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

REPLY BRIEF FOR PETITIONERS

THEODORE H. FRANK
Counsel of Record
MELISSA HOLYOAK
ANNA ST. JOHN
ADAM EZRA SCHULMAN
COMPETITIVE ENTERPRISE INSTITUTE
1310 L St., N.W., 7th Floor
Washington, D.C. 20005
(202) 331-2263
ted.frank@cei.org

Counsel for Petitioners

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

INTRODUCTION

Respondents do not deny that *cy pres* is an inferior form of relief for class members (Google Br. 30; Gaos Br. 31) and one of many ways class attorneys can capture the lion's share of settlement proceeds. Affirmance here would encourage future litigants to short-change class members with this inferior relief. The Ninth Circuit's idiosyncratic "feasibility" standard permits even $100 million class distributions to go instead entirely to pet charities. Pet. Br. 50–51. Faced with these indefensible consequences, respondents instead attempt to relitigate the certiorari grant or argue that the Court lacks authority to clarify standards to police class-action abuses. The Court does.

Rule 23(e) requires settlements to be "fair" and "reasonable." That provides textual basis for petitioners' proportionality rule: a settlement that compromises a class's claims, but seeks to pay class attorneys an amount disproportionate to the actual and direct class benefit, is not fair or reasonable under Rule 23(e). Pet. Br. 39. Respondents conflate "adequacy" with these other two Rule 23(e) requirements, but never dispute that class-action settlements incentivize illusory class relief to maximize attorneys' fees and minimize defendants' expenses. *Id.* at 22–28. Some appellate courts interpret Rule 23(e) to require economically realistic settlement review that sees through fictional relief, aligning class attorneys' incentives with the class's interests. Others do not, allowing attorneys to capture the majority of settlement value. *Id.* at 27. There is no reason to prefer the latter view to the former, especially when both respondents concede class attorneys' fiduciary duty to the class.

Gaos derides (Br. 2) petitioners' brief as "dissertation" and "anecdotes" but petitioners are simply giving examples of how settling parties undisputedly respond to differing incentives when legal rules do or do not protect absent class members. Gaos and *amici* point (*e.g.,* Gaos Br. 44) to petitioners' previous victories against abusive *cy pres* to argue the status quo works. But Gaos concludes that such previous success justifies an affirmance here that would both reject the grounds petitioners won on and preclude future successful objections. This is both ironic and self-refuting. Respondents never gainsay *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014), though the Ninth Circuit's rule (and Gaos's proposed extension of *Boeing Co. v. Van Gemert,* 444 U.S. 472 (1980)) would have required affirmance in *Pearson*. Why shouldn't, as a matter of policy, this Court agree with *Pearson* and interpret Rule 23's text to require protection of absent class members? Crickets.

Gaos submits (Br. 22–23, 40, 49, 54) that "petitioners never claim[] that" plaintiffs' counsel here "s[old] their clients out" in an "adequate" settlement. This is wrong: selling out the class can occur even where the total settlement value is adequate, if class attorneys have not *fairly* allocated the sums between the class, third parties, and themselves. This happened in other cases petitioners discuss—and it happened here. Pet. Br. 33–34, 40, 42 (describing *In re Citigroup Sec. Litig.*, 199 F. Supp. 3d 845 (S.D.N.Y. 2016);[1] *Pearson*, 772 F.3d 778; and *In re Baby Prods.*

[1] Gaos insinuates (Br. 47) that objector Frank was unwilling to prosecute his *Citigroup* appeal. Not so. After Frank filed his opening brief in Appeal No. 16-2850, class counsel confessed error and stipulated to vacate the appealed ruling. *In re Citigroup Sec. Litig.*, 2017 WL 3842601, at *2 (S.D.N.Y. Sept. 1, 2017).

Antitrust Litig., 708 F.3d 163 (3d Cir. 2013)). Class counsel negotiated a greater-than-lodestar $2.1 million for themselves, and nothing—*gornisht!*—for absent class members. They justify that allocation with illusory relief that treats class members worse than opt-outs, including funneling money to class counsels' *alma maters*. The record contains no evidence that it is infeasible to offer direct relief to class members and distribute the settlement fund to those class members that would submit a claim for relief. Pet. Br. 10–11, 52; Pet. App. 120–123.

Such self-dealing need not come from "collusion." *Compare* U.S. Br. 19–20 *with* Pet. Br. 27–28. It is a natural result of the perverse incentives *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012), created and the Ninth Circuit re-affirmed here. Class attorneys' undisputed ability to structure a settlement to maximize their own fees at the class's expense makes this a question of Rule 23(e) settlement *fairness*, not merely one of Rule 23(h) reasonable fees. *Accord* U.S. Br. 29. Gaos conflates the two questions and treats their inquiries as identical when they are not because Rule 23(e) fairness should look at the *allocation* of a compromised claim. Pet. Br. 20–28. Class counsel here *compromised* the class's claims for no direct payment except to themselves and the named plaintiffs. That disproportionate allocation is fundamentally unfair and unreasonable under Rule 23(e), even if the underlying lawsuit is so weak that the settlement's total amount is "adequate." Pet. Br. 41.

Petitioners' proposed proportionality rule cuts the Gordian knot, appropriately aligns class attorneys' interests with the class's, and prevents the whack-a-mole evasion that a narrower clarification of Rule 23 limiting *cy pres* settlements would occasion (Pet. Br.

48). This Court should interpret Rule 23(e) to adopt it.

ARGUMENT

I. A proportionality rule is essential to give Rule 23(e)'s "fair" and "reasonable" requirements meaning.

A. This Court should resolve the circuit split over the meaning of "fair" and "reasonable" "with the interests of absent class members in close view."

1. Petitioners' proposed proportionality rule is not "atextual" (Gaos Br. 3; Google Br. 24–27): Rule 23(e)(2) requires settlements to be "fair" and "reasonable," *beyond* the "adequate" requirement that respondents repeatedly emphasize. Such "broadly-framed" "generality" in language "leave[s] the courts … free to perform their historic role of formulating more definite standards within the general mandate." Henry J. Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislatures Who Won't*, 63 COLUM. L. REV. 787, 792 (1963).

Broad language in Rule 23 has not prevented this Court from pronouncing what the law is without additional congressional guidance. *E.g., Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360–65 (2011) (Rule 23(b)(2) "final injunctive relief" that is "appropriate respecting the class as a whole"); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (Rule 23(a)(4) "adequate representation"); *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981) (Rule 23(d)'s "appropriate orders"). Rule 23 should be "applied with the interests of absent class members in close view." *Amchem,* 521 U.S. at 629. The Court can provide the clarification petitioners seek.

2. Google finds it "telling[]" (Br. 25) that amendments to Rule 23 have not curtailed *cy pres*. But the Rules Committee's forbearance contemplates the Judiciary's continued engagement in expounding Rule 23. It also reflected concern that a procedural rule authorizing *any cy pres* could violate the Rules Enabling Act. Civil Rules Advisory Committee, Report to the Standing Committee 25–26 (Dec. 11, 2015). And contrary to respondents' assertions, failed legislative proposals are not a basis to assume the Court cannot interpret a legal provision. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187–88 (1994). "Congressional inaction lacks persuasive significance in most circumstances." *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017) (cleaned up). Thus, when confronted with the Sherman Act's similarly broad language, *State Oil Co. v. Khan* unanimously adopted the rule that made the most economic sense—even though "Congress ha[d] not reacted legislatively" to a decades-old precedent getting it wrong. 522 U.S. 3, 19 (1997).[2]

[2] What is atextual is Gaos's use of ellipses to extrapolate *Amgen* to all class-action litigation when *Amgen* merely rejected an additional inquiry in class *certification* requirements for the heavily legislated area of *securities* litigation. *Compare Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 478 (2013) *with* Gaos Br. 24. Congress has not legislated extensively in the *cy pres* arena, and where it has, contrary to Gaos's claims, it expressed disapproval. For example, 28 U.S.C. § 1712(e) permits coupon distribution to third-party charities—but precludes courts awarding fees for that *cy pres*. *Compare* Gaos Br. 29. There is no reason to read Congress's silence as *authorizing* anything-goes *cy pres* resolution in the non-coupon context, as opposed to forbidding it without the legislative authorization

Here, unlike *Khan*, there are not even *stare decisis* hurdles obstructing the economically-superior proportionality rule.

3. Gaos suggests (Br. 25–26, 28) that Rule 23(e) language provides nothing more than an *ad hoc* discretionary balancing test. But a "trial court has wide discretion when, but only when, it calls the game by the right rules." *Fox v. Vice*, 563 U.S. 826, 839 (2011). To require simply that settlements be "fair" and "reasonable" under Rule 23(e) is, without further guidance from this Court, to "restate th[e] question"; "such an empty and amorphous test" would simply "leave to each and every trial court not only the implementation, but also the invention, of the applicable legal standard." *Id.* at 835–36. This Court has every reason to announce a uniform rule of construction for evaluating settlements that would deter their abuse. Contrary to respondents' assertions that existing jurisprudence satisfactorily protects class members, "current case law on the criteria for evaluating settlements is in disarray." PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.05 cmt. (a) (2010); *see generally* Pet. Br. 24, 27 (discussing circuit splits); Pet. 16–22 (same). And "[n]o matter how virtuous the judge, the fact remains that courts are overworked, they have limited access to quality information, and they have an overwhelming incentive to clear their docket. They cannot reliably police the day-to-day interests of absent class members." Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 829 (1997); *accord Marshall v. Deutsche Post DHL,* 2015 WL 5560541, at *1 (E.D.N.Y. Sept. 21,

---

present in many state statutes. *See also* discussion at U.S. Br. 30–31.

2015). Only bright-line rules can reliably prevent abuse.[3]

Petitioners'—and the Seventh Circuit's—reading of "fair" and "reasonable" is fair and reasonable, consistent with the 2018 amendments to Rule 23(e)(2), and would resolve this case. Without a proportionality rule, many decisions have left class attorneys free to negotiate self-dealing settlements that champion their own interests ahead of the class's; respondents do not dispute that an affirmance here gives class attorneys a loophole to ensure payment to themselves with nothing to the class. *Compare* Pet. Br. 36 (discussing possibility of restructuring *Subway* settlement as *cy pres*) *with* Gaos Br. 44 (acknowledging *Subway* correctly reversed settlement approval).[4] That is not "micromanagement" of fees (Gaos Br. 54), but resolving a circuit split in favor of requiring enforcement of class attorneys' fiduciary duties, as *Amchem* commands.

4. Gaos (but not Google) asserts (Br. 24) the proportionality rule is "not properly before this Court." But a petitioner "generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). Petitioners

---

[3] Gaos accuses (Br. 43) petitioners of unfair attacks on the Judiciary, but Gaos simply quotes petitioners quoting the Eighth Circuit. Pet. Br. 49.

[4] Gaos incorrectly characterizes (Br. 44) *Subway* as a reversal of an "inadequate" settlement, though Frank, the appellant in that case, made the same proportionality arguments there that petitioners make here. *In re Subway Footlong Sandwich Mktg. Litig.*, 869 F.3d 551, 556–57 (7th Cir. 2017); Pet. Br. 16; Opening Br. at 12, *Subway*, No. 16-1652 (7th Cir. May 3, 2016).

repeatedly argued that courts need to consider proportionality and prioritize direct relief in considering settlement fairness. Ninth Cir. Opening Br. 24–28; Ninth Cir. Reply Br. 9; Pet. App. 123–24; J.A. 118–19. Petitioners have consistently raised the claim that courts should discount attorneys' fees in *cy pres* settlements. Ninth Cir. Opening Br. 40–43; Ninth Cir. Reply Br. 22–23; Pet. App. 134–39. And the courts below both ruled upon it. Pet. App. 21–23, 60. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Citizens United v. FEC*, 558 U.S. 310, 330–31 (2010) (cleaned up); *accord Yee*, 503 U.S. at 534. The purely legal issue of fees in *cy pres* settlements is "fairly included" in the question presented: "in what circumstances" is a *cy pres* settlement appropriate? The petition expressly argued this issue regarding the circuit split. *E.g.*, Pet. 21. And, as discussed in the next section, the *allocation* of settlement proceeds between the class, attorneys, and third parties is a fundamental Rule 23(e) issue best resolved with the proportionality rule. Pet. Br. 20–28.

B. The proportionality rule makes the most economic and policy sense.

1. As petitioners showed, the proportionality rule enhances class recovery in—rather than "encumbers"—reasonably colorable class-action litigation. *Compare* Pet. Br. 41–43 *with* Gaos Br. 24. Only meritless class actions might be "encumbered." That's a feature, not a bug. When discussing the need to encourage class actions, Gaos asserts (Br. 27) *ipse dixit* that "low-quality lawsuits most often result in costly investment for no return" and thus no further steps are needed. That does not explain how or why Gaos settled here

for an infinitesimal fraction of the statutory damages asserted (with none of it going to absent class members), yet collected a multiple of lodestar for fees. Such settlements that satisfy the class attorneys and leave the class with nothing are "untenable":

> [I]f the chance of success really is only 1%, shouldn't the suit be dismissed as frivolous and no one receive a penny? If, however, the chance of success is materially greater than 1% … then the failure to afford effectual relief to [absent] class member[s] makes the deal look like a sellout.

Murray v. GMAC Mortg. Corp., 434 F.3d 948, 952 (7th Cir. 2006) (Easterbrook, J.).

Amicus AAJ protests (Br. 8) that such suits provide deterrence, but the opposite is true. Meritless strike suits impose costs on the innocent, thereby reducing the marginal cost, and thus deterrence, of punishment for wrongdoing. George J. Stigler, *The Optimum Enforcement of Laws*, ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT 55, 57 (1974).

2. Google suggests (Br. 43) that defendants must "efficiently compromis[e]" weak cases. But this Court has refused to allow efficiency concerns to override absent class members' rights, even when confronting the "elephantine mass of asbestos cases" that "defies customary judicial administration." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999). The most "efficient" compromise (and one with full deterrent effect) would be to bribe class counsel to waive the class's claims, but courts obviously do not permit that. Pet. Br. 22. Nor should courts allow form-over-substance *cy pres* and other illusory relief as a "disguise for concealing its real character": the

economic approximation of a bribe, just with slightly greater transaction costs. *Gregory v. Helvering*, 293 U.S. 465, 469 (1935); *see also Pearson*, 772 F.3d at 786–87.

It is not merely statutory damages that encourage meritless suits, as Google posits (Br. 39–40); the possibility of settling meritless claims with illusory relief for class members creates the same incentives. Meritless challenges over sandwiches, merger disclosures, or diapers needed no statutory-damages threat to generate lucrative fees. Pet. Br. 24, 36, 41 (discussing *Subway*; *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718 (7th Cir. 2016); and *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013)). Respondents do not dispute that the Ninth Circuit's rule would permit abusive suits and settlements—like those thrown out in those three cases—to be profitable by converting to *cy-pres*-only settlements. Defendants there made the same arguments defending paying Danegeld that Google does now, but their predictions of endless litigation were falsified. Pet. Br. 43.

Indeed, that Google insists it would be harder for a defendant to agree to settle a case without *cy pres* proves petitioners' point that the *cy pres* is often an illusory expense to defendants. Pet. Br. 30–33. Why does Google prefer donating to organizations that largely promote its interests, rather than sending equivalent cash to class members? The question answers itself: the latter is an actual cost to Google, and the former is a shift in accounting labels of promotional business expenditures. And if Gaos and *amici* actually care about deterrence (Gaos Br. 33), rather than fees, the difference should matter to them too.

Google's argument also serves to refute Gaos's assertion (Br. 46) that class attorneys have no reason to prefer *cy pres* to class recovery. If a defendant prefers $5 million of *cy pres* to, say, paying class members $3 million, class counsel will also prefer *cy pres*, because it justifies a higher fee request under the Ninth Circuit's rule: quintessential imaginary relief to rationalize a large attorneys' fee. And this is before the nonpecuniary reasons for class attorneys to prefer *cy pres*. Pet. Br. 28–30; U.S. Br. 20. Even Gaos's argument implicitly acknowledges that affirmance would make class attorneys indifferent to their clients' recovery.

3. Google complains (Br. 47) that a claims process would reward "a tiny percentage of self- or arbitrarily selected class members and leave the rest of the class with no benefit at all," but that argument proves too much. As respondents never dispute, that description covers *every* claims-made settlement in consumer class actions; the median claims rate leaves over 99% of the class uncompensated. Pet. Br. 26–27, 50–51. But a claims process provides the possibility of direct recovery to *all* class members. That most class members are indifferent to small sums of recovery (*Pearson*, 772 F.3d at 782) does not imply, as Google asserts, that it is unfair for other class members to recover. *Compare* Google Br. 23–24, 36–37 *with* Pet. Br. 45.

Google's concern rationalizes even nine-digit all-*cy-pres* consumer settlements. The $115 million Anthem settlement had a claims rate under 2% despite direct notice. Pet. Br. 50. Google's claim (Br. 34) that petitioners' cases "involv[e] known class members, much larger settlement funds per class member, or both" is irrelevant under the Ninth Circuit's holding that

settlements of $1.80/class member are "*de minimis*" and "infeasible" to distribute. Pet. App. 9; *see also* pp. 23–24 below. Parties regularly distribute settlement funds smaller than the $8.5 million here to large indeterminate classes whose claimants self-identify. *E.g.*, *In re Packaged Ice Antitrust Litig.,* 322 F.R.D. 276, 291 (E.D. Mich. 2017) ($2 million net-fund distribution to "millions" of consumers). Even if one accepts Gaos's incorrect characterization that *cy pres* is "rare,"[5] an affirmance here will surely change that, given the incentives to prefer *cy pres* to class distribution. Pet. Br. 28–30.

Google thinks (Br. 46–47) $8 payments to 600,000 class members (in exchange for waiving millions of $10,000 statutory-damages claims) would constitute "windfalls," but *it was Google that decided to settle for $8.5 million*. Google had full control over whether to hold out for a more favorable settlement. Settlements, by definition, are compromises falling between a take-nothing judgment and the complaint's demand. Google has no response for the perverse incentive created by a rule that says class attorneys need not share settlement proceeds so long as the underlying lawsuit is weak. Pet. Br. 41. Under Google's formulation, *Subway*, *Walgreen*, and *Pampers* are wrongly decided, because those suits were even weaker than the one here. Google never mentions those cases, much less justifies the discrepancy.

4. Respondents discuss (Google Br. 33–34; Gaos Br. 32) the administrative costs of giving money to the class (as does Section II.A.2 below), but ignore the

---

[5] *Compare* Gaos Br. 1 *with* Martin H. Redish *et al.*, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 653 (2010).

inefficiencies and third-party administrative costs of *cy pres*. Preparing "detailed grant-like proposals" (Google Br. 2) is not costless, and the numerous charities that lost the tournament for respondents' favor also incurred that expense. (Respondents append the extra-record proposals of the successful grantees, but did not submit to any court the unsuccessful proposals for comparison, or disclose which recipients Google vetoed or why.)

And the deadweight loss is not just in the transactions costs of participating in the grant-making beauty contest. Take recipient AARP, which spends over $1.5 billion annually. AARP Form 990, Line 18 (2016). It proposed funding education about online fraud. J.A. 68. There are two possibilities: either AARP did not believe that such a program was the best use of its copious funds (in which case the program is a sub-optimal expenditure artificially created only to qualify for *cy pres*) or AARP would have funded such a program independently (in which case the *cy pres* is superfluous and merely transferring wealth to an organization far richer than most class members). Cash is fungible: in the latter case, AARP will use *cy pres* to fund something *other* than the targeted program, which would have existed anyway.

5. Gaos argues (Br. 26) against a straw-man when it suggests petitioners' proportionality rule precludes injunctive-relief settlements. It doesn't. Pet. Br. 41 n.4. The injunction *here* is worthless because

- it only requires Google to continue a practice it was concededly doing prior to settlement approval (Dkt. 66 at 4);[6]

[6] Google has independent incentive for the disclosures, because they create a colorable defense of "authorization" to future alleged

- "Google's allegedly unlawful practice will not change as a result of this case" (Pet. App. 49); and
- most importantly, by benefiting only "future users" (Pet. App. 50), the injunction provides no marginal benefit to class members that opt-outs and other non-class-members do not receive. (The settlement class comprises only past users. Pet. App. 73.)

The injunctive relief is therefore not consideration for the waiver of the class's retrospective claims, and every absent class member would have been better off opting out. Pet. Br. 53. Gaos protests (Br. 27 n.4) that class attorneys accede to terms that effectively preclude them from advising class members to opt out, but that only confirms the breach of fiduciary duty. Gaos does not claim the Ninth Circuit found the injunction relevant in affirming settlement approval; it didn't.

6. Several *amici* argue for *cy pres* to legal-aid organizations as promoting the interests of class members in "access to justice." Even if every class member had an interest in "access to justice" (*but see* Pet. Br. 33–34 (*Citigroup* example)),[7] every class member has a

---

Stored Communications Act violations. 18 U.S.C. § 2701(c)(2). Gaos does not dispute that federal law precludes awarding fees under a "catalyst" theory. Pet. Br. 47. The district court found the weakness of the injunction "weigh[ed] against a finding of fairness." J.A. 94.

[7] *Citigroup* is also an example of *cy pres* requiring class members to subsidize speech they disagree with. 199 F. Supp. 3d at 853. While petitioners do not seek a First Amendment decision, another reason to prefer petitioners' Rule 23(e) interpretation is to avoid these constitutional disputes.

perhaps greater interest in curing cancer or the national defense. What's the limiting principle, other than that lawyers know more lawyers socially than medical researchers or veterans? What is the argument for permitting this in the class-action context but still criminalizing as embezzlement the same diversion to legal aid when an attorney's client is a decadent hedonist or a tobacco executive?

C. The Ninth Circuit's decision is ahistorical.

1. Google assumes (Br. 16–21) that because class actions have equitable roots and *cy pres* is an equitable doctrine in the trust context, *cy pres* in class actions is likewise legitimate. But context matters. If a *cy pres* approach were acceptable whenever a modern lawsuit can point to equitable roots, history would be familiar with *cy pres* decrees in the framing of injunctions, or orders of specific performance, or as a common feature of constructive trust, or subrogation, or reformation. But in five volumes of POMEROY'S EQUITY JURISPRUDENCE (5th ed. 1941), *cy pres* doctrine is limited to a single, narrow application of charitable trusts, and then only to those charitable trusts where the donor's intent has been frustrated. 4 *id*. §§ 1027, 1027a. *See generally* U.S. Br. 16–17.

Class actions did not employ *cy pres* when the device transitioned from equity to law. "[W]hile the doctrine of *cy pres* has a venerable history in its original format, use of a venerable label cannot hide the practice's radical nature in the class action context." Redish, 62 FLA. L. REV. at 630. Indeed, until 1912's Equity Rule 38, class proceedings did not even bind absentees. *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 363–64 (1921); *West v. Randall*, 29 F. Cas. 718, 722 (C.C.D.R.I. 1820) (Story, J.) (noting need to reopen

cases if absent individuals objected). None of these suits used *cy pres* the way contemporary settlements do.

Google cites (Br. 20–21) *In re Hotel Telephone Charges*, but that case eschewed the proposed *cy pres* remedy, and rejected class certification. 500 F.2d 86, 91–92 (9th Cir. 1974); Pet. App. 132. Class-action *cy pres*'s earliest use likewise agrees that *cy pres* will "certainly not … benefit those on whose behalf the action was brought." *Miller v. Steinbach*, 1974 WL 350, at *2 (S.D.N.Y. Jan. 3, 1974).

2. This ahistoricity is significant because tension between Rule 23 and the Rules Enabling Act "is best kept within tolerable limits by keeping" Rule 23 "close to the practice preceding its adoption." *Ortiz*, 527 U.S. at 845; *accord, e.g., Wal-Mart*, 564 U.S. at 361 ("in determining [Rule 23's] meaning we have previously looked to the historical models on which the Rule was based"). Indeed, Google reprises (Br. 18) reasoning *Ortiz* repudiated: inferring "[f]rom the historical fact that rule 23(b)(1)(B) originated in courts of equity" the erroneous conclusion that "*all* actions certified under rule 23(b)(1)(B) are equitable and thus immune" from considerations of law. *In re Asbestos Litig.*, 90 F.3d 963, 1003 (5th Cir. 1996) (Smith, J., dissenting), *rev'd sub nom. Ortiz*, 527 U.S. 815.

Outside the class context, the same considerations apply; the Court has refused to allow expansions of equitable remedies beyond those traditionally available. *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319–24 (1999) (Rule 65 injunction power). Although equity is flexible, "in the federal system, at least, that flexibility is confined with the broad boundaries of traditional equitable

relief." *Id.* at 322. Class-action *cy pres* is another invocation "not of flexibility, but of omnipotence." *Id.*

3. Google argues (Br. 25–26) the opposite: *limiting* courts' discretion under Rule 23 is what violates the Rules Enabling Act, because individual parties can settle in exchange for charitable contributions. If Google were correct, Rule 23 could not forbid a district court from permitting attorneys to take the entire settlement fund; after all, individual parties can voluntarily settle that way.[8] Class-action settlements are not just "ordinary" contracts (Google Br. 26–27; Gaos Br. 27–28) because they affect "the interests of unnamed class members who by definition are not present during the negotiations." *Pampers*, 724 F.3d at 715. *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986), is not to the contrary. *Firefighters* dealt solely with the limits of 42 U.S.C. § 2000e-5(g), not Rule 23(e), in a case in which the petitioners refused an invitation "to raise any substantive claims." *Id.* at 530; *accord id.* at 530–531A (O'Connor, J., concurring).

Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 339 (1980), cited by Google (Br. 21), notes class actions are an "evolutionary response to … unremedied" injuries but in no way supports *cy pres*. Indeed, *Roper* acknowledges the "obvious" "potential for misuse of the class action mechanism" including turning "persons other than class members [into] the

---

[8] Gaos implies (Br. 26) the 2001 Advisory Committee Minutes contemplate this (and thus permit the lesser wrong of *cy pres*), but the Committee never considered, much less approved, a voluntary dismissal that pays the attorneys without paying the class; the scenario discussed was a certified Rule 23(b)(2) action mooted by defendants' voluntary action. Civil Rules Advisory Comm., Meeting Minutes 24–25 (Apr. 23–24, 2001).

chief beneficiaries." *Id.* *Cy pres* is evolution *away* from providing "aggrieved persons" with "effective redress." *Cf. id.* Such "abuses" should be remedied "with re-examination of Rule 23." *Id.*

Even if courts are to use equitable principles, the result is indeterminate. Courts could just as well apply the equitable doctrine of constructive trusts, given that "in the eyes of equity" class members are the "true owners" of class settlement proceeds. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002); *see also Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011). And it is inequitable for a fiduciary to self-deal at the expense of his clients. Equity provides no basis to reject the proportionality rule and ignore the conflict-of-interest problem.

4. The appellate cases respondents cite (Gaos Br. 31–32; Google Br. 19–20) simply do not support what the Ninth Circuit does here. True, no other court goes as far as the Fifth and Seventh Circuits (Pet. 17–22), but other decisions do not loose *cy pres* like the decision below.

Most importantly, *Hughes v. Kore of Indiana Enterprise, Inc.*, has nothing to do with Rule 23(e). 731 F.3d 672 (7th Cir. 2013). *Hughes* involved a federal statute setting defendant's maximum liability to the class at $10,000, so the defendant immediately conceded the case and did not oppose plaintiff's Rule 23(f) appeal. *Id.* at 674. Petitioners do not require a claims process for a $10,000 fund. But *Hughes* involved no compromise whatsoever: class counsel obtained the maximum possible, while only compromises trigger petitioners' proposed proportionality rule. *Hughes*'s sole holding in an *ex parte* case was that the district court did "not provide adequate

grounds" in decertifying the class and remanded to redecide the certification decision. *Id.* at 678. One year later, the same circuit decided *Pearson*, precluding using *cy pres* to inflate settlement value, holding that the plaintiffs should have distributed $1.1 million of *cy pres* to 12 million class members, and imposing the proportionality rule petitioners seek here. Pet. Br. 40.

In *In re Pharmaceutical Industry Average Wholesale Price Litigation*, a claims process paid claimants double damages, plus treble damages in a staggered plan, before any money went to *cy pres*. It expressly refused to reach the question of an all-*cy-pres* settlement. 588 F.3d 24, 34 (1st Cir. 2009). *Klier* similarly restricted residual *cy pres* to the scenario when claimants had received up to the amount of their liquidated damages claims. 658 F.3d at 475.

Baby Products left open the use of *cy pres* case-by-case, but its approach dramatically contradicts the Ninth Circuit's. *Compare* 708 F.3d at 178 *with* Pet. App. 9–10; *see also* Pet. 19–20; Pet. Br. 42, 51–52. As here, the $35.5 million fund in *Baby Products* was adequate—but the "*allocation*" was "troubling." 708 F.3d at 169 (emphasis added). The class received only $3 million, when they should be the "foremost beneficiaries." *Id.* at 179.[9] So too here, with an even larger disproportion.

New York v. Reebok International Ltd., 96 F.3d 44 (2d Cir. 1996), was a *parens patriae* case, not a class

---

[9] *Baby Products* also demonstrates why Google's proposed lodestar rule (Br. 55–56) conflates the Rule 23(e) and (h) inquiries and is insufficient to protect absent class members. *Baby Products* class counsel proposed to get several times the class's actual recovery, but its proposed award was substantially below lodestar. 708 F.3d at 177.

action that waived absent class members' claims with concomitant fiduciary duties.

5. *Boeing* says nothing about proportionality under Rule 23(e). *Boeing* was a fee dispute after a *litigated judgment*. 444 U.S. at 476 n.4. It does not speak to a Rule 23(e) objection that a settlement is unfairly slanted toward class counsel; nor does it implicate *Pearson*'s requirement that courts determine compromised settlement value by actual benefit to the class. *Pearson*, 772 F.3d at 782 (distinguishing *Boeing*); *contra Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 282–83 (6th Cir. 2016); *see generally* Pet. Br. 25–28. Similarly, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), was a litigated, rather than compromised, victory. Perhaps Gaos could rationalize her fee award if she had litigated and won such a feeble result (*but see* Pet. Br. 46–47), but she cannot settle for full payment for her attorneys and nothing for the class. By the truncated logic of a *cy pres* award, it is sufficient that a defendant is being mulcted for the benefit of attorneys and worthy bystanders. If equity jurisprudence ever contemplated such a result, it would reject it out of hand.

While petitioners question *Boeing*'s soundness (*cf. International Precious Metals Corp. v. Waters,* 530 U.S. 1223 (2000) (O'Connor, J., respecting denial of certiorari) (raising concerns)), *Boeing* is not relevant here.

II. The Court should reject the Ninth Circuit's holdings, which create perverse incentives.

A. "Feasible" means "feasible."

1. Respondents seek (Google Br. 30–31; Gaos Br. 31–32) to relitigate the certiorari grant by arguing

that the Ninth Circuit applied the same "feasibility" standard other courts use. This is wrong. *See* Reply in Support of Pet. 4–7. While the Ninth Circuit used the word "feasible," it meant something other than feasible. It declared that its "review of the district court's settlement approval is not predicated simply on whether there may be 'possible' alternatives" that directly paid class members, even acknowledging "other conceivable methods of distribution." Pet. App. 9–10 & n.2. But if there is a possible alternative means of distribution that is feasible, then distribution *is* "feasible."

For example, *Pearson* involved $1.13 million residual *cy pres* and a 12-million-member class. 772 F.3d at 784. It is certainly infeasible to distribute eight cents to *each* unidentified class member, but it *was* feasible to distribute the residual to claimants through a reasonable claims process. *Id*. (*Pearson* also complained that parties improperly throttled the claims process to reduce the claims rate. *Id.* at 783. Respondents' eliminating the claims process is maximally restrictive. Residual *cy pres* settlement provisions create the incentive to reduce the number of claimants to benefit attorneys' pet causes; only a proportionality rule like *Pearson*'s avoids this problem.) In *In re BankAmerica Corp. Securities Litigation*, the district court made similar erroneous legal holdings that further distribution to the class were unnecessary as "costly and difficult." 775 F.3d 1060, 1065 (8th Cir. 2015). While the Eighth Circuit reversed the legal error, the Ninth Circuit held a district court has the discretion to "declin[e] to adopt" a feasible means of distribution to the class. Pet. App. 10 n.2. This is a *legal* error, and not, as respondents claim, a factual finding.

2. Perhaps recognizing that they cannot defend the Ninth Circuit's standard given the conceded fiduciary duty to class members, respondents and *amici* for the first time try to argue facts that a claims process is too expensive to be feasible. They reach that conclusion with suppositions that are neither in the record nor supported by courts' Internet-age experience. Moreover, respondents incorrectly claim that the district court considered the possibility of a low claims rate, when it expressly spoke only of the "significant burden to distribute" to "this many people"—the entire class. Pet. App. 47; J.A. 95–96 (requiring claims from "one hundred million individuals" "would impose a significant burden to distribute"); *see also* Pet. App. 9 ("4 cents in recovery");[10] U.S. Br. 27–28.

Again, the only record evidence was petitioners' showing that there was no reason to expect a claims rate in a Google settlement *without* direct notice to be higher than in the *Fraley v. Facebook* settlement *with* direct notice to a larger class of 150 million. 966 F. Supp. 2d 939 (N.D. Cal. 2013); Pet. Br. 42; Pet. App. 120–23. (Remarkably, Gaos (Br. 44) cites *Fraley* as an example of the court system working to reject an inappropriate all-*cy-pres* settlement, but fails to explain the difference in cases.)

Gaos hypothesizes (Br. 51) a 2% claims rate with no record support or explanation why the claims rate would be five times greater than *Fraley*'s. Google, citing decades-old cases without economies of scale distributing to 2,619 claimants, asserts (Br. 35) that the costs of notice and administration in a claims-

[10] Gaos uses ellipses to distort the district court's findings. *Compare* Gaos Br. 18 *with* Pet. App. 47. The district court's "millions" refers to the entire class, not a subset.

made settlement here would be $4.50-$5.50/claimant (as compared to the $1,000,000 it spent in the all-*cy pres* settlement that paid no one (Pet. App. 41)), but *Fraley* and other cases bely these newly contrived figures.

Fraley, which had direct notice to 150,000,000 class members and a claims process that paid $9 million to 600,000 class members, Pet. Br. 42, had notice and administration costs of only $1,017,397.66. Declaration of Robert Arns, *Fraley*, No. 11-cv-01726, Dkt. 464 ¶ 5 (N.D. Cal. May 9, 2017).[11] A memory-chip antitrust settlement, with publication notice to 175.5 million class members, spent $1.05 million to distribute $188 million to 445,000 claimants; a nationwide milk antitrust settlement spent $1.5 million to distribute $35 million to 3.8 million claimants. Further Submission, *In re Lithium Ion-Batteries Antitrust Litig.*, No. 4:13-md-2420, Dkt. 1988 (N.D. Cal. Oct. 16, 2017) (documenting these and other large-settlement claim rates and administrative costs). These antitrust classes were every bit as "indeterminate" (Google

[11] *Fraley* plaintiffs perhaps encouraged efficient settlement administration after the court refused to award fees for any funds depleted by the administrator. 2013 WL 4516806, at *2 (N.D. Cal. Aug. 26, 2013). Class counsel here, by contrast, collected a 25% fee on every dollar whether cash went to the settlement administrator, *cy pres*, or the class. Pet. App. 40, 54. *Redman* recognizes this perverse incentive, but some circuits do not—yet another reason to prefer petitioners' proposed rule basing settlement fees on actual class benefit. *Compare Redman v. RadioShack Corp.,* 768 F.3d 622, 630 (7th Cir. 2014) *with, e.g., In re Life Time Fitness, Inc. TCPA Litig.*, 847 F.3d 619, 623 (8th Cir. 2017).

Respondents could have had costless notice on Google's homepage, and instead paid for "an elaborate advertising campaign." J.A. 45.

Br. 44) and reliant upon claimant self-identification as the class here. *See also, e.g., In re Carrier IQ, Inc., Consumer Privacy Litig.*, 2016 WL 4474366, at *2–*4 (N.D. Cal. Aug. 25, 2016) ($655,500 to distribute $5.9 million fund to claimants in 30-million-member class, even after auditing and rejecting over 30% of claims as fraudulent). All four of these settlements, and many more, are "non-distributable" under the Ninth Circuit's decision and respondents' arguments. Given that the class is one of *Google users*, there's no reason (in the record or otherwise) a claims and payment process couldn't be done electronically at relatively low expense. The leading empirical study finds it feasible to distribute *paper* checks once they are over "around $1–$2." Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J.L. & BUS. 767, 791 (2015).

B. The appearance of impropriety precludes the *cy pres* recipients here.

Google acknowledges (Br. 52) that "[m]eaningful sources of potential conflicts should be disclosed to the district court," but that did not happen here.

Gaos argues (Br. 52) that the Ninth Circuit already applied petitioners' proposed standard, but it did not: it required a showing of "fraud or collusion," which does not adequately protect against self-dealing. Pet. Br. 55–56.

Google asserts (Br. 52–54) the appearance-of-impropriety standard would hurt class members, but provides no legal basis for that claim. The district court acknowledged the "potential for a conflict of interest," Pet. App. 59, and that should be legally enough to reject this settlement.

III. The Court has jurisdiction.

The United States suggests (Br. 13–15) that named plaintiffs may not have alleged an "injury in fact" sufficient to give them Article III standing. For an injury to suffice, it must be, among other things, "concrete." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548–49 (2016).

An injury need not be "tangible" to be "concrete." *Spokeo*, 136 S. Ct. at 1549–50. An intangible injury more likely constitutes a "concrete" harm if it is closely related "to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* at 1549. If an analogous common-law injury exists, lower courts have uniformly read *Spokeo* to permit statutory allegations to go forward. *E.g.*, *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 638–39 (3d Cir. 2017); *Pedro v. Equifax, Inc.*, 868 F.3d 1275, 1279–80 (11th Cir. 2017); *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 983 (9th Cir. 2017); *Matera v. Google Inc.*, 2016 WL 5339806, at *10 (N.D. Cal. Sept. 23, 2016).

Regardless of the named plaintiffs' claims' factual or legal merit, the injuries *alleged* share sufficient similarity with common-law privacy injuries to qualify as concrete. Named plaintiff Anthony Italiano alleges he used Google's search engine to query his name together with terms relating to his marriage's dissolution, and Google transmitted the queries' contents to third parties. Complaint, Dkt. 39 ¶¶ 90–96. Italiano's alleged injuries parallel interests protected by the common-law tort of public disclosure of private facts. RESTATEMENT (SECOND) OF TORTS § 652D, cmt. b (1977) ("family quarrels"). Whether or not Gaos is a cognizable lead plaintiff, Italiano is, and that "is sufficient to satisfy Article III's case-or-

controversy requirement." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). No one disputes the Rule 23(a)(2) and (3) findings that Italiano's claims are "typical" of class members, who have "suffered the same injury." J.A. 87–89; Pet. App. 35–36.

Plaintiffs' alleged injury need not "exactly track[] the common law." *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1115 (9th Cir. 2017). Congress and state legislatures have a measure of leeway to expand upon and "elevate" the preexisting common-law interests. *Spokeo*, 136 S. Ct. at 1549.

The government maintains (Br. 14) that plaintiffs have not identified consequential injury from Google's use of referrer headers. But "with privacy torts, improper dissemination of information can itself constitute a cognizable injury." *Horizon Healthcare*, 846 F.3d at 638–39. "Many traditional remedies for private-rights causes of action … are not contingent on a plaintiff's allegation of damages beyond the violation of his private legal right." *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring).

There is jurisdictional standing under *Spokeo*.

Gaos's argument (Br. 54) for dismissal of the writ as improvidently granted is incorrect; the cases she relies on involved situations when a lower court found lack of standing and the petitioner failed to challenge that in the petition. So even if the Court expanded *Spokeo* to create newfound jurisdictional doubt, the government's suggestion of remand is correct. When an appeals court determines a trial court has no jurisdiction, it should vacate "all district court pronouncements on the merits … to ensure against preclusion."

13B Charles A. Wright, *et al.*, *Federal Practice & Procedure* § 3531.15 (3d ed. 2018). *E.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997).

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

THEODORE H. FRANK
Counsel of Record
MELISSA HOLYOAK
ANNA ST. JOHN
ADAM EZRA SCHULMAN
COMPETITIVE ENTERPRISE INSTITUTE
1310 L St., N.W., 7th Floor
Washington, D.C. 20005
(202) 331-2263
ted.frank@cei.org

Counsel for Petitioners

SEPTEMBER 28, 2018