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 OF AMICI CURIAE PUBLIC CITIZEN, INC. AND PUBLIC CITIZEN FOUNDATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Public Citizen and Public Citizen Foundation (jointly, Public Citizen) are non-profit consumer advocacy organizations that appear on behalf of their members and supporters nationwide before Congress, administrative agencies, and the courts. Public Citizen works on a wide range of issues, including enactment and enforcement of laws protecting consumers, workers, and the public.

Public Citizen believes that class actions are an important tool for seeking justice where a defendant's wrongful conduct has harmed many people and resulted in injuries that are large in the aggregate, but not cost-effective to redress individually. In that situation, a class action offers the best means for both individual redress and deterrence, while also serving the defendant's interest in achieving a binding resolution of the claims on a broad basis, consistent with due process.

Public Citizen offers a unique perspective on this case because it has received cy pres distributions in appropriate cases, declined the opportunity to receive cy pres awards where it believed it was not an appropriate cy pres recipient, and represented objectors to settlements involving cy pres distributions. For example, Public Citizen represented an objector to the settlement in *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012), *cert. denied sub nom. Marek v. Lane*, 571 U.S. 1003 (2013), in which it argued that the settlement provided a cy pres distribution that did not benefit the class. As explained below, despite some missteps, as in *Lane*, the courts of appeals have correctly recognized the value of cy pres in appropriate

[1] This brief was not authored in whole or part by counsel for a party. No one other than amici curiae made a monetary contribution to preparation or submission of the brief. Counsel for all parties have consented in writing to its filing.

cases and developed standards by which to evaluate settlements involving cy pres distributions.

SUMMARY OF ARGUMENT

The plaintiffs in this case brought a class action against Google for violating users' privacy by disclosing their Internet search terms to third-party websites. The complaint alleged claims for violation of the Stored Communications Act and several state-law causes of action. The class includes approximately 129 million people. Following mediation, the parties entered into a settlement providing for injunctive relief, an $8.5 million settlement fund, and attorney's fees. Because distribution to the individual class members was infeasible, the settlement provided for cy pres distribution of the fund to organizations dedicated to protecting Internet privacy.

To allow appropriate use of cy pres settlements while preventing their misuse, the federal appellate courts have articulated a consistent set of standards to assess cy pres awards. The lower courts allow settlements involving cy pres payments when distributions to individual class members are impracticable or when class members to whom distributions are practicable have been fully compensated for their losses. And the courts agree that proposed cy pres awards must be carefully scrutinized to ensure that they adequately benefit class members in ways that have a sufficient relationship to the claims asserted by the class. The courts below properly applied these broadly accepted standards.

Although the standards adopted by the lower courts are well-tailored to guide a court's assessment under Rule 23(e) of whether a class-action settlement is "fair, reasonable, and adequate," the Solicitor General would add an Article III overlay to the evaluation of a cy pres settlement. Article III, however, neither limits the ability of parties to settle a case nor addresses the form of distribution of

compensatory relief. The Solicitor General's ultimate concern—that cy pres distributions may provide an insubstantial remedy—is one properly considered under the rubric of Rule 23(e) and one that the courts already consider in determining whether to approve or disapprove proposed settlements providing for cy pres.

ARGUMENT

I. The lower federal courts apply appropriate principles to assess cy pres distribution.

The common fund generated through resolution of a class action is "presumptively the property of the class members." Am. Law Inst., Principles of the Law of Aggregate Litigation § 3.07 cmt. b (2010). As the lower courts have broadly recognized, however, where "distribution of damages to the class members would provide no meaningful relief, the best solution may be what is called (with some imprecision) a 'cy pres' decree." *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 676 (7th Cir. 2013). In a given case, individual distributions may not be viable, "either because class members cannot be reasonably identified or because distribution would involve such small amounts that, because of the administrative costs involved, such distribution would not be economically viable." Am. Law Inst., *supra*, § 3.07 cmt. b.

The notion of cy pres begins with the recognition that "there should be a presumed obligation" to benefit the class through distribution "to an entity that resembles, in either composition or purpose, the class members or their interests." *Id.* The alternatives of awarding no damages at all or returning undistributed funds to the defendant "would undermine the deterrence function of class actions and the underlying substantive-law basis of the recovery by rewarding the alleged wrongdoer simply because distribution to the class would not be viable." *Id.; see, e.g.*, *In re LivingSocial Mktg. & Sales Practice Litig*., 298 F.R.D. 1,

13 (D.D.C. 2013) (approving cy pres distribution "where the alternatives would be to return the funds to defendant, thereby reducing the deterrent effect of the suit, or to escheat to the state"); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1356 (S.D. Fla. 2011) (approving cy pres use of funds due to class members who could not reasonably be identified because certain of the defendant bank's older transaction data was not in a reasonably searchable form, on the ground that "[w]hat would be legally unjustified here is for unclaimed funds to revert to [defendant]").

A. In many cases, direct distribution is not viable because, although the defendant's wrongdoing affected a large number of people, the amount of damages per person is small. For example, in *State of New York by Vacco v. Reebok Int'l Ltd.*, 96 F.3d 44, 49 (2d Cir. 1996), the court approved an $8 million cy pres payment in lieu of direct payment, in the settlement of a price-fixing claim involving the sale of an estimated 1.7 million pairs of shoes, where damages were about $4 per pair. The court noted the "impracticality of attempting to distribute the settlement proceeds among the multitude of unidentified possible claimants." *Id.* "[S]uch distribution would be consumed in the costs of its own administration." *Id.* (citation omitted).

In other cases, statutory caps on damages may make individual distribution infeasible. The Fair Debt Collection Practices Act (FDCPA), for instance, caps damages in a class action at 1% of the defendant's net worth. 16 U.S.C. § 1692k(a). In a case against a debt collector for violating the FDCPA, this cap can preclude distribution to the class. For example, in an FDCPA case, a court approved "$15,000.00 as a Cy Pres payment to the Queens County Legal Aid Society for use defending consumers against lawsuits brought by debt collectors," noting that "[w]ere the case to proceed to trial, the distribution to the class

could not exceed $10,000, representing 1% of [the defendant's] net worth of $1,000,000. With a class of over 45,000 persons, this recovery would be de minim[i]s." *Reade-Alvarez v. Eltman, Eltman, & Cooper, PC*, No. CV-04-2195, 2006 WL 3681138, at *4, *7 (E.D.N.Y. Dec. 11, 2006).

Other consumer-protection statutes include similar class-action damages caps. *See, e.g.*, Real Estate Settlement Procedures Act, 12 U.S.C. § 2605(f); Homeowners Protection Act, 12 U.S.C. § 4907(a); Truth in Lending Act, 15 U.S.C. § 1640(a)(2(B); Equal Credit Opportunity Act, 15 U.S.C. § 1691e(b); Electronic Funds Transfer Act, 15 U.S.C. § 1693m(a)(2)(B). In class actions under these statutes, cy pres distribution provides a way to deter and punish violations of federal law, providing a benefit to the class where a large number of consumers were harmed by the statutory violation but without putting the defendant-wrongdoer out of business.

Without the cy pres option, Congress's express decision to allow claims under these statutes to proceed as class actions would be significantly undercut, and the deterrent value of federal statutory causes of action would be significantly weakened. *See also Hughes*, 731 F.3d at 676 (stating that cy pres awards "prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement" or judgment to the class members (citation omitted)).

B. The Solicitor General urges that cy pres should not be approved without "careful" scrutiny. U.S. Br. 16. The courts of appeals—including the court below—are a step ahead: They have already developed principles to guide careful consideration of cy pres settlements.

To begin with, the courts have broadly adopted the principle, discussed above, that cy pres awards are appropriate only when distribution to individual class members is not economically viable. *See, e.g.*, *In re BankAmerica Corp.*

Sec. Litig., 775 F.3d 1060, 1064–65 (8th Cir. 2015) (stating that the cy pres "inquiry *must* be based primarily on whether 'the amounts involved are too small to make individual distributions economically viable'" (quoting Am. Law Inst., *supra*, § 3.07(a)); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 32 (1st Cir. 2012) (affirming use of cy pres where burden of locating and directing payment to additional class members would be prohibitive); *Powell v. Georgia-Pac. Corp.*, 119 F.3d 703, 706 (8th Cir. 1997) (approving cy pres distribution of remainder where it "would be extremely difficult to distribute the funds pro rata"); *In Re Agent Orange Product Liab. Litig.*, 818 F.2d 179, 185 (2d Cir. 1987) (noting the availability of cy pres remedies where individual payment to class members would otherwise be unmanageable).

Thus, where distribution to class members *is* feasible, courts have not allowed cy pres. *See, e.g.*, *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d at 1064–65 (disallowing cy pres where "from the perspective of administrative cost, a further distribution to the class was clearly feasible"); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 480 (5th Cir. 2011) (reversing district court order of cy pres where distribution to subclass members of unused medical-monitoring funds was feasible).

In addition, the courts scrutinize proposed recipients to ensure that cy pres awards go to "recipient[s] whose interests reasonably approximate those being pursued by the class." Am. Law Inst., *supra*, § 3.07. In evaluating proposed recipients, the courts look to factors such as "the purposes of the underlying statutes claimed to have been violated, the nature of the injury to the class members, the characteristics and interests of the class members, the geographical scope of the class, the reasons why the settlement funds have gone unclaimed, and the closeness of the fit between the class and the cy pres recipient." *In re*

Lupron Mktg., 677 F.3d at 33 (adopting "reasonable approximation test"); *see Nachshin v. AOL, LLC,* 663 F.3d 1034, 1036 (9th Cir. 2011) (stating that cy pres distribution is permissible where it "account[s] for the nature of the plaintiff's lawsuit, the objectives of the underlying statutes, and the interests of the silent class members"). Through this evaluation, courts ensure that the recipients are "tethered to the nature of the lawsuit and the interests of the silent class members." *Dennis v. Kellogg Co*., 697 F.3d 858 (9th Cir. 2012).

Applying the factors set forth in cases such as *In re Lupron* and *Nachshin*, courts seek to assure that a cy pres distribution (whether as the only form of compensatory relief or of a remainder) provides an "indirect benefit" to the class that approximates that of the direct payment of damages for the injuries inflicted by the claimed unlawful conduct at issue. For example, in *Perez-Farias v. Global Horizons, Inc*., No. CV-05-3061-RHW, 2014 WL 1399420 (E.D. Wash. Apr. 2, 2014), the court approved cy pres recipients with "lengthy track records providing [pertinent] outreach services and legal representation to farm workers in eastern Washington," *id.* at *2, but disallowed "proposed worthy charities" whose work was not as pertinent to the case and the class members, *id.* *2 n.1.

Applying the same considerations, in *In re Motor Fuel Temperature Sales Practices Litigation*, No. 07-MD-1840-KHV, 2012 WL 5876558 (D. Kan. Nov. 20, 2012), the court rejected a cy pres recipient, where "[a]lthough the Court [was] confident that [the organization] does wonderful work, its selection would not serve the interests of silent class members or the deterrence goals of underlying state consumer protection statutes" at issue in the case. *Id.* at *9 (citing *Nachshin*, 663 F.3d at 1039); *see also In re Apple iPhone/iPod Warranty Litig*., No. CV-10-01610, 2014 WL 12640497, at *11 (N.D. Cal. May 8, 2014) (approving cy

pres recipients where "[e]ach organization focuses on consumer protection, has a demonstrated track record in research regarding and in educating and assisting consumers with the resolution of warranty-related disputes and violations of consumer protection statutes involving warranty-related issues, and has proposed using any cy pres funds to further their activities in that regard—which are the very issues raised in Plaintiffs' complaints"); *In re Universal Serv. Fund Tel. Billing Practices Litig*., No. 02-MD-1468-JWL, 2013 WL 2476587, at *4 (D. Kan. June 7, 2013) (approving cy pres recipient with "more than 40 years of experience and an impressive track record of advocating on behalf of" the class).[2]

Reflecting the courts' consensus principles on cy pres, the two cases on which the Solicitor General primarily relies—*In re Baby Products Antitrust Litigation*, 708 F.3d 163 (3d Cir. 2013), and *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014)—both agree that cy pres relief, including cy pres-only relief, may be appropriate in particular cases. In *In re Baby Products*, for example, although the Third Circuit vacated a district court's approval of a cy pres settlement because the district court had lacked information pertinent to the determination whether the settlement was in the interest of the class as a whole, the court at the

[2] The American Law Institute also recommends that "[a] cy pres remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the selection of the recipient was made on the merits." Am. Law Inst., *supra*, § 3.07 cmt. b. While it is unclear whether this recommendation is, for practical purposes, already incorporated in the principles that the courts apply, the decision below noted that no circuit has adopted this comment, which might be read to make the mere existence of "questions" dispositive. Pet. App. 15 n.5. Nonetheless, the court considered the point at some length and found that no substantial question existed on the facts before it. *Id.* 15–20.

same time "join[ed] other courts of appeals" in holding that cy pres distribution may be an appropriate part of a class-action settlement. 708 F.3d. at 172. The court explained that approval of a class-action settlement "is warranted when the court finds that the settlement, taken as a whole, is 'fair, reasonable, and adequate' from the perspective of the class. Inclusion of a *cy pres* provision by itself does not render a settlement unfair, unreasonable, or inadequate." *Id.* at 172–73 (quoting Fed. R. Civ. P. 23(e)(2)).

And in *Pearson*, the Seventh Circuit, while reversing approval of a cy pres settlement, did not suggest that cy pres distribution was inappropriate generally. Rather, consistent with the approach applied by the other circuits (including the court below), it stated that cy pres awards are appropriate where "it's infeasible to provide that compensation to the victims—which ha[d] not been demonstrated" in that case. 772 F.3d at 784.

Importantly, the principles adopted by the courts of appeals are not empty words, but the basis for "vigilant and realistic" review. *Id*. at 787. And applying these principles, courts have both approved and rejected cy pres settlements. *See, e.g.*, *In re BankAmerica Corp. Sec. Litig*., 775 F.3d at 1064–65 (disallowing cy pres where a further direct distribution to the class was feasible); *Reebok Int'l*, 96 F.3d at 49 (affirming approval of cy pres-only distribution, as discussed *supra* at p.4); *Francisco v. Numismatic Guar. Corp. of Am*., No. 06-61677-CIV, 2008 WL 649124, at *9 (S.D. Fla. Jan. 31, 2008) (in case about misleading labeling of collectible coins, approving settlement providing for injunctive and cy pres relief "given the relatively small amount of damages the Class Members are likely to be able to establish due to the fluctuating value of the U.S. bullion coin market and the size of the individual losses," as well as "the size of the fund [and] the cost of administration"); *New York v. Salton, Inc*., 265 F. Supp. 2d

310, 314 (S.D.N.Y. 2003) ("Because of the difficulty in identifying and locating individual purchasers of the [product], and the minimal amount of recovery an individual consumer would be entitled to compared to the cost of administering individual relief, the Court finds that the cy pres method of distribution proposed in the Settlement Agreement is reasonable and adequate."); *Six Mexican Workers v. Arizona Citrus Growers,* 904 F.2d 1307, 1311–12 (9th Cir. 1990) (invalidating a cy pres distribution to the Inter-American Fund for "indirect distribution" in Mexico, in a class action brought by undocumented Mexican workers regarding violations of the Farm Labor Contractor Registration Act, because the distribution was "inadequate to serve the goals of the statute and protect the interests of the silent class members").

Far from being out of step with the trend toward allowing cy pres settlements only where direct distribution is infeasible and subject to rigorous scrutiny of the appropriateness of the recipients, the court below has long been a leader of it. *See Six Mexican Workers*, 904 F.2d at 1307 (establishing guidelines). In *Dennis v. Kellogg Co.*, for example, the court considered a settlement of a case concerning false advertising of Kellogg's cereal, under which cy pres payments would be distributed to "charities that provide food for the indigent." 697 F.3d at 867. Because cy pres relief properly must provide a benefit to the class and be pertinent to the claim alleged, the court rejected the settlement, explaining that "appropriate *cy pres* recipients are not charities that feed the needy, but organizations dedicated to protecting consumers from, or redressing injuries caused by, false advertising." *Id*.

Likewise, in *Nachshin*, the plaintiffs brought claims for breach of electronic communications privacy, unjust enrichment, and breach of contract, relating to AOL's provision of commercial e-mail services. 663 F.3d at 1040.

The proposed *cy pres* recipients were the Legal Aid Foundation of Los Angeles, the Boys and Girls Clubs of Santa Monica and Los Angeles, and the Federal Judicial Center Foundation. Because those organizations did not "have anything to do with the objectives of the underlying statutes on which Plaintiffs base their claims," and also because the proposed recipients did not account for the geographic scope of the class, the court rejected the settlement. *Id*. As the court explained, cy pres relief must be "tethered to the nature of the lawsuit and the interests of the silent class members." *Id.* at 1039; *see also Six Mexican Workers,* 904 F.2d at 1311–12, *described supra at* p.10.

As with any legal standard, courts may sometimes err in the application of these principles in particular cases. *See, e.g*., *Lane*, 696 F.3d 811 (in which Public Citizen represented an objector). Nonetheless, the case law establishes that the approval in *Lane* is an outlier. Overall, the track record of the federal courts of appeals, including the court below, reflects that the existing standards are adequate to enable the courts to determine whether proposed settlements that include cy pres are fair, reasonable, and adequate from the standpoint of the class.

II. Cy pres distribution is appropriate on the facts of this case.

Consistent with these well-established principles, which are reflected in many of the cases cited by both petitioners and the Solicitor General, the court below required a demonstration that distribution of damages to individual class members was infeasible and that the cy pres distribution had a substantial nexus both to the interests of the class members and the interests protected by the laws on which the class's claims are based. In so doing, the court properly fulfilled its obligation to ensure

that the settlement was fair, reasonable, and adequate, as required by Rule 23(e).

Affirming the district court's order approving the settlement, the court of appeals "scrutinized the proceedings to discern whether the [district] court sufficiently" considered the possibility that the class representatives or class counsel "sacrificed the interests of absent class members for their own benefit." Pet. App. 7–8. Agreeing with a Fifth Circuit case, it recognized that "cy pres-only settlements are considered the exception, not the rule." *Id.* at 8. And it stated that cy pres-only settlements are limited to situations in which "the settlement fund is 'non-distributable.'" *Id.*

Importantly, petitioners neither challenged the reasonableness of the amount of the settlement fund in relation to the value of the claims in the case, nor contested the conclusion that distribution to the class was not feasible. *Id.* 9. The question here, then, is whether a settlement that includes injunctive relief directly benefiting the class together with a cy pres distribution that provides indirect benefit is fair, reasonable, and adequate, when the alternative is no damages relief at all. For the reasons recognized by the American Law Institute and numerous courts of appeals, the answer to this question is yes.

A. Petitioners, joined by the Solicitor General, now ask the Court to second-guess the feasibility of distribution, suggesting that the lower court should have based the feasibility determination on the assumption that the fund would be distributed to the class through a claims process under which a very small percentage of class members would submit claims. *See* Pet. Br. 44; U.S. Br. 28. This suggestion has several flaws.

First, under the hypothetical posited by the Solicitor General, $4.00 would be distributed to each of approximately 1.3 million people (1% of the 129 million-

person class). That scenario assumes no administrative costs, when in reality the costs of administering the claims process—notice, claims processing, mailing—would be substantial. *See* Francis McGovern, *Second-Generation Dispute Sys. Design Issues in Managing Settlements*, Ohio St. J. on Disp. Resol. 53, 57 (2008) (describing a 2007 settlement in which notice provided by print and electronic media to 20.8 million people cost $941,000 and the total cost of claims processing was approximately $25 million). Thus, even assuming only a 1% claims rate, the funds distributed to each person would be far less than the $4.00 posited by the Solicitor General; indeed, the costs of notice and claims administration could easily exhaust the $5.3 million available for distribution under the settlement. *See also id*. at 63 (discussing tensions between efficiency and equity in the claims distribution process); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d at 475 n.15 (recognizing that "[i]n large class actions, substantial administrative costs attend the distribution of settlement funds," so that "[a]s the settlement funds are disbursed and the amount still available for distribution to the class declines, there comes a point at which the marginal cost of making an additional pro rata distribution to the class members exceeds the amount available for distribution").

Second, the actual number of claimants cannot be known in advance of sending notice and implementing a claims process. "No one outside of the industry of administering class action settlements" knows the average claims rate for consumer class actions. Alison Frankel, *FTC's class action claims investigation could be "bombshell" for consumer cases*, Reuters, Nov. 15 2016. One expert, though, has estimated that the average response rate for a consumer class action is 5%–8%. *See Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 290 (6th Cir. 2016) (describing expert testimony). Assuming a claims rate at the low end of this range, each claimant here would receive

only 82 cents—less the costs of claims administration. Given the likelihood of such a result if a claims process were utilized, the court's approval of a settlement that put the full amount of the fund to the indirect benefit of all class members, rather than one that expended a significant portion of the fund on administrative costs with the expectation of providing only a minuscule direct benefit to a small fraction of the class, fully comports with Rule 23(e).

Third, the better the notice and the less cumbersome the claims procedures, the higher the claims rate would be. *See* McGovern, Ohio St. J. on Disp. Resol. at 57 (describing an increase in claims rate from 0.45% to 27% after better notice and improved claims process). In evaluating whether the proposed settlement was fair, reasonable, and adequate, the lower courts' assumption that a claims process, if provided, would be appropriately user-friendly cannot properly be deemed an abuse of discretion. And assuming effective notice and a user-friendly claims process, it is entirely reasonable to assume a claims rate higher than the 1% of the 129 million-person class posited by the Solicitor General, making distribution to individual class members infeasible.

Conversely, for the court knowingly to approve an ineffective notice and claims process with the expectation and intent of keeping the claims rate low would be to flout the requirements of Rule 23(e). Reliance on such methods to make individual distribution practicable is no better than the arbitrary lottery process proposed by petitioners, which the Solicitor General correctly recognizes does not seem "reasonable." U.S. Br. 27 n.2. *Cf. In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d at 34–35 ("Because the consumer fund was established for the benefit of all consumer purchasers of Lupron, not just the 11,000 who filed claims, the court appropriately determined that the 'next best' relief would be a cy pres distribution which

would benefit the potentially large number of absent class members. Such relief may yield tangible benefits for class members in the form of lower prices for existing drugs, more effective or more cost-efficient versions of current drugs, or even new cures altogether.").

In short, an approach to distribution of the fund based on the unrealistic assumption of no administrative costs or premised on an ineffective claims process would not be fair, reasonable, and adequate.

B. Petitioners also argue that, if distribution directly to class members is not feasible, then certification should be denied on the ground that a class action is not "superior" to individual actions. Pet. Br. 53. In many cases, however, particularly cases where the value of each class member's claim is small, if the class-action device is effectively unavailable, the alternative to the rough justice of cy pres relief is no justice at all, because an economically rational individual would not bring an individual suit. *See Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."); *see also Am. Express Co. v. Italian Colors Restaurant,* 570 U.S. 228, 245 (2013) (Kagan, J., dissenting) ("No rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands."); 7AA Charles Alan Wright, et al., Federal Practice & Procedure § 1779 (3d ed. 2002 & Sept. 2018 update) (stating that where "a group composed of consumers or small investors typically will be unable to pursue their claims on an individual basis because the cost of doing so exceeds any recovery they might secure, … it seems appropriate to conclude that the class action 'is superior to other available methods for the fair and efficient adjudication of the controversy'" (quoting Rule 23(b)(3))).

Moreover, petitioners are wrong to suggest that this concern is not presented in the subcategory of cases where a statute provides for statutory damages and attorney fees. Pet. Br. 53. To begin with, statutory damages under consumer protection statutes are for relatively small amounts. "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Mace v. Van Ru Credit Corp*., 109 F.3d 338, 344 (7th Cir. 1997). "A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Id.* In such cases, the "financial barriers may be overcome by permitting the suit to be brought" as a class action. 7AA Fed. Prac. & Proc. Civ., *supra*, § 1782.

"This fact" has led numerous courts to find that a "class action is a superior means of proceeding in class actions under the FDCPA and other consumer-protection statutes," such as the Fair Credit Reporting Act and the Fair and Accurate Credit Transactions Act, notwithstanding the possibility of recovering statutory damages and fees. *Id.* & nn.14–15. As the Seventh Circuit has explained: "True, the FDCPA allows for individual recoveries of up to $1000. But this assumes that the plaintiff will be aware of her rights, willing to subject herself to all the burdens of suing and able to find an attorney willing to take her case. These are considerations that cannot be dismissed lightly in assessing whether a class action or a series of individual lawsuits would be more appropriate for pursuing the FDCPA's objectives." *Mace*, 109 F.3d at 344.

In addition, as discussed above, in some of those statutes, Congress has also expressly contemplated class actions and, at the same time, limited the amount of damages recoverable in a class action. *See supra* p.5. Where

the class-action damages cap makes distribution infeasible, disallowing cy pres would either let the defendant off "scot-free," *Hughes*, 731 F.3d at 676, or disadvantage the defendant by exposing it to a large number of individual damages and attorney fee awards, not subject to any cumulative cap and therefore with a potentially crippling effect. Neither outcome advances the interests of Congress as embodied in the federal statute—and neither is "superior" to class treatment with the indirect class-wide benefit of cy pres. *See Six Mexican Workers*, 904 F.2d at 1306 ("Where the goals of the underlying statute are strictly compensatory, a class action resulting in substantial unclaimed funds will not further that goal. But where the statutory objectives include enforcement, deterrence or disgorgement, the class action may be the 'superior' and only viable method to achieve those objectives, even despite the prospect of unclaimed funds." (citing 7A Charles Wright, Arthur Miller, et al., Federal Practice and Procedure § 1780 at 584 (1986))).

III. The Solicitor General's Article III redress argument lacks merit.

A. Article III does not place limitations on cy pres settlements.

The Solicitor General argues that Article III's case-or-controversy requirement bars settlements that include cy pres distributions, absent a showing that the cy pres will redress the specific injuries asserted by the plaintiffs in the class-action litigation. U.S. Br. 22–24. This argument lacks merit.

As an initial matter, whether the relief included in a settlement agreement redresses the plaintiff's injuries does not affect whether the case presents an "actual and concrete dispute[], the resolution[] of which ha[s] direct consequences on the parties involved." *Id*. at 22–23 (quoting *United States v. Sanchez-Gomez*, 138 S. Ct. 1532,

1537 (2018)). This standard is met when "three conditions are satisfied," which together establish Article III standing: The plaintiff must have "'suffered an injury in fact' that is caused by 'the conduct complained of'" and that is capable of being "'redressed by a favorable decision.'" *Camreta v. Greene*, 563 U.S. 692, 701 (2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

Importantly, although Article III jurisdiction requires that the relief *requested* by the plaintiff's complaint be likely to redress the plaintiff's injury, *see*, *e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998), jurisdiction does not turn on whether the injury ultimately is redressed. Thus, when a court rules that a plaintiff has failed to prove a necessary element of her claim, the court will dismiss the claim on the merits, not for lack of Article III jurisdiction. Although the judgment in the case does not redress the plaintiff's injury, it still embodies the resolution of an "actual and concrete dispute" and has "direct consequences" for the parties. *Sanchez-Gomez*, 138 S. Ct. at 1537. Likewise, as long as a class-action plaintiff has standing to bring the case (and the case has not become moot), a settlement is the resolution of a concrete dispute and has direct consequences for the parties, regardless of the relief it contains. The terms of a settlement cannot retroactively void the Article III case or controversy that the case was brought to (and did) resolve.

Further, Article III does not prohibit a court from approving a settlement in which the parties agree to terms that a court could not itself order in contested litigation. As this Court has recognized in the context of consent decrees, "in addition to the law which forms the basis of the claim, the parties' consent animates the legal force of" the agreement and order. *Firefighters v. Cleveland*, 478 U.S. 501, 522 (1986); *see id.* at 525 (stating that the parties' agreement "serves as the source of the court's authority to

enter any judgment at all" and that "creates the obligations embodied" in the order).[3] Thus, although the parties' agreed-upon decree is entered as a judgment, "a federal court is not necessarily barred from entering [it] merely because the decree provides broader relief than the court could have awarded after a trial." *Id*. at 525.

Likewise, "[a] court may approve a settlement that proposes a cy pres remedy even if such a remedy could not be ordered in a contested case." Am. Law Inst., *supra*, § 3.07.[4] The question for the court reviewing a proposed settlement is not an Article III issue, nor is it whether the relief corresponds to what the class could obtain if it prevailed, but whether the settlement is "fair, reasonable, and adequate" under Rule 23(e)(2). For example, had the settlement included a provision that Google search pages would show no advertisements on Fridays—a term unrelated to the alleged injury—that term would be

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[3] *See also Rufo v. Inmates of Suffolk Cty.*, 502 U.S. 367, 389 (1992) (stating that although "[f]ederal courts may not order States or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated," a court through a consent decree may order "more than what a court would have ordered absent the settlement").

[4] A class-action settlement is a settlement to which the class representative has consented on behalf of the class. In considering objections, the court is not resolving a contested issue as to whether the class is entitled to relief, but determining whether the class representative has fulfilled his fiduciary duties to the class by entering into a fair, reasonable, and adequate settlement. *See, e.g.*, *Isby v. Bayh*, 75 F.3d 1191, 1196–97 (7th Cir. 1996). If the class representative has fulfilled his duties to the class in consenting to the settlement (and class certification meets the requirements of Rule 23 and due process, *see Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620–29 (1997)), the court's authority to approve it and enter its terms as a decree is the same as in a case involving a consent decree. *See, e.g.*, *EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 888–89 (7th Cir. 1985).

considered as part of the Rule 23(e) assessment; it would not implicate Article III.

B. The relief provided by the settlement is fair, reasonable, and adequate to redress the injuries alleged by the plaintiff class.

The plaintiffs' complaint in this case sought damages as a remedy for Google's past conduct and injunctive relief as a remedy for its ongoing conduct—requests for relief that readily satisfied the redressability requirement of Article III standing by, respectively, seeking to remedy both the past and the ongoing injuries alleged by the plaintiffs. The form of relief for which the plaintiffs ultimately *settled* does not implicate Article III's requirements, for the reasons discussed above. Even if, however, Article III imposed an actual-redress limitation on the relief awarded in a court-approved settlement, the order approving the settlement in this case would satisfy it, as it provides both damages and injunctive relief aimed at redressing the plaintiffs' claims of both past and continuing injury.

The Solicitor General suggests as part of his actual-redress argument that cy pres—the form of compensatory relief in this case—is permissible only on a *showing* of either a continuing violation that causes injury or an imminent, future violation that would inflict the same injury because, in the Solicitor General's view, cy pres offers only prospective benefits to the class. U.S. Br. 23. To begin with, in all types of litigation, both class-actions and otherwise, a settlement is typically a resolution made *without* a showing that the plaintiff is entitled to relief on the merits. No authority supports the Solicitor General's notion that Article III permits a class settlement only upon proof of the claim on the merits.

Moreover, the Solicitor General's premise is incorrect: Cy pres relief is not a form of prospective relief comparable

to an injunction, but rather a way of awarding compensation for past injuries by providing comparably valuable relief to the class in circumstances where direct monetary compensation is not possible. *See Six Mexican Workers*, 904 F.2d at 1307 (stating, when considering cy pres, that "the question is how to distribute the damages"). To be sure, through cy pres, the compensation is provided indirectly, as in-kind relief, through distribution to entities "tethered to the objectives of the underlying statutes and the interests of the silent class members." Pet. App. 12. But Article III neither speaks to the method of distributing compensation nor bars the parties from agreeing that relief will be provided indirectly.

Failing to recognize that the cy pres distribution is a form of compensatory relief, the Solicitor General wrongly invokes case law addressing standing to bring citizen suits seeking injunctive relief and civil penalties. In that context, the Court has stated, the harm sought to be addressed "lies in the present or future, not in the past." *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 187–188 (2000) (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987)). This conclusion arose from the text of the Clean Water Act's citizen-suit provisions, which tie injunctive relief (which is necessarily forward looking) to civil penalties and describe the "citizen" who may sue as one whose interest "is or may be adversely affected." *Gwaltney*, 484 U.S. at 59. Similarly, the passage of *Steel Co.* from which the Solicitor General quotes to support his contention that a continuing or future injury is required addresses injunctive relief, which by its nature cannot remedy a past injury. *See* 523 U.S. at 108 (stating that injunctive relief "cannot conceivably remedy any past wrong but is aimed at deterring petitioner from violating [the statute] in the future").

Elsewhere, *Steel Co.* explains that the possibility that a lawsuit might result in civil penalties paid to the government does not support standing because such penalties would not remediate a plaintiff's injury, but rather would vindicate the "undifferentiated public interest" in the rule of law. *Id*. at 107. Here however, plaintiffs sought no civil penalty; they sought—and the order approving the settlement provided—injunctive relief as to the ongoing dispute and compensatory relief as to the harm that already occurred. Compensatory relief cannot properly be equated with civil penalties, as the two are distinct. *See, e.g.*, 31 U.S.C. § 3729(a) (providing for both damages and a civil penalty under the False Claims Act). The Solicitor General's novel suggestion that a showing of continuing injury is required for a plaintiff to seek compensation for past injury is illogical and patently wrong.[5]

At bottom, the Solicitor General's actual-redress argument reflects doubts about whether the indirect relief provided by cy pres is adequate to remedy the injury experienced. *See* U.S. Br. 24–25 (positing that cy pres that has only an "insubstantial" effect on the class members or provides "exclusively emotional relief" poses an Article III question). Whether a settlement is adequate, however, has nothing to do with Article III; it is a matter of whether the settling parties have correctly evaluated the costs and benefits of settling. That concern is not properly addressed by contorting Article III and standing doctrine, but by a court's evaluation under Rule 23(e)(2) of whether a proposed settlement is fair, reasonable, and adequate—the very evaluation that, as the Solicitor General

[5] The Solicitor General does not explain why the allegations of future injury in this case, which support the injunctive component of the award, would not also suffice to support the cy pres component under his theory.

recognizes, the lower courts perform. *See id.* at 25 (citing cases). As described above and reflected in the cases cited by the Solicitor General, courts have developed appropriate principles to ensure that settlements providing for cy pres distributions satisfy Rule 23, including that the cy pres recipients are appropriate to provide a benefit, albeit indirect, to the class. The court below properly applied those principles here.

CONCLUSION

For the foregoing reasons and those set forth in the brief of respondents Gaos, et al., the decision below should be affirmed.

Respectfully submitted,

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