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.*,
*Respondent*s.

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

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BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae law professors and legal scholars teach, write, and research in the areas of constitutional law, civil procedure and class actions, remedies, trusts, and internet privacy. They have analyzed the history and the use of *cy pres* awards. *Amici curiae* seek to advance the administration of law by offering their views on the circumstances under which a *cy pres*-only award is appropriate. *Amici* are:

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No party or entity other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission. Parties consented to the filing of this brief.

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SUMMARY OF ARGUMENT

Class actions developed out of equity. Federal Rule of Civil Procedure 23 did not intend to displace consideration of equity. *Cy pres* is an equitable doctrine that is appropriate to class action settlements when (i) there are settlement funds unclaimed by the class or (ii) the class members suffer an injury or invasion of right, but with very little, if any, quantifiable monetary damages and their injuries can be redressed by non-monetary relief, including changes in conduct or policy by the defendant and measures undertaken via *cy pres* to provide ongoing benefit to the class, subject to Rule 23(e)'s requirements.

In either situation, *cy pres*, along with the requirements of Rule 23, can provide proper relief to class members, who either (i) had an opportunity to claim compensation or (ii) suffered an alleged injury but without appreciable actual damages.

Cy pres distribution in class actions is well established in American jurisprudence and is beneficial to class members and to defendants. Stringent standards are applied by courts to assure that the use of *cy pres* is "fair, reasonable, and adequate." When used in *cy pres*-only cases, these standards are adequate to protect the interests of the class members and to guard against collusion between class action counsel and the defendant.

ARGUMENT

I. CLASS ACTIONS AND *CY PRES* DISTRIBUTIONS ARE LONG-STANDING DOCTRINES FIRMLY ROOTED IN EQUITY AND WELL ESTABLISHED IN AMERICAN JURISPRUDENCE

The current use of the *cy pres* doctrine in class actions is firmly rooted in American jurisprudence, particularly in the equitable principles which became the foundations of the modern American judiciary.

A. The History of Equitable Relief

Class actions originated in England in the principles of equity and date as far back as the year 1199. Debra Lyn Bassett, *Just Go Away: Representation, Due Process, and Preclusion in Class Actions*, 2009 BYU L. Rev. 1079, 1082 (2009). Class actions predate the formal institutionalization of the courts of equity which occurred in England by the fourteenth century. George Burton Adams, *The Origin of English Equity*, 16 Columbia L. Rev. 87, 88 (1916).

The development of the body of principles which became known as equity—including class actions—and the rise of chancery courts occurred due to the need to address controversies for which no remedy existed in the courts of law. James M. Fischer, Understanding Remedies 176-77 (Matthew Bender & Company, 2014). This lack of remedy at law arose due to the natural evolution of the early English legal system:

> Primitive legal 'systems' are usually not systems at all but simply a *number of remedies* available for certain types of wrongs. Thus, in early English law there was no thought of an all-embracing law which would, as we now assume, provide protection for the citizen's rights of all sorts, but rather a number of writs which were available to set in motion a selection of formalized actions to remedy certain specific ills. If the injustice suffered fell outside the scope of the writs, the would-be litigant had no remedy in the law.

Justinian, The Digest of Roman Law: Theft, Rapine, Damage and Insult 60 (Penguin Books 1979) (translated by C. F. Kolbert) (emphasis added). Thus, it was paradoxically due to the origin of the early English legal system as a system of limited remedies that the need for a supplementary remedy-based court system arose. *Id.* This development, however, is not unique to English law. Ancient Roman jurisprudence, for example, also developed a system of equity to address the problems created by the lack of an adequate legal remedy, granting upon those in power the ability to resolve controversies by providing remedies "where none had existed previously." *Id.* In fact, it is understood that English equity traces its origins to some extent to Roman law. *See* Fischer, Understanding Remedies at 177 note 8; Andrew Borkowski & Paul Du Plessis, Textbook on Roman Law 4 (Oxford University Press 2005); Timothy S.

Haskett, *The Medieval English Court of Chancery*, 14 Law & Hist. Rev. 245, 258 (1996).

In synergy with the courts of law, the courts of equity became instrumental in the delivery of justice:

> Into [chancery court] came individuals seeking justice. We may reflect for a moment on the type of justice available in chancery as opposed to the law courts. The law courts had by this time developed the principle of "deciding like cases alike;" chancery, however, knew no such principle. In chancery, each case was distinct and precedent was not consciously used as a method of resolving disputes…. The reason litigants chose chancery was because their claims fell outside those recognized by the law courts. This was not a case of concurrent jurisdiction with litigants selecting the most favorable forum for tactical reasons; litigants went to chancery because the law courts did not provide a remedy.

Fischer, Understanding Remedies at 176-77 (citations omitted). As such, the unique nature of matters heard in the courts of equity required granting the chancellors a high level of discretion in adjudicating controversies, resulting in the chancellors' ability to decide matters according to their own sense of right and wrong on a case-by-case basis. Haskett, *The Medieval Court of Chancery* at 255-56. This discretion, however, was neither unprincipled nor

unfettered. It was based on the principles and rules which became known as "equity"—including those governing class actions—that shaped the evolution of the "chancellor as judge" as well as the manner in which he adjudicated controversies. *Id.* at 251. Therefore, chancellors thought of their work as "reinforcing the [English common law] by making sure that justice was done in cases where shortcomings in the regular procedure, or human failings, were hindering its attainment by due process. [Chancellors] came not to destroy the law, but to fulfill it." *Id.* (quoting J. H. Baker, An Introduction to English Legal History, 117-18 (London 1990)). Later, and despite the deference traditionally accorded to the chancellors, courts of equity evolved to follow precedent and adopt set principles as did the courts of law. Haskett, *The Medieval Court of Chancery* at 256.

It was the manner in which English law and equity functioned as complementary to each other that ensured their survivability across the Atlantic after the American Revolution. Fischer, Understanding Remedies at 178. In fact, English law and equity became the pillars of the American judiciary as explicitly set forth in Article III, Section 2 of the United States Constitution: "The judicial Power shall extend to all Cases*, in Law and Equity,* arising under this Constitution, the Laws of the United States, and Treaties Made, or which shall be made, under their Authority." U.S. Const. Art. III, § 2 (emphasis added). *See also* Jennifer M. Bandy, *Interpretive Freedom: A Necessary Component of Article III Judging*, 61 Duke L.J. 651, 669 (2011). In 1938, courts of law and courts

of equity merged to become the modern American civil court system. *Id.* at 670 (citation omitted).

Thereafter, many principles which originated in equity became integral to American civil jurisprudence, including what is known today as the courts' "equitable power" which became the modern incarnation of the English chancellors' unique ability to deliver justice where the courts of law fell short. *See* Justinian, The Digest of Roman Law at 60; *see also* Borkowski & Du Plessis, The Textbook on Roman Law at 4. *See*, *e.g.*, *Tincher v. Arnold*, 147 F. 665, 675 (7th Cir. 1906); *see also* Haskett, *The Medieval Court of Chancery* at 254-55. This power derived from equity allows federal courts to resolve controversies with the flexibility necessary to achieve justice and fairness. *See*, *e.g.*, *Tincher*, 147 F. at 675; *see also* Haskett, *The Medieval Court of Chancery* at 254-55. This flexibility, however, is rooted in the interests of justice and "lies in [a court's] inherent capacity *to adjust remedies in a feasible and practical way* to eliminate the conditions or redress the injuries caused by unlawful action. *Equitable remedies must be flexible if these underlying principles are to be enforced with fairness and precision.*" *Freeman v. Pitts*, 503 U.S. 467, 487 (1992) (emphasis added). As such, the federal judiciary's use of its equitable powers is rooted in the fabric of American jurisprudence itself, and the courts have employed it from the moment Article III conferred upon them the power to resolve controversies. *See, e.g., In re Cendant Corp. Prides Litig.*, 233 F.3d 188, 191 (3d Cir. 2000) (upholding the District Court's decision to extend the deadline for filing claims pursuant to a securities class action settlement on the

ground that, "'[u]ntil the fund created by the settlement is actually distributed…the court retains its traditional equity powers.'") (quoting *Zients v. LaMorte*, 459 F.2d 628, 630 (2d Cir. 1972)).

B. Class Actions Have a Storied History and Are Based in Equity

Class actions arose purely out of necessity from a fundamental principle of equity jurisdiction in the English judiciary: "The traditional ticket of admission to equitable remedies was the requirement that the remedy at law be inadequate." Fischer, Understanding Remedies at 187. The necessity of bringing a multiplicity of lawsuits to enforce a right was considered evidence of the inadequacy of a legal remedy. "Where legal remedies require multiple suits involving identical issues against the same defendant, federal equity practice has recognized the inadequacy of the legal remedy and has provided a forum." *Garrett v. Bamford*, 538 F.2d 63, 71 (3d Cir. 1976) (citations omitted); *see also Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 187 (8th Cir. 1948). The justification for class actions is twofold: "First, in the interests of equity, to promote the filing of litigation that would otherwise *never be prosecuted*." Richard O. Faulk, *Armageddon Through Aggregation? The Use and Abuse of Class Actions in International Dispute Resolution*, 10 Mich. St. U. Det. C. L.J. Int'l L. 205, 214 (2001) (emphasis added). Second, to give "small claimants an opportunity to recover damages from defendants who, in the absence of a class remedy, would be unjustly enriched by retaining an aggregated ill-gotten gain." *Id.* at 213-14 (citations omitted).

This Court in 1842 promulgated Equity Rule 48, "officially recogniz[ing] representative suits where the parties were too numerous to be conveniently brought before the court." *In re Joint Eastern & Southern Dist. Asbestos Litigation*, 129 B.R. 710, 804 (S.D.N.Y. 1991), *judgment vacated*, 982 F.2d 721 (2d Cir. 1992) ("*Asbestos Litigation*").

In 1854, this Court applied the doctrine and described its equitable origins:

> The rule is well established that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest. Mr. Justice Story, in his valuable treatise on Equity Pleadings, after discussing this subject with his usual research and fullness, arranges the exceptions to the general rule, as follows: 1. Where the question is one of a common or general interest, and one or more sue or defend for the benefit of the whole; 2. Where the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole; and 3. Where the parties are very numerous, and though they have or may have

separate and distinct interests, yet it is impracticable to bring them all before the court.

. . . .

Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. *For convenience, therefore, and to prevent a failure of justice,* a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court.

. . . .

The case in hand illustrates the propriety and fitness of the rule…. It is manifest that to require all the parties to be brought upon the record, as is required in a suit at law, would amount to a denial of justice. The right might be defeated by objections to parties, from the difficulty of ascertaining them, or if ascertained, from the changes constantly occurring by death or otherwise.

Smith v. Swormstedt, 57 U.S. 288, 302-3 (1853) (emphasis added) (citations omitted); *see also* Georgene Vairo, *What Goes Around, Comes Around: From the Rector of Barkway to Knowles*, 32 Rev. Litig. 721, 729-30 (2013).

Equity Rule 48 and its successor, Equity Rule 38, were transformed into Federal Rule of Civil Procedure 23 in 1938 (*id.* at 737), which adopted its present form in 1966. Thereafter, Rule 23 made class actions—including their equitable origins—part of the American civil justice system generally: "Rule 23, governing federal-court class actions, stems from equity practice…." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). Some of the most venerated U.S. decisions have been class actions. *See, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954).

Today, class actions are used widely around the globe.[2] A class action does not always result in the distribution of monetary damages. *See, e.g., In re Toys "R" Us Antitrust Litig.,* 191 F.R.D. 347, 353 (E.D.N.Y. 2000) ("The decision to forego individual recoveries was sensible, given the difficulty of identifying proper claimants and the difficulty, and especially the costs,

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[2] Countries in which class actions are used include Argentina, Brazil, Bulgaria, Chile, China, Denmark, Finland, Indonesia, Israel, Italy, Mexico, the Netherlands, Norway, Poland, Portugal, South Africa, Spain, Sweden, and Taiwan. Debra Lyn Bassett, *The Future of International Class Actions*, 18 Sw. J. Int'l L. 21, 22 (2011) (citations omitted).

that such recoveries and their administration would have entailed. The net monetary relief for any individual claimant would have been limited."); *Vista Healthplan, Inc. v. Warner Holdings Co. III*, 246 F.R.D. 349, 355 (D.D.C. 2007) (donating goods that benefit the class instead of compensating members). In fact, the U.S. has been criticized for allowing class members to get monetary relief instead of another measure to help assure social or legal change (such as an injunction or a declaratory judgment). Debra Lyn Bassett, *The Future of International Class Actions*, 18 Sw. J. Int'l L. 21, 23 (2011).

C. The *Cy Pres* Doctrine, Established in Equity, Is Well Recognized and Historically Rooted

The term *cy pres* comes from the French Norman phrase *cy pres comme possible,* which translates to "as near as possible." *See Caligiuri v. Symantec Corp.*, 855 F.3d 860, 866 (8th Cir. 2017); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) (citations omitted). The concept of *cy pres* dates at least as far back as the third century A.D. in Roman law. *See Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. U.S.*, 136 U.S. 1, 52 (1890).

As usual in the context of equity, the use of *cy pres* in the United States was born of necessity, as equity understood the importance of saving a testamentary gift which could not be carried out as explicitly set forth in a will. *See, e.g., Tincher*, 147 F. at 665. In 1906 in *Tincher*, the Court of Appeals for the Seventh Circuit explained the rationale for the use of the *cy pres* doctrine in cases in which literal

interpretation of a testator's charitable gift would render the testator's intent impossible to execute. *Id.* at 674. In that case, the court found that allowing the gift to fail by narrowly reading it so that its execution would be impossible was an inferior choice to that of reading the gift broadly "thus giv[ing] effect to the testator's worthy purpose." *Id.* at 673. In *Tincher*, the court explained the *cy pres* doctrine as applied to wills:

> When a definite function or duty is to be performed, and it cannot be done in exact conformity to the scheme of the donor, it must be performed with as close an approximation to that scheme as reasonably practicable, and thus enforced. It is the doctrine of approximation. It is not confined to the administration of charities, *but it is equally applicable to all devises and contracts wherein the future is provided for*; and it is an essential element of equity jurisprudence. The doctrine of cy pres… is found to be a simple rule of judicial construction, designed to aid the court to ascertain and carry out, as nearly as may be, the intention of the donor.

Id. at 675 (citations omitted) (emphasis added). In applying the *cy pres* doctrine in 1906 in the wills context, the court in *Tincher* recognized the concerns its use presented and which were already well known at the time, particularly, that the *cy pres* doctrine was "characterized… as a cloak for loose reasoning." *Id.* at

673. However, in rejecting this criticism, the court noted that application of the doctrine had "usually been most just, enlightened, and beneficial." *Id.* Not applying the *cy pres* doctrine and allowing the charitable gift to fail, the court reasoned, was manifestly unjust, as it would "defeat the very purpose of the trust, disappoint just expectations, and destroy gifts of great public importance and utility." *Id.*

Cy pres awards thus have a rich history in trust law and, over the past forty years, in the context of the distribution of class action damages. As far back as 1974, a court approved a *cy pres* approach to distribution of funds in the settlement of a derivative suit. *Miller v. Steinbach*, No. 66 Civ. 356, 1974 U.S. Dist. LEXIS 12981 (S.D.N.Y. Jan. 3, 1974). The use of *cy pres* in class actions by federal and state courts is now well established. *See, e.g., id.*; *Heekin v. Anthem, Inc.*, 2012 U.S. Dist. LEXIS 160864 (S. D. Ind. Nov. 9, 2012); *Nachshin*, 663 F.3d at 1038; *Fauley v. Metro Life Ins. Co.*, 2016 IL App (2d) 150236, 52 N.E.3d 427 (2d Dist. 2016).

The equitable origins and the purpose of the *cy pres* doctrine mirror those of class actions. "[E]very class action is always about access to justice for a group of litigants who on their own would not realistically be able to obtain the protections of the justice system." Bob Glaves and Meredith McBurney, *Cy Pres Awards, Legal Aid and Access to Justice: Key Issues in 2013 and Beyond*, 27 Mgmt. Info. Exch. J. 24, 25 (2013). The *cy pres* doctrine has become an important mechanism through which courts oversee class action settlements to ensure they comport with

Rule 23's requirement that they be "fair, reasonable, and adequate." Fed. R. Civ. P. 23.

The *cy pres* doctrine works in class actions as follows:

> Used in lieu of direct distribution of damages to silent class members, this alternative allows for "aggregate calculation of damages, the use of summary claim procedures, and distribution of unclaimed funds to indirectly benefit the entire class." To ensure that the settlement retains some connection to the plaintiff class and the underlying claims, however, a *cy pres* award must qualify as "the next best distribution" to giving the funds directly to class members.

Dennis v. Kellogg Co., 697 F.3d 858, 865 (9th Cir. 2012) (quoting *Nachshin*, 663 F.3d at 1038, and *Six (6) Mexican Workers v. Arizona Citrus Growers,* 904 F.2d 1301, 1305 (9th Cir. 1990)).

Courts value *cy pres* awards in class actions as a way to combat a variety of problems such as the unfair benefit to the defendant if the unclaimed portion of a class action award reverts to the defendant, the overcompensation of certain plaintiffs if an alternative distribution method such as a lottery were used, and the undercompensation of plaintiffs if the cost of distribution would swallow up the money set aside for them (such as if the mailing costs of distributing a check to each plaintiff is more than the

amount that each plaintiff would receive). *Cy pres* awards prevent defendants "from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement [or] judgment." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004). In *The State of Cal. v. Levi Strauss & Co.,* 715 P.2d 564 (1986), a *cy pres* award was upheld to "ensure that the policies of disgorgement or deterrence are realized. Without fluid recovery, defendants may be permitted to retain ill gotten gains...." *Id.* at 570-71 (citations omitted). *See also Six (6) Mexican Workers,* 904 F.2d at 1301.

In sum, as the authoritative treatise on class actions, in describing *cy pres*-only awards, explains:

> Full *cy pres* distributions serve several purposes. First, they ensure that the defendant is disgorged of a sum certain, even if that money does not compensate class members directly. This disgorgement furthers the deterrence goals of the class suit. Second, *cy pres* distributions provide indirect compensation to the plaintiff class by funding activities that are in the class's interest. Indeed, large multimillion dollar contributions to charities related to the plaintiffs' causes of action arguably do more good for the plaintiffs than would a miniscule sum of money distributed directly to them. Third, the resolution of the class suit brings finality and repose to the defendant and relieves

> the judicial system of the possibility of myriad individual (or further class) suits.

William B. Rubenstein, 4 *Newberg on Class Actions* § 12:26 (5th ed. 2018) (citations omitted).

II. THE REQUIREMENTS FOR A *CY PRES* DISTRIBUTION PROVIDE AMPLE SAFEGUARDS TO ASSURE FAIRNESS AND JUSTICE ARE ACHIEVED

Cy pres is an equitable doctrine that is appropriate to class action settlements when (i) there are settlement funds unclaimed by the class or (ii) the class members suffer an injury or invasion of right, but with very little, if any, quantifiable monetary damages and their injuries can be redressed by non-monetary relief, including changes in conduct or policy by the defendant and measures undertaken via *cy pres* to provide ongoing benefit to the class, subject to Rule 23(e)'s requirements.[3]

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[3] The United States as *amicus curiae* proposes three factors to determine if a *cy pres* distribution is appropriate in class actions. Brief for the United States as Amicus Curiae Supporting Neither Party at 22-32, Frank v. Gaos, No. 17-961 (S. Ct. Jul. 16, 2018). The use of *cy pres* distribution in *de minimis* damage cases easily satisfy the first two factors. First, where actual damages are *de minimis* at best in a class involving millions of people, class members' injuries are redressed by changes in the defendant's conduct coupled with a *cy pres* award for charitable or public interest activities designed to redress the class members' injuries and provide ongoing protection of the interests of the class. This approach is consistent with the Stored Communications Act, which expressly authorizes the court to award "other equitable…relief as may be appropriate." 18

Cy pres awards are appropriate when several criteria are met: (i) the distribution to class members would be burdensome or not feasible; (ii) the *cy pres* award is "fair, reasonable, and adequate;" and (iii) the activities of *cy pres* recipients are designed to benefit the class members. They are especially appropriate in situations where class members can show only small monetary harm but an important right is at issue.

The district court's role in reviewing and approving a class action settlement is substantial, as the court "must ensure that there is a sufficient record as to the basis and justification for the settlement" to support a finding that it is "fair, reasonable, and adequate" as required by Rule 23(e). *Ehrheart v. Verizon Wireless,* 609 F.3d 590, 604 (3d Cir. 2010). "This examination [of the proposed settlement] must be 'exacting and thorough' because the 'adversariness

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U.S.C. § 2707(b)(1). Second, there may be no economically feasible and non-arbitrary way to distribute the settlement funds to class members of a very large class such as a class of millions of internet users, particularly not where actual damages are *de minimis* and the identities and addresses of most of the millions of class members are unknown. The United States' suggestion that the settlement fund here might be distributed to 1% of the class at a payout of $4.00 each (U.S. Br. 28) is arbitrary in itself and is based on an assumption of an average claims rate that is speculative. The third factor the United States proposes—discounting of attorney's fees for *cy pres*-only settlements (*id.*)—conflates two different issues: the approval of a class action settlement involving *cy pres* distribution under Rule 23(e) with the approval of attorney's fees under Rule 23(h). The latter issue is not before this Court. And, ultimately, it does not bear on the separate question of whether *cy pres* distributions can be approved.

of the litigation is often lost' once the parties agree to settle." *Id.*

In addition to the factors the court must consider in class actions generally, in cases providing for a *cy pres* award, including a *cy pres*-only award, 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…." *Nachshin,* 663 F.3d at 1036 (citation omitted).

A. The Feasibility Requirement

Courts apply the *cy pres* doctrine in the settlement of class actions when "proof of individual claims would be burdensome or distribution of damages costly." *Nachshin*, 663 F.3d at 1038 (quoting *Six (6) Mexican Workers*, 904 F.2d at 1305). A *cy pres* award is appropriate if it is impossible or infeasible to distribute the funds to class members. *Principles of the Law of Aggregate Litig.*, A.L.I. § 3.07 (2010). This occurs when "proceeds cannot be economically distributed to the class members." *In re Microsoft Corp. Antitrust Litig.*, 185 F. Supp. 2d 519, 523 (D. Md. 2002).

If an individual claimant's potential damages are small, this is "the type of case in which class action treatment is most needful" and a *cy pres* award "would amplify the effect of the modest damages in protecting consumers." *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 676-77 (7th Cir. 2013). "[S]mall-claim class actions are primarily about deterrence, not

compensation." Robert G. Bone, *Justifying Class Action Limits: Parsing the Debates over Ascertainability and Cy Pres*, 65 U. Kan. L. Rev. 913, 946 (2017).

The Court of Appeals for the Third Circuit explained the pros and cons of the different methods of handling undistributed funds or funds that are not feasible to distribute. In particular, the court noted the benefits of *cy pres* awards when compared to the other methods:

> Reversion to the defendant risks undermining the deterrent effect of class actions by rewarding defendants for the failure of class members to collect their share of the settlement. 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 163, 172 (3d Cir. 2013).

B. The Requirement that the Award Is Fair, Reasonable, and Adequate

Rule 23(e)(2) of the Federal Rules of Civil Procedure provides, with respect to a proposed settlement of a class action: "If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate."

Courts use a wide range of factors in determining whether a proposed settlement meets the "fair, reasonable, and adequate" standard set forth in Rule 23. These factors include:

> (1) the complexity, expense and likely duration of the litigation…; (2) the reaction of the class to the settlement…; (3) the stage of the proceedings and the amount of discovery completed…; (4) the risks of establishing liability…; (5) the risks of establishing damages…; (6) the risks of maintaining the class action through trial…; (7) the ability of the defendants to withstand a greater judgment; [and] (8) the range of reasonableness of the settlement fund in light of the best possible recovery….

Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions), 148 F.3d 283, 317 (3d Cir. 1998) (citations omitted). In making a determination that the proposed settlement is "fair, reasonable, and adequate," the court must consider whether the settlement as a whole is fair rather than assessing its individual components. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). "[T]he court's intrusion upon what is

otherwise a private consensual agreement" is limited to 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." *Id.* at 1027 (citation omitted). In other words, "a settlement agreement achieved through good-faith, non-collusive negotiation does not have to be perfect, just reasonable, adequate and fair." *Joel A. v. Giuliani*, 218 F.3d 132, 144 (2d Cir. 2000).

Of great importance is that, "in approving a proposed class action settlement, the *district court has a fiduciary responsibility* to ensure that…the class members' interests [are] represented adequately." *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 22 (2d Cir. 1987) (emphasis added) (citation omitted). The district court exercises greater oversight over a class action settlement than the court does over other settlements. Generally, a settlement between a single plaintiff and a defendant in a non-class action matter is a process which does not require the court's oversight or approval. *Kraus v. PA Fit II, LLC,* 155 F. Supp. 3d 516, 525 (E.D. Pa. 2016) (citing *Digital Equip. Corp. v. Desktop Direct*, *Inc.*, 511 U.S. 863, 881 (1994); and *Williams v. First Nat. Bank*, 216 U.S. 582, 595 (1910)). On the other hand, the court plays a major role in reviewing and approving a class action settlement, as the court "must ensure that there is a sufficient record as to the basis and justification for the settlement," to support a finding that the settlement is "fair, reasonable, and adequate" as required by Rule 23(e). *Ehrheart,* 609 F.3d at 604 (citations omitted).

Due to the potential for a loss of adversariness, the court scrutinizes whether the settling parties are presenting the benefits of their proposed settlement to the court as well as any drawbacks. *Id.* (citation omitted). While objectors may be present and may point out deficiencies in a proposed settlement in some cases, in others, objectors "might simply seek to be treated differently than the class as a whole, rather than advocating for class-wide interests." *Id.* In addition, class counsel and defendant's counsel may be inclined to seek to further their own self-interest, specifically due to "the inherent tensions among class representation, defendant's interests in minimizing the cost of the total settlement package, and class counsel's interest in fees." *Partl v. Volkswagen, AG (In re Volkswagen Clean Diesel Mktg., Sales Practices, & Prods. Liab. Litig.)*, 2018 U.S. App. LEXIS 18562, *22 (9th Cir. 2018) (citation omitted). Intervenors may "counteract any inherent objectionable tendencies by reintroducing an adversarial relationship into the settlement process and thereby improving the chances that a claim will be settled for its fair value." *Vollmer v. Selden*, 350 F.3d 656, 660 (7th Cir. 2003). But intervenors may also seek to intervene for improper purposes, such as "caus[ing] expensive delay in the hope of getting paid to go away." *Id.*

The trial court's decision about the appropriateness of a *cy pres* award is entitled to a great deal of deference and is reviewed according to the "abuse of discretion" standard of review. *Powell v. Georgia-Pacific Corp.,* 119 F.3d 703, 706 (8th Cir. 1997), *see also Boyle v. Giral,* 820 A.2d 561, 567 (D.C.

2003) (stating that the trial court's determination is entitled to "great weight").

The requirements of Rule 23 and the factors which courts use in evaluating the fairness of a settlement are not, however, the only safeguards that exist to ensure that a settlement is fair to the class. Class counsel owes a fiduciary duty to the class which "requires it to refrain from misconduct and prosecute the case with loyalty to the class." *In re Southwest Airlines Voucher Litig.*, 2016 U.S. Dist. LEXIS 80834, *5 (citing *Eubank v. Pella Corp.*, 753 F.3d 718, 723 (7th Cir. 2014)). District courts review whether class counsel have breached their fiduciary duty. The existence of some clauses in settlement agreements of class actions, for example, may indicate that the settlement was not reached for the benefit of the class. The types of clauses which may indicate self-dealing by counsel or collusion with the defendant, are, for example, "clear sailing" clauses—which provide that the defendant will not object to class counsel's fee petition—and "reverter" clauses—which provide that unclaimed fees from the settlement are to be returned to the defendant. *Allen v. Bedolla*, 787 F.3d 1218, 1225 (9th Cir. 2015).

The existence of a *cy pres*-only award is not itself an indication of self-dealing or collusion. A class action attorney receives no more in fees when the settlement goes to a *cy pres*-only award than when the whole settlement goes to class members. Nor are defendants unduly benefited by a *cy pres*-only award. Giving four cents or four dollars or forty dollars to each class member in a class action suit likely has less

impact on a defendant's business than giving a substantial *cy pres* award to public interest institutions that are working to protect the interests of the class members in the future as well as to remedy the prior injury.

Nor is a *cy pres* award inherently unfair to the class members. Although the constitutional propriety of *cy pres* awards is not before this Court, Petitioners (and some of their *amici curiae*) suggest that the use of *cy pres* violates the First Amendment rights of class members by compelling them to support speech with which they do not agree. Brief of Petitioner-Appellant 17, 36, Frank v. Gaos, No. 17-961 (S. Ct. Jan. 3, 2018). *See also* Brief of the Cato Institute as Amicus Curiae in Support of Petitioners 20-24, Frank v. Gaos, No. 17-961 (S. Ct. Feb. 7, 2018) (arguing that a *cy pres* award compels class members to support speech with which they do not agree in violation of the First Amendment). It is worth noting, however, that the class members in this case brought suit out of concerns for the privacy of their information on the internet. It would be passing strange if a subset of the class could then challenge the propriety of actions undertaken by *cy pres* recipients to protect consumers' privacy on the internet. If the interests of the class were so noxious to Petitioners, they should have opted out of the class in the first place.

C. The Requirement that the Activities of *Cy Pres* Recipients are Designed to Benefit Class Members

Cy pres awards must "(1) address the objectives of the underlying statutes, (2) target the plaintiff

class, [and] (3) provide reasonable certainty that any member will be benefitted." *Nachshin*, 663 F.3d at 1040. Appellate courts have overturned *cy pres* awards when those safeguards have not been met.

Where a statute embodies policies of compensation, deterrence, and disgorgement, *cy pres* is an appropriate remedy. Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. Cal. L. Rev. 97, 117–18 (2014). *See also Simer v. Rios*, 661 F.2d 655, 677 (7th Cir. 1981) ("those cases where a corporate defendant engages in unlawful conduct and illegally profits [are] most appropriate for a fluid recovery").

The interests of *cy pres* award recipients must reasonably approximate those being pursued by the class. *Principles of the Law of Aggregate Litig.*, A.L.I. § 3.07 (2010), cmt. a. *See also Six (6) Mexican Workers,* 904 F.2d at 1307. The submission of proposals about specific *cy pres* projects is an appropriate means to allow the district court and the public to analyze if the project could further the underlying purpose of the litigation. This creates transparency in the decision-making process and ensures that *cy pres* is really being used for the "next best use" that furthers the objectives of the class action litigation. Cecily C. Shiel, *A New Generation of Class Action Cy Pres Remedies: Lessons from Washington State*, 90 Wash. L. Rev. 943, 948, 986 (2015) (describing the proposal review process in *Judd v. Am. Tel. & Tel. Co.*, No. 00-2-17565-5 SEA (King Cnty. Super. Ct., Wash. Jan. 22, 2013) Settlement Agreement at app. 1); *see also Dennis*, 697 F.3d at 865–68; *Nachshin*, 663 F.3d at 1040.

The statute at issue in the case at bar is the Stored Communications Act. The Stored Communications Act ("SCA") was passed in 1986 as Title II of the Electronic Communications Privacy Act. 18 U.S.C.A. §2701-2713 (West). The SCA addresses stored wire and electronic communications and transactional records access. *Id.* It is intended to "protect privacy interests in personal and proprietary information, while protecting the Government's legitimate law enforcement needs." S. Rep. No. 99–541, 2d Sess. at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N, 3557; *see also* H.R. Rep. No. 99-647, 2d Sess. at 19 (1986). The SCA was enacted because changes and rapid advances in technology presented the need for "a set of Fourth Amendment-like privacy protections by statute." *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 972 (C.D. Cal. 2010) (citing Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1212 (2004)). Unlike the forms of communication that already had legal protections in place, there were "no comparable Federal statutory standards to protect the privacy and security of communications transmitted by new noncommon carrier communications services or new forms of telecommunications and computer technology." S. Rep. No. 99–541 at 5. Another key objective of the SCA was to encourage technological advancement. *Id.* Inadequate legal protections could "unnecessarily discourage potential customers from using innovative communications systems" and "may discourage American businesses from developing new innovative forms of telecommunications and computer technology." *Id.*

In a consumer class action case where the statutory objectives include consumer protection on the internet, a *cy pres* distribution to non-profit institutions whose activities are directed at protecting internet privacy is an appropriate means to achieve the public policy objectives of the statute. *See In re Google Buzz Privacy Litigation*, No. C10-00672JW, 2011 WL 7460099, *1 (N.D. Cal. June 2, 2011) (listing funding recipients).[4] In contrast, courts have reversed approval of *cy pres* award in internet privacy cases where the recipients were not involved with protecting internet privacy. *Nachshin*, 663 F.3d at 1036-37, 1040-1041 (reversing approval of settlement in an online privacy case where unclaimed funds were awarded via *cy pres* to a legal aid foundation, the Boys and Girls Club, and the Federal Judicial Center Foundation because the recipients did not "have anything to do with the objectives of the underlying statutes on which Plaintiffs base[d] their claims"); *see also Dennis*, 697 F.3d at 866 (reversing approval of the settlement of a false advertising case, where relief included *cy pres* donation of $5.5 million worth of food to the indigent, on the basis that the awards were "divorced from the concerns embodied in consumer protection laws").

[4] In the case at bar, *cy pres* recipients evidently were chosen because of the close nexus between the projects that they were proposing and the underlying goals of the statute under which the class was suing. Joint Appendix in Case Number 17-961 (Supreme Court Joint Appendix) at 47-48. *Cy pres* awardees will train consumers, the elderly, reporters, lawyers, and others to protect their privacy online. See J.A. at 20.

There must also be "a match between the geographic breadth of the plaintiff case and the range of the *cy pres* recipients' work." 4 *Newberg* at § 12:33; *Nachshin,* 663 F.3d at 1040 (rejecting, in a nationwide privacy class action, a *cy pres* distribution with two-thirds of the money going to local Los Angeles charities, stating that the "*cy pres* distribution…fails to target the plaintiff class, because it does not account for the broad geographic distribution of the class").[5]

III. PERVASIVE DIGITAL TECHNOLOGIES AND THE POTENTIAL PROBLEMS THEY CREATE WARRANT A FLEXIBLE APPROACH AND THE CONTINUED EQUITABLE USE OF *CY PRES* IN CLASS ACTIONS

A signal virtue of equity is affording the court "a practical flexibility in shaping its remedies and…a facility for adjusting and reconciling public and private needs." *Brown v. Board of Education*, 349 U.S. 294, 300 (1955). That flexibility affords the court the ability to fashion relief—or, here, to approve a settlement—in a way "necessary to the right administration of justice between parties." *Seymour v. Freer*, 75 U.S. 202, 218 (1868). This flexibility is not

[5] In the case at bar, the class was a national class and the *cy pres* recipients include non-profit organizations working on internet privacy issues from the West Coast, Midwest, and East Coast. J.A. at 24-25. (West Coast: World Privacy Forum, Stanford Center for Internet and Society; Midwest: Chicago-Kent College of Law Center for Information, Society, and Policy; East Coast: Carnegie Mellon University, Berkman Center for Internet and Society at Harvard University, AARP Foundation).

limitless, but is guided by history and the traditional practice of equity by courts over time. *See Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("We are dealing here with the requirements of equity practice with a background of several hundred years of history.... The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.") (citation omitted).

This flexibility, guided by history and traditional practice, holds true with courts' approval of *cy pres* settlements in class actions that satisfy the requirements of Rule 23. As explained above, the class action and the *cy pres* doctrine each originated in equity and have a long history. The suggestion that the equitable doctrine of *cy pres* cannot be used in the context of class action settlements because it was first used in the context of trusts outside of class actions is illogical and misguided. Injunctive relief also developed in equity outside of class actions, but is routinely used in class actions today. *See, e.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) ("In class actions, injunctions may be necessary to protect the interests of absent class members and to prevent repetitive litigation").

The need for maintaining *cy pres* within the court's equitable authority in class actions has a renewed importance in the 21st century, a time in which courts are facing the consequences of technologies with the capacity to affect staggering numbers of people. Digital technologies have

astounding reach. Because these technologies are often pervasive, they have the potential to affect millions of people instantaneously and continually. As this Court recognized, "seismic shifts in digital technologies" have "made possible the tracking of not only [an individual's] location but also everyone else's, not for a short period but for years and years." *Carpenter v. United States*, 138 S. Ct. 2206, 2219 (2018). Indeed, "[t]here are 396 million cell phone service accounts in the United States—for a Nation of 326 million people." *Id.* at 2211. And "it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate." *Riley v. California*, 134 S. Ct. 2473, 2490 (2014). In this case, the class settlement covers everyone who used Google in the United States between October 25, 2006 and April 25, 2014, which, according to the court below, involved 129 million people. *In re Google Referrer Header Privacy Litigation*, 869 F.3d 737, 740 (9th Cir. 2017). The pervasiveness of digital technologies often implicates the privacy interests of the many people who use them. *See Carpenter*, 138 S. Ct. at 2217; *Riley*, 134 S. Ct. at 2489-95.

The class action is an especially well-suited vehicle to resolve disputes over the legality of certain practices engaged in by a provider of services related to those digital technologies, given the pervasiveness of digital technologies in affecting millions of people—and their privacy interests. Indeed, a user policy or technological feature effectuated through pervasive digital technologies often results in a textbook case for

a class action—satisfying numerosity, commonality, typicality, and adequacy. The millions of users experience exactly the same user policy or technological feature.

Moreover, allowing a court, as a matter of its equitable discretion, to approve *cy pres*-only awards in this type of class action serves the interests of the parties and justice. This is particularly true in a case where unconsented-to disclosure of a person's information on the internet can potentially cause them harm, but that harm is difficult to quantify.[6] Those affected may not be able to prove they lost money or that they were physically harmed as a result of disclosure of their information. Accordingly, if they cannot prove actual damages, they may not be entitled to recovery of any damages under the Stored Communications Act. See *Van Alstyne v. Elec. Scriptorium*, 560 F.3d 199, 202 (4th Cir. 2009) (need to prove actual harm); *but see In re Hawaiian Airlines*, 355 B.R. 225, 230 (D. Haw. 2006) (need not prove actual harm).

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[6] A person may be refused a job or insurance based on private information from the internet which is disclosed without the person's consent, yet the person may never learn that the breach of privacy occurred or led to the refusal. Lori Andrews, I Know Who You Are and I Saw What You Did: Social Networks and the Death of Privacy (2013). Private information from the internet can also be harvested by hackers for purposes of identity theft or sale.

In this type of situation, where actual damages are uncertain if not unavailable, a *cy pres*-only settlement can be fair, reasonable, and adequate. For example, instead of class members being entitled to a dollar or less, they can have their interests better served by non-monetary relief in the form of the defendant's alteration of conduct and the ongoing efforts of public interest groups dedicated to protecting their privacy online. In a case involving an emerging technology that implicates the important right of privacy in unseen ways, a *cy pres* award to such public interest institutions may be superior to an injunction that protects only against a single threat to privacy, for the time being, and not the entire range of privacy issues that the class members are concerned about. Given how quickly digital technologies change, such ongoing efforts of public interest groups may provide more effective and lasting protection.

"The main critiques of the cy pres doctrine stem from the improper use of the doctrine, not from inherent flaws in the doctrine itself." Shiel, *A New Generation of Class Action Cy Pres Remedies* at 980. The issues critics have identified with the use of *cy pres* awards in class actions can be addressed without eliminating the doctrine in cases in which it is impracticable and ineffectual to distribute funds to class members. *See id.* at 979-82. A direct *de minimis* distribution of settlement funds to class members at times provides no effective remedy, and "[a] legal remedy that exists only as an abstraction is not equal to an equitable remedy that will provide real redress. A remedy that is only illusory is not a remedy." Fischer, Understanding Remedies at 199. In

summary, the reasoning underlying the Court's decision to uphold a *cy pres* award in *Tincher v. Arnold* is as applicable in the context of wills when that case was decided in 1906 as it is in the context of class actions today. Not allowing the class action settlement funds to go to their "next best use" "defeat[s] the very purpose" of class actions stemming from their origins in equity, and will "disappoint just expectations, and destroy gifts of great public importance and utility." *Tincher*, 147 F. at 673.

CONCLUSION

There is ample precedent for allowing *cy pres*-only awards and there are stringent safeguards available to assure the appropriate use of such awards. *Cy pres* awards are part of the rich history of equitable remedies to assure that justice is done. *Cy pres* is appropriate in class action settlements when class members suffer an injury with very little, if any, quantifiable monetary damages and their injury can be redressed by non-monetary relief, including changes in conduct or policy by the defendant and measures undertaken via *cy pres* to provide ongoing benefit to the class, subject to Rule 23(e)'s requirements.

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