 9.

The Ninth Circuit disagreed, finding that although "direct distributions to class members are preferable," *cy pres*-only settlements "are appropriate where the settlement fund is 'non-distributable' because 'the proof of individual claims would be burdensome or distribution of damages costly.'" Pet. App. 9 (citations omitted). It agreed with the lower court that here, the settlement fund was effectively non-distributable given each class member's *de minimis* recovery amount. *Id.*

The objectors filed a petition for a writ of certiorari, which this Court granted on April 30, 2018. *Frank v. Gaos*, 138 S. Ct. 1697 (U.S. Apr. 30, 2018).

SUMMARY OF ARGUMENT

Under the Federal Rules of Civil Procedure, parties to class-based litigation are free to enter into an agreement settling the dispute, provided that they receive court approval that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e). In recognition of the private, negotiated nature of such settlement agreements, courts typically will not disturb the agreement unless it is unfair, unreasonable, or inadequate. Parties therefore have a great deal of flexibility in structuring class action settlement agreements, including both the settlement amounts and the manner in which settlement funds are distributed to class members.

Distribution of the settlement fund can prove especially problematic in certain, rare scenarios. For example, occasionally a fund may be "non-distributable" because "the proof of individual claims would be burdensome or distribution of damages costly," *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (citation and internal quotations omitted), or where, as here, each class member is entitled to only a *de minimis* amount. Where a settlement fund is non-distributable, the parties are left either to proceed to litigation or agree to an alternative means of distribution. One alternative is the *cy pres* device, by which settlement funds are distributed to a third party, often a charity or foundation, which agrees to use the funds to benefit the class as a whole. Use of the *cy pres* settlement device, which has been endorsed by several courts of appeals, is appropriate where there is no better alternative for distributing the settlement funds. Thus, the *cy pres* mechanism addresses uncommon circumstances and accordingly should be the exception rather than the rule. *See In re*

Baby Prods. Antitrust Litig., 708 F.3d 163, 173 (3d Cir. 2013).

However, neither the putative rarity of *cy pres* settlements, nor the extraordinary circumstances giving rise to them, changes the fact that they only must pass muster under Rule 23(e). Although a Rule 23(e) fairness review of a *cy pres* settlement naturally involves consideration of some factors that are different from the ordinary Rule 23(e) fairness review, those factors simply offer further assurance of the settlement's fairness, in light of the uncommon circumstances at play. Given that a *cy pres* settlement need only satisfy a Rule 23(e) fairness review to be approved, such a settlement conceivably could distribute the entire settlement fund using the *cy pres* device, thus entirely foregoing direct distributions. In the end, if the proposed settlement as the parties have structured it is "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e), it will pass judicial muster; if it is unfair, unreasonable, or inadequate, the court will reject it.

The Ninth Circuit ruled correctly that under certain circumstances, a class action settlement fund may be distributed by way of a *cy pres* mechanism, in lieu of making direct distributions to class members. Pet. App. 21. Respondents correctly contend that a *cy pres*-only settlement is permissible and appropriate given that only a *de minimis* direct recovery would have been available to each of the 129 million class members. Although the *cy pres* device is to be used sparingly, its mere availability is valuable to employers, as it offers the chance to resolve certain burdensome class actions before they enter costly litigation phases. *Cy pres* settlements give defendants the opportunity to credibly propose a settlement *prior* to

the certification stage, one that provides some form of recovery to class members without requiring unnecessary expenditures on class administration. In avoiding litigation, use of the *cy pres* device offers finality to both parties (and far sooner than if the device were unavailable), allowing class members to receive benefit from the settlement more quickly than they otherwise may have, and encouraging the employer to shift its focus to future compliance.

Cy pres settlements are especially well-suited for some types of class actions that employers may face, including under employment laws such as Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended; the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*; and the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.* To the extent that employment-based class actions give rise to sprawling classes for which "proof of individual claims would be burdensome or distribution of damages costly," *Facebook*, 696 F.3d at 819 (citation and internal quotations omitted), the availability of the *cy pres* device gives employers a chance to resolve disputes while avoiding protracted, potential bet-the-company litigation. The inclusion by federal enforcement agencies of *cy pres*-style devices in settlement agreements further underscores their utility in resolving allegations of noncompliance with employment laws.

This Court's resolution of whether parties to a class action settlement may utilize *cy pres*-only settlements will therefore impact employers' ability to resolve class-based employment disputes in a fair, efficient, and cost-effective manner.

ARGUMENT

I. THE *CY PRES* DEVICE IS A VALID MEANS OF RESOLVING CLASS-BASED LITIGATION IN FEDERAL COURT

The Federal Rules of Civil Procedure permit "[o]ne or more members of a class … [to] sue or be sued as representative parties on behalf of all members," provided that the class meets certain criteria and has been certified by the court. Fed. R. Civ. P. 23(a). Nevertheless, the class action device remains "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (citation and internal quotations omitted).

A. *Cy Pres* Settlements Are Permissible Under The Federal Rules Of Civil Procedure

Once a class is certified, the parties may not enter into a binding settlement agreement without court approval that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see also Evans v. Jeff D.*, 475 U.S. 717, 726 (1986) (noting that "Rule 23(e) wisely requires court approval of the terms of any settlement of a class action"), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. Nevertheless, "there are few, if any, hard-and-fast rules about what makes a settlement 'fair' or 'reasonable,'" *In re Volkswagen "Clean Diesel" Marketing Litigation*, 895 F.3d 597, 610 (9th Cir. 2018), and a Rule 23(e) review of a proposed settlement "[u]ltimately … is nothing more than an amalgam of delicate balancing, gross approximations and rough justice." *Officers for Justice v. Civil Serv.*

Comm'n, 688 F.2d 615, 625 (9th Cir. 1982) (citation and internal quotations omitted).

B. Parties To A Class Action Are Broadly Free To Structure A Settlement Agreement As They Wish, Provided That It Is "Fair, Reasonable, And Adequate"

As long as a proposed settlement agreement "is 'fair, adequate and free from collusion' [it] will pass judicial muster." *Volkswagen* at 610 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998)). Indeed, a guiding principle of a Rule 23(e) fairness review is that the court will not

> intru[de] upon what is otherwise a private consensual agreement … [except] to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and adequate to all concerned.

Officers for Justice v. Civil Serv. Comm'n, 688 F.2d at 625; *see also Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (finding that a Rule 23(e) fairness review determines "whether a settlement is fundamentally fair … [which] is different from the question whether the settlement is *perfect*") (emphasis added); *Hanlon v. Chrysler Corp.*, 150 F.3d at 1027 ("[T]he question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion").

Because courts are loath to disturb a settlement of class claims unless its terms are unfair, unreasonable, or inadequate, the parties have considerable latitude in fashioning the terms of a settlement agreement in

a manner that takes into account the particular circumstances and context in which the dispute arose.

C. *Cy Pres* Settlements Offer The Best Method Of Settlement Distribution In Certain, Rare Circumstances

The flexibility class litigants possess to freely structure the terms of a settlement extends not only to the settlement *amounts*, but also to the *manner* in which those funds are distributed. Provided that the overall settlement agreement is fair, reasonable, and adequate under Rule 23(e), the parties may choose any number of formulas and methods to determine who, or what entity, should receive which portion of the settlement fund.

1. When a settlement cannot be directly distributed to class members, use of the *cy pres* mechanism is appropriate

Ideally, the proceeds from a class settlement should be distributed directly to class members, *see, e.g., Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011), in direct proportion to the actual damages suffered by each individual. However, proportional direct distribution is not always possible. In the typical class action, for instance, such calculations may be unduly complex and burdensome, given that classes usually include members with similar – but not identical – claims. *See* Fed. R. Civ. P. 23(a)(3) (requiring class members only to have claims that are "typical" as compared to the class, not identical).

In addition, as the size of a class increases, so too do the costs of proving and awarding damages. This can lead to a class action settlement fund becoming "non-distributable, [which occurs] when the proof of

individual claims would be burdensome or distribution of damages costly." *Facebook*, 696 F.3d at 819 (citation and internal quotations omitted). A settlement fund may become non-distributable "if, for example, the cost of distributing individually to all class members exceeds the amount to be distributed," *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 169 (3d Cir. 2013), or if a large class size would result in each member receiving only *de minimis* amounts. *See, e.g., Facebook*, 696 F.3d at 825.

Where a settlement fund is not directly distributable, an alternative approach to distribution is appropriate. One such alternative that the parties may elect to use is the *cy pres* distribution, which "is a settlement structure wherein class members receive an indirect benefit (usually through defendant donations to a third party) rather than a direct monetary payment." *Facebook*, 696 F.3d at 819. The *cy pres* mechanism is properly used "[w]here the only question is how to distribute the damages …." *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990).

Under circumstances such as these, where there is no better, alternative method of distributing a class action settlement fund, the inclusion of the *cy pres* mechanism is entirely uncontroversial: "'[C]ourts are not in disagreement that cy pres distributions are proper in connection with a class settlement, subject to court approval of the particular application of the funds.'" *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 34 (1st Cir. 2009) (quoting A. Conte & H.B. Newberg, 4 *Newberg on Class Action* § 11:20, at 28 (4th ed. 2002)).

2. In the absence of a feasible direct distribution, the other options for distributing the settlement are worse than *cy pres*

The lack of controversy surrounding use of *cy pres* settlements under the narrow circumstance of a non-distributable settlement fund can be explained by the fact that the mechanism is intended to be used only where there is *no better alternative* for disposing of the settlement fund. *See Dennis v. Kellogg*, 697 F.3d 858, 865 (9th Cir. 2012) ("[A] *cy pres* award must qualify as 'the next best distribution' to giving the funds directly to class members") (citation omitted). If a class action settlement fund cannot be directly distributed – as would be the case, for example, if class members cannot be readily identified, or if class members would each receive only *de minimis* recoveries – there in fact remains no better alternative method than *cy pres* for disposing of a settlement fund.

Two other options for distribution that are frequently identified by courts are reversion of the settlement fund to the defendant, or escheat to a governmental entity. *See, e.g., In re Baby Prods. Antitrust Litig.*, 708 F.3d at 172. These options are less preferable than *cy pres* distribution because both deprive the class of any benefit, with one scenario (reversion) providing the settlement fund to the very entity accused of causing the harm in the first place, thus muting any potential deterrent effect on the defendant's behavior. Compared to reversion or escheat, a *cy pres* distribution at least ensures that settlement funds will be used to provide a benefit to the class as a whole. As the Third Circuit observed:

> Reversion to the defendant risks undermining the deterrent effect of class actions …. Escheat to the

> state preserves the deterrent effect of class actions, but it benefits the community at large rather than those harmed by the defendant's conduct. *Cy pres* distributions also preserve the deterrent effect, but (at least theoretically) more closely tailor the distribution to the interests of class members, including those absent members who have not received individual distributions.

In re Baby Prods. Antitrust Litig., 708 F.3d at 172.

Petitioners insist that the settlement fund must be distributed directly to individual class members in some fashion, even though the high costs of distribution relative to the size of the settlement fund render direct distribution completely infeasible and thus make this as an ideal circumstance to apply the *cy pres* mechanism. Perhaps acknowledging the absurdity (and impracticalities) of distributing approximately $0.04 to each of 129 million class members, Petitioners instead propose two options for directly distributing the settlement fund: (1) holding a lottery to determine which class members would be eligible to share in the settlement fund; or (2) promising a token recovery of $5 or $10 to all class members who make a claim, under the assumption that few class members will do so. Pet. App. 9.

Both proposals make far less sense than the *cy pres* settlement to which the parties agreed, and which the district court and Ninth Circuit below ultimately approved. This is because the alternatives proposed by Petitioners would distribute recoveries to only a portion of the affected class while simultaneously introducing unnecessary administrative expenses associated with management of large classes. The agreed-upon and approved *cy pres* distribution, on the other hand, benefits the entire class by providing

money to organizations whose activities would promote the protection of Internet privacy. The *cy pres* distribution also reduces administrative costs as compared to Petitioners' proposals: rather than spend money unnecessarily on administering recoveries to millions of individuals – as would be the likely outcome under either proposal – the only costs associated with administering the *cy pres* distribution are those related to evaluating foundations' proposals to ensure that the money would be used to benefit the class. The *cy pres* method of distribution provides a greater benefit to the class and represents a lower administrative burden, and therefore is by far the superior option of those available under the circumstances presented here.

D. Numerous Courts Of Appeals Endorse The Use Of *Cy Pres* Settlements

The Ninth Circuit properly approved the parties' use of the *cy pres* device to resolve their otherwise non-distributable class claims given the *de minimis* amounts due to each class member, deeming the settlement to be "fair, adequate, and free from collusion." Pet. App. 10. In doing so, it accorded with a line of Ninth Circuit precedent generally approving of the use of the *cy pres* mechanism in class action settlements. *See, e.g., Six (6) Mexican Workers*, 904 F.2d at 1311-12; *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011); *Facebook*, 696 F.3d at 819-20.

In *Lane v. Facebook*, a case that bears a close resemblance to the one at issue, the Ninth Circuit considered a class of 3.6 million individuals claiming that Facebook "had violated [its] members' privacy rights by gathering and publicly disseminating information about their online activities without permis-

sion." 696 F.3d at 817. The parties proposed settling the claims by making a *cy pres* payment of $6.5 million to a charity that would sponsor programs related to protection of personal information online. The appeals court affirmed the district court's approval of the settlement, finding "that it would be 'burdensome' and inefficient to pay the $6.5 million in *cy pres* funds that remain after costs directly to the class because each class member's recovery under a direct distribution would be *de minimis*." *Facebook*, 696 F.3d at 825. Notably, had the *Facebook* settlement been directly distributed to class members, each would have received approximately $1.77. Even though these recoveries would have been approximately 44 times larger than the $0.04 direct recoveries that would have been available to each class member in the case at issue, they were still deemed to be *de minimis*.

The decision below also accords with decisions by other courts of appeals. For example, in *In re Mexico Money Transfer Litigation*, the Seventh Circuit reviewed a class action settlement agreement that, in addition to providing coupons to class members, included a *cy pres* component "in recognition of the fact that many class members will prove to be unidentifiable, will not claim their coupons, or will not use all coupons they receive." 267 F.3d 743, 746 (7th Cir. 2001). The appeals court affirmed the district court's approval of the settlement, finding that it fairly compensated the class. *Id*. at 748-49. Likewise, in *In re Baby Products Antitrust Litigation*, the Third Circuit approved of the use of *cy pres* distributions generally, saying that "a district court does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component[, provided that the third party uses the funds] for a purpose related to the class injury." 708 F.3d at 172 (footnote

omitted). The D.C. Circuit has even gone so far as to suggest that parties to a class action could negotiate a *cy pres* settlement even where "claimants are identifiable and dispersal of funds is feasible," noting that "[t]here is no precedent in this circuit" that would prevent that outcome. *Keepseagle v. Perdue*, 856 F.3d 1039, 1050 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 1326 (2018), *and cert. denied*, 138 S. Ct. 1345 (2018).

In short, the inclusion of the *cy pres* mechanism as a negotiated term in class action settlement agreements is neither controversial nor unusual. Because use of this mechanism – which is permissible under the Federal Rules of Civil Procedure and has been endorsed by numerous courts of appeal – gives parties a settlement option that is superior to other available alternatives, the Ninth Circuit's decision, approving of the parties' use of the *cy pres* mechanism, should be affirmed.

II. WHETHER A *CY PRES* SETTLEMENT ALSO INCLUDES DIRECT DAMAGES IS OF NO IMPORT, AS LONG AS THE SETTLEMENT MEETS RULE 23(e)'s REQUIREMENTS

It bears repeating that the *cy pres* mechanism addresses uncommon circumstances and should therefore be the exception rather than the rule. *See In re Baby Prods. Antitrust Litig.*, 708 F.3d at 173. However, these uncommon circumstances do nothing to change the fact that the settlement need only meet Rule 23(e)'s requirement that it be fair, reasonable, and adequate.

Of course, the uncommon circumstances that necessitate a *cy pres* settlement bring with them special considerations that typically are not present in run-of-

the-mill class action settlements. For example, *cy pres* settlements are often appropriate when class members cannot be readily identified, resulting in a class consisting largely of silent, potentially geographically diverse members who lack the ability to influence the settlement. *See Six (6) Mexican Workers*, 904 F.2d at 1307 ("[T]he interests affected are not the defendant's but rather those of the silent class members"). The large number of silent class members can, in turn, increase the potential for self-dealing. *See, e.g., In re Baby Prods. Antitrust Litig.*, 708 F.3d at 173 ("*Cy pres* distributions also present a potential conflict of interest between class counsel and their clients because the inclusion of a *cy pres* distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class"); *Nachshin*, 663 F.3d at 1039 (cautioning that selection of *cy pres* beneficiaries must not fall prey to "the whims and self interests of the parties, their counsel, or the court").

To account for these uncommon circumstances, courts pay special attention to settlements that include a *cy pres* mechanism, in order to ensure that they provide appropriate protection and benefit for silent class members whose rights will be impacted by the settlement. *See Nachshin*, 663 F.3d at 1036. However, even though a court may end up considering multiple factors when deciding whether to approve a *cy pres* settlement, in reality it is doing nothing more than conducting a Rule 23(e) fairness review that is tailored to the circumstances of the settlement at hand. As the Ninth Circuit recognized in *Facebook*, where it ultimately approved a *cy pres*-only settlement:

> The district court's review of a class-action settlement that calls for a *cy pres* remedy is not substantively different from that of any other class-action settlement except that the court should not find the settlement fair, adequate, and reasonable unless the *cy pres* remedy 'account[s] for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members ….'

696 F.3d at 819-20 (quoting *Nachshin*, 663 F.3d at 1036). *See also In re Baby Prods. Antitrust Litig.*, 708 F.3d at 174 ("To assess whether a settlement containing a *cy pres* provision satisfies this requirement, courts should employ the same framework developed for assessing other aspects of class action settlements"); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 33 (1st Cir. 2012) (holding that, in order to be fair, *cy pres* distributions must "reasonably approximate the interests of the class members").

Thus, in terms of judicial review, *cy pres* settlements need do nothing more than satisfy Rule 23(e)'s requirement that they must be "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). This is true whether they are *cy pres*-only or merely include a *cy pres* component in addition to direct distribution.

III. FOR EMPLOYERS THAT FACE LARGE CLASS ACTIONS, THE AVAILABILITY OF A RANGE OF SETTLEMENT OPTIONS, INCLUDING THE *CY PRES* SETTLEMENT DEVICE, IS CRITICALLY IMPORTANT

Employers derive considerable benefits from the availability of *cy pres* settlements. Although *cy pres* settlements are rare, their mere availability promotes

efficient resolution of class actions as well as future compliance with legal requirements.

A. *Cy Pres* Settlements Promote Prompt Dispute Resolution, And Decrease The Likelihood That Costly Class Procedures Will Be Necessary

Cy pres settlements are a valuable tool for dispute resolution. They offer the opportunity to resolve disputes in lieu of costly litigation on the merits and complex damages proceedings. In short, the availability of *cy pres* settlements promotes prompt resolution of burdensome class actions.

In addition to serving as a useful tool for more efficient dispute resolution, the availability of *cy pres* settlements can serve as a check against abusive tactics aimed at coercing settlement of questionable class claims. If *cy pres* settlements were completely unavailable, plaintiffs would have greater ability to force employers into costlier litigation phases that inch ever closer to ruinously high damages.

Indeed, it is at the certification stage that the playing field begins to tilt in the plaintiffs' favor. As this Court has observed, class actions can entail "the risk of 'in terrorem' settlements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). *See also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense"), *superseded by rule on other grounds*, Fed. R. Civ. P. 23(f), *as recognized in Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017); Federal Rule Civil Procedure 23 advisory committee's note to 1998 Amendment, 28

U.S.C. app. Subdivision (f) ("An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability").

B. *Cy Pres* Settlements Are Beneficial To Both Class Members And Employers

Cy pres settlements provide numerous benefits to both parties to a class action. First, *cy pres* settlements confer finality, to the benefit of all involved. Class members receive some form of redress – albeit indirectly – for the harm alleged, and both parties are given the chance to move past the dispute with certainty. Obtaining final resolution is a critically important objective of litigation, both for the parties and for the courts. *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) (explaining that the doctrine of collateral estoppel "promot[es] judicial economy by preventing needless litigation") (citation omitted).

Second, *cy pres* settlements can be useful in promoting deterrence. *See In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d at 33-34 ("[T]he cy pres ... distributions serve the objective[] of … deterrence of illegal behavior") (quoting A. Conte & H.B. Newberg, 3 *Newberg on Class Action* § 10:15, at 513 (4th ed. 2002)). This benefits class members by creating an incentive for future compliance. The employer also benefits from this deterrent effect, which affords it the opportunity to redress harms, address discontent within its workforce, and continue striving toward compliance with legal requirements.

Third, *cy pres* settlements provide class members some form of recovery in instances where otherwise

they may receive nothing. The *cy pres* mechanism is appropriately used where, for example, distribution of a settlement fund is infeasible. *See supra* pp. 11-12. Without the availability of the *cy pres* mechanism, the settlement fund would be disposed of in a manner that would provide no direct *or* indirect benefit to the class, such as reversion to the defendant or escheat to a governmental entity. *See supra* pp. 13-15. Thus, as the Seventh Circuit pointed out in *Mirfasihi v. Fleet Mortg. Corp.*, "In the class action context the reason for appealing to cy pres is to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement …." 356 F.3d 781, 784 (7th Cir. 2004).

Further, a *cy pres* distribution may also permit the class to receive an indirect benefit from a settlement even though "the shakiness of the plaintiffs' claims," Pet. App. 9, could well prove fatal if the dispute were to proceed to litigation.

Moreover, it is highly unlikely here that the class of 129 million individuals could possibly have obtained class certification and maintained it through litigation. As this Court held in *Comcast v. Behrend*, "certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" 569 U.S. at 33 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011)). Included among these requirements is "ascertainability," which is "an implicit requirement … that a class must be defined clearly and that membership be defined by objective criteria …." *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015). Classes have failed to meet this requirement "when they were too vague." *Id.* The

class here is the very definition of vague, as it includes *anyone* who used Google during a seven-and-a-half year period. In sum, had this case proceeded to litigation rather than ended with a *cy pres* settlement, it is likely that, due to weaknesses in the underlying claims and questionable ability to maintain class status, class members would have received absolutely nothing, compared to the myriad benefits they would gain as a result of the parties' *cy pres* settlement.

C. *Cy Pres* Settlements Are Particularly Well-Suited For The Types Of Disputes That Employers Face

Employers, especially those with large workforces, can expect to face class action lawsuits, and the *cy pres* mechanism is particularly well-suited to helping them reach satisfactory resolution of at least some such disputes. This is because certain claims may give rise to sprawling classes for which proof of specific harm is extremely difficult to establish, or for which direct distribution to individual class members would cost more than the settlement fund itself. Direct distribution, in other words, may be infeasible for some specific types of class claims that employers can expect to face.

For example, the ADEA prohibits an employer from "refus[ing] to hire … any individual … because of such individual's age." 29 U.S.C. § 623(a). One potential claim that may arise under the ADEA is that an employer intentionally discouraged older workers from applying for jobs by targeting younger job applicants, either through the language contained in a job advertisement itself (for instance, by expressing a preference for "recent college graduates"), or through its targeted distribution of job advertisements exclusively to younger workers. *See, e.g., Bradley v. T-*

Mobile U.S., Inc., 5:17-cv-07232 (N.D. Cal, Dec. 20, 2017) (complaint filed). In such a case, the plaintiffs likely would face considerable difficulty proving collectively that they would have applied for the job had they seen the advertisement, or had it been worded differently. Faced with such a claim, the *cy pres* mechanism could enable the employer to settle the threatened collective action in a manner beneficial to the plaintiffs without resort to protracted and uncertain collective litigation.

Employers also regularly face class-based ("collective") actions under the FLSA, which requires payment of overtime to any employee who works more than forty hours during a given workweek, unless he or she is exempt from the FLSA's requirements. 29 U.S.C. § 207. *See also Kempen v. Matheson Tri-Gas, Inc.*, No. 15-cv-00660-HSG, 2017 WL 475095, at *4 (N.D. Cal. Feb. 6, 2017) (approving settlement of FLSA claims using *cy pres* mechanism and noting that "[c]ourts generally apply the [Rule 23(e) fairness] standard to FLSA collective action settlements"). A common FLSA claim involves allegations that an employer failed to pay wages for work done "off-the-clock" – that is, before clocking in or after clocking out. For example, a non-exempt employee may occasionally spend a few minutes answering emails in the evening, which work generally must be compensated unless it is *de minimis*. 29 C.F.R. § 785.47. Because "off-the-clock" work typically must be compensated, employees could file a collective action, 29 U.S.C. § 216(b), alleging that their employer violated the FLSA by failing to pay them for such work; however, class members likely would have difficulty proving when they performed the work and how much of it they did. In other words, in such a circumstance, "proof of individual claims would be burdensome," which would

make it ideal for application of the *cy pres* mechanism. *Nachshin*, 663 F.3d at 1038 (citation and internal quotations omitted).

Furthermore, *cy pres* settlements, which provide a beneficial deterrent effect, are especially appropriate for settling certain types of employment disputes where deterrence is a primary statutory goal. For instance, prevention of harm is a chief aim of many equal employment opportunity laws, such as Title VII of the Civil Rights Act of 1964. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) ("[T]he primary objective [in enacting Title VII] was a prophylactic one"), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. The *cy pres* mechanism therefore may be particularly suitable for settling some workplace discrimination claims brought under such laws, because the deterrent effect of *cy pres* settlements aligns neatly with such laws' aim of keeping workplace discrimination from occurring in the first place.

Given that the *cy pres* mechanism deters future violations, using it to settle certain employment class actions in turn promotes the underlying purpose of such laws. For example, in *Powell v. Georgia-Pacific Corporation*, the Eighth Circuit considered a settlement between Georgia-Pacific and a class of African American employees alleging that the company had discriminated against them in violation of Title VII. 119 F.3d 703, 706 (8th Cir. 1997). Following direct distribution of the settlement fund to class members, there remained more than $1 million that had gone undistributed, and the Eighth Circuit approved a *cy pres* distribution of the funds to a scholarship program that would help African American students improve their employment prospects. This approval served as

tacit recognition that *cy pres* settlements can indeed dovetail with the underlying aims of federal workplace nondiscrimination laws.

Even federal enforcement agencies, such as the U.S. Equal Employment Opportunity Commission (EEOC), often utilize *cy pres* or similar mechanisms in resolving public enforcement actions. *See, e.g., EEOC v. Ruby Tuesday, Inc.*, No. 2:09-cv-01330-MRH (W.D. Pa. Dec. 9, 2013) (Consent Decree at 6) (stipulating that if any portion of the settlement fund were to go unclaimed by class members, the EEOC would distribute such funds to "a non-profit entity that advocates for older workers or assists in the job placement of older workers"). The U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) also has utilized *cy pres*-style components in its settlement agreements. One such agreement required the employer, after making payments to class members, to "use any uncashed funds to conduct [equal employment opportunity] training at the Corporate office." Conciliation Agreement Between The U.S. DOL-OFCCP and Humana Inc., at 8 (Mar. 2018).[2] In another settlement, OFCCP included a *cy pres*-style device that was to be used only in the event that redistributing unclaimed funds among the class would have resulted in *de minimis* payments to class members. In the settlement, OFCCP required uncashed funds to be redistributed to class members who had cashed checks, unless "the total amount of uncashed funds would result in a payment of *less* than $40.00 to each Eligible Class Member," in which case the remaining funds were to be used "to provide training in equal employment

[2] *Available at* https://www.dol.gov/ofccp/foia/files/Humana_CA_Redacted.pdf.

opportunity to its personnel ….” Conciliation Agreement Between The U.S. DOL-OFCCP and Tyson Foods, Inc., at 9 (Sept. 2016).[3]

The *cy pres*-style devices that the EEOC and OFCCP routinely include in resolving agency-initiated enforcement actions serve the same function as the *cy pres*-only settlement at issue here: in the absence of some discernable way to distribute settlement funds to those who were otherwise entitled to receive them, the settlements provide some means of public relief rather than reverting the funds to another party. Such settlements help enforcement agencies maximize the deterrent effect of the laws they enforce, by ensuring all settlement funds – even the remnants that remain after distribution – are used for the benefit of the class. The settlements also help the parties manage their limited resources by resolving allegations at the administrative stage, avoiding costly litigation. This finality has the added benefit of freeing up the employer's resources to focus on achieving future compliance. In short, federal enforcement agencies' use of a *cy pres*-style mechanism in settling alleged violations of equal employment opportunity laws underscores the mechanism's utility in supporting the underlying prophylactic aims of federal workplace nondiscrimination laws. Because the *cy pres* mechanism is permissible and has clear utility in settling certain employment disputes, it must remain a viable settlement option.

---

[3] *Available at* https://www.dol.gov/ofccp/foia/files/TysonCA_Redacted.pdf.

CONCLUSION

For the reasons set forth above, the *amicus curiae* Center for Workplace Compliance respectfully submits that the decision below should be affirmed.

Respectfully submitted,

RAE T. VANN
JOHN R. ANNAND
Counsel of Record
NT LAKIS, LLP
1501 M Street, N.W.
Suite 1000
Washington, DC 20005
jannand@ntlakis.com
(202) 629-5600

Attorneys for *Amicus Curiae*
Center for Workplace
Compliance

September 2018