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 FOR PETITIONERS

THEODORE H. FRANK
Counsel of Record
MELISSA HOLYOAK
ANNA ST. JOHN
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

QUESTION PRESENTED

Whether, or in what circumstances, a class-action settlement that provides a *cy pres* award of class-action proceeds but no direct relief to class members comports with the requirement that a settlement binding class members must be "fair, reasonable, and adequate" and supports class certification.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners Theodore H. Frank and Melissa Ann Holyoak were objectors in the district court proceedings and appellants in the court of appeals proceedings.

Respondents Paloma Gaos, Anthony Italiano, and Gabriel Priyev were named plaintiffs in the district court proceedings and appellees in the court of appeals proceedings.

Respondent Google LLC was the defendant in the district court proceedings and an appellee in the court of appeals proceedings.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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INTRODUCTION

Petitioners, as class members, challenge an $8.5 million class settlement negotiated between class counsel and the defendant that pays the class no money, but instead directs millions to class counsel and funnels the remainder to third parties, including class counsel's *alma maters* and nonprofits to which the defendant already contributes. This is a clear abuse and must be curtailed.

This Court has long recognized that Rule 23(b)(3) opt-out class actions are an "adventuresome" innovation fraught with potential conflicts. *E.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614, 625–26 (1997). Rule 23 must be "applied with the interests of absent class members in close view." *Id.* at 629. The Court has consistently rejected the use of procedural tactics by plaintiffs or defendants to game class actions. *E.g., China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018); *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017); *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016); *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588 (2013).

Because of conflicts of interest inherent in the class-action process—especially with regard to settlements—careful judicial scrutiny is necessary lest class counsel and the defendant bargain away the rights of the class members on terms that minimize payoff by the defendant, maximize benefit to class counsel, and leave injured class members out in the cold. Yet the Ninth Circuit below took the opposite approach, declaring that close scrutiny of the terms of a *cy pres* settlement would be "an intrusion into the private parties' negotiations" and therefore "improper and disruptive to the settlement process." Pet. App. 15.

The majority of class actions that survive motions to dismiss are resolved by settlement. As one court has noted, "Inequitable settlements are an unfortunate recurring bug in our system of class litigation." *Pearson v. Target Corp.*, – F.3d –, 2018 WL 3117848, at *1 (7th Cir. Jun. 26, 2018) (Wood, C.J.) ("*Pearson II*"). In the absence of legal rules providing proper incentives, the negotiating parties' preferences—readily achieved even in the absence of explicit collusion—are to structure a settlement that maximizes the class attorneys' share of the settlement value of the case while minimizing cost to the defendant, all at the expense of absent class members. *In re Dry Max Pampers Litig.*, 724 F.3d 713, 717–18 (6th Cir. 2013) (Kethledge, J.); *see generally* Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 Notre Dame L. Rev. 859, 874–903 (2016) ("Erichson"). Parties structure settlements to hide the economic reality, create the appearance of a larger recovery, and thus support a larger claim for attorneys' fees. This case involves one of the most notorious devices used to create the "illusion of compensation," so-called *cy pres* recovery. 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 (2010) ("Redish").

The Ninth Circuit treated the *cy pres* arrangement here as equivalent to a class settlement paying $8.5 million to class members. In fact they got zero. All the money went to class counsel and to favored non-profit organizations affiliated with class counsel and the defendant. It is not fair or reasonable under Rule 23(e) for class attorneys to arrogate millions for themselves and nothing for their clients. In ratifying the district court's approval of this settlement, the

Ninth Circuit adopted several holdings that create perverse incentives that encourage both gamesmanship at the expense of absent class members and meritless class actions designed to benefit only attorneys. If this Court affirms the Ninth Circuit's approach, *cy pres* settlements like this one, previously substantially deterred by other appellate courts' refusal to endorse them, will become dramatically more common, even supplanting settlements that currently directly pay class members tens of millions of dollars. The Court should reverse the judgment below, thereby making clear that class counsel has a fiduciary duty to class members, and that Rule 23(e) requires courts to align the interests of class counsel with the interests of their clients.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 869 F.3d 737 and reproduced at Petition for Writ of Certiorari Appendix at Pet. App. 1. Of the two opinions of the District Court for the Northern District of California, one is reported at 87 F. Supp. 3d 1122 and the other is unreported; they are reproduced at Pet. App. 31 and Pet. App. 62 respectively.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2017. A timely petition for rehearing *en banc* was denied on October 5, 2017. Pet. App. 67. Petitioners timely filed their petition for writ of certiorari with this Court on January 3, 2018, which was granted April 30, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1). As class members who objected to the settlement, Petitioners have standing to appeal the final judgment. *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

RULES AND STATUTE INVOLVED

Federal Rule of Civil Procedure 23(a)(4) provides that one or more members of a class may sue as representative parties on behalf of all members only if, *inter alia*,

> the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b)(3) provides that a class action may be maintained if, *inter alia*,

> the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Rule 23(e)(2) 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.

Rule 23(g)(4) provides:

> Class counsel must fairly and adequately represent the interests of the class.

Rule 23(h) provides:

> In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement.

Under 18 U.S.C. § 2707(c):

> The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $1,000. If the violation is willful or intentional, the court may assess punitive damages. In the case of a successful action to enforce liability under this section, the court may assess the costs of the action, together with reasonable attorney fees determined by the court.

STATEMENT OF THE CASE

A. The *cy pres* doctrine in class-action settlements.

Cy pres originated in trust law. Short for the French "*cy près comme possible*," or "as near as possible," it referred to a court's power, typically under statute, "to save testamentary charitable gifts that would otherwise fail." *Klier v. Elf Atochem N. Am., Inc.,* 658 F.3d 468, 473–74 (5th Cir. 2011) (cleaned up); *see generally* Redish at 625. For example, a 19th-century court applied the doctrine to repurpose a trust created to support the abolition movement to instead provide assistance to poor African-Americans. *Jackson v. Phillips*, 96 Mass. 539 (1867).

The application of the *cy pres* doctrine, or something resembling it, to class-action settlements is a more recent phenomenon. The "most adventuresome" of the 1966 amendments to Federal Rules of Civil Procedure was the addition of Rule 23(b)(3)'s provision for "class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded." *Amchem*, 521 U.S. at 614–15. That provision empowered attorneys, armed with a few representative plaintiffs, to file actions on behalf of large and diffuse classes, aggregating members' paltry claims into litigation well worth an attorney's time. When these suits prevail, usually through settlement, the proceeds typically flow into a fund out of which disbursements to individual class members are made.

It is a unique feature of class actions that, unlike in bilateral civil litigation, funds often remain unclaimed, particularly where class members' claims are small or the claims process is burdensome. "Traditionally, such funds would revert to a defendant—often an unpopular result because reversion of the funds undermines the deterrent effect of the suit and leaves the defendant largely with the benefit of his illegal activity." Redish at 631. In the 1970s, a law student comment proposed the *cy pres* doctrine as a solution for this "problem" of unclaimed settlement funds that could achieve the "next best" result to compensation by indirectly compensating absent class members, without undermining the deterrent effect of liability. *Id*. at 631–34.

Around the same time, plaintiffs experimented with the related concept of fluid recovery. Fluid recovery involves "an effort … to approximate the injured class of consumers through the provision of relief to future consumers." *Id.* at 662. But several federal appellate courts rejected fluid recovery as unauthorized by law and constitutionally problematic. *Id.* at 662–63 (citing cases).

With fluid recovery rejected, the use of *cy pres* awards in class actions quickly moved beyond its modest origins to become an integral component of many settlements. In these cases, settlement agreements expressly provide for awards to charities or foundations in addition to, or in place of, funds earmarked for distribution to class members. Redish at 656–57. As critics have documented, these types of *cy pres* awards "create the potential for conflicts of interest by ensuring that class attorneys are able to reap exorbitant fees regardless of whether the absent class members are adequately compensated." John Beisner *et al.*, Cy Pres: *A Not So Charitable Contribution to Class Action Practice* 13 (2010) ("Beisner"). Despite these concerns, the use of *cy pres* awards in class-action settlements has grown quickly since the 1980s, accelerating sharply recently. Redish at 653; Natalie Rodriguez, *Era of Mammoth Cases Tests Remedy of Last Resort*, Law360 (May 2, 2017) ("Rodriguez, *Era*").

B. Plaintiffs launch a privacy class action against Google.

Google operates the eponymous search engine that internet users query billions of times each day. When a user enters search terms into Google, the service returns a search-results page listing relevant websites. Each results page has a unique address—known as a "Uniform Resource Locator," or "URL"—that contains the user's search terms. And when a user clicks on a search result, the user's web browser (Chrome, Internet Explorer, etc.) typically transmits a "referral header" containing the URL of the referring search-results page, including the user's search terms, to the destination website. This is not unique to Google; clicking any links on the Web will cause referral headers to be sent, unless the user has disabled them. Websites, in turn, use this referral information to inform their editorial decisions and marketing efforts. Joint App. 17.

In October 2010, Paloma Gaos filed a putative class action in the United States District Court for the Northern District of California against Google. She sought damages for the disclosure of her search terms to third-party websites through referral headers sent when she conducted "vanity searches" for her own name and other personal information and then clicked on results links. The complaint alleged claims for fraud, invasion of privacy, breach of contract, breach of the covenant of good faith and fair dealing, breach of implied contract, and unjust enrichment under California law and for violation of the federal Stored Communications Act, which provides for statutory damages of at least $1,000 per violation and attorneys' fees for a successful action—over $100 billion across the class. 18 U.S.C. § 2707(c). It sought certification and money damages for a class of United States-based Google users. Pet. App. 3–4, 32–33; Joint App. 25, 27.

C. Class counsel and Google propose an $8.5 million *cy pres*-only settlement that awards class members nothing.

Some of Gaos's claims were initially dismissed for failure to plead an injury that would support Article III standing. Joint App. 23–31. After Gaos amended her complaint, the parties stipulated to consolidate her action with a similar one filed by Gabriel Priyev for purposes of settlement proceedings and filed a proposed settlement. Pet. App. 34.

Under the settlement, Google would obtain a release of any and all privacy-related claims of the estimated 129 million people who used Google's search engine in the United States between 2006 and the settlement class notice date in 2014. Pet. App. 5. In exchange, the company would pay a total of $8.5 million into a settlement fund and continue to include in its "Frequently Asked Questions" webpages an explanation of referral headers, a known feature of the Web since at least 1996, two years before Google's founding.[1] Pet. App. 5, 82. The settlement specifically provided that Google "will not be required or requested to make any changes to … the practices or functionality of Google Search" or other services. Pet. App. 82.

Class counsel and Google agreed that attorneys' fees would be drawn out of the settlement fund. Pet. App. 92. Ultimately, class counsel sought, and was awarded in full, $2.125 million in fees, equal to 25 percent of the settlement fund and more than double counsel's asserted lodestar. Pet. App. 54–57. Class counsel made no claim that the minimal injunctive relief entitled them to fees, and acknowledged that Google had already changed its practices long before the settlement and those changes had no known connection to the litigation. Dkt. 66 at 2–4; Joint App. 42.

The settlement was less generous to class members. Other than "incentive awards" of a few thousand apiece to the named plaintiffs, class members would receive no compensation at all. Pet. App. 83. Instead, their money would be disbursed to organizations that

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[1] *See* Internet Engineering Task Force, Hypertext Transfer Protocol HTTP/1.0, RFC No. 1945 (May 1996), https://tools.ietf.org/html/rfc1945#section-10.13.

"agree to devote the funds to promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet." Pet. App. 84. Class counsel and Google selected six recipients: the Center for Information, Society and Policy at Chicago-Kent College of Law; the Berkman Center for Internet and Society at Harvard University; the Stanford Center for Internet and Society; World Privacy Forum; Carnegie Mellon University; and AARP, Inc. Pet. App. 5. Though there were forty applicants for *cy pres* money, the parties did not disclose the proposals that were rejected or whether class counsel or Google had unilaterally vetoed any in particular. Joint App. 126, 133, 159. The district court complained about the opacity of the selection process, but never required the disclosures it sought. Joint App. 133, 159, 166.

D. Petitioners object.

Petitioners and class members Theodore H. Frank and Melissa Holyoak objected to approval of the settlement, class certification, and class counsel's fee request. Pet. App. 112. Petitioners are public interest attorneys with the Center for Class Action Fairness, which has won over $100 million for class members through objections to abusive class-action settlements since Frank founded it in 2009. Dkt. 70-2; Andrea Estes, *Critics hit law firms' bills after class-action lawsuits*, Bost. Globe (Dec. 17, 2016) (reprinted at *Arkansas Teacher Retirement Sys. v. State Street Bank & Trust Co.*, 232 F. Supp. 3d 189, 200–07, 205 (D. Mass. 2017)); *Pearson II*, 2018 WL 3117848 at *1.

Petitioners argued that it was feasible to use a standard claims process to compensate class members, citing undisputed evidence that claims rates in class actions for payments of $10 or less are typically well below one percent. Pet. App. 120–23 (discussing *Fraley v. Facebook, Inc.*, 966 F. Supp. 2d 939 (N.D. Cal. 2013) (approving $20 million settlement in 150-million-member privacy class action providing for $15 payments to those class members who filed claims)). And if the court were to find that any distribution to class members was infeasible, then that made class certification improper. Pet. App. 131–34.

Petitioners also objected to the parties' selection of *cy pres* recipients that had preexisting relationships with Google and class counsel. Pet. App. 125–31. Prior to the settlement, Google was already a donor to several of the recipients, especially Stanford. Likewise, three of the *cy pres* recipients—Harvard, Stanford, and Chicago-Kent—were *alma maters* of class attorneys who signed the settlement. Petitioners objected that even the appearance of divided loyalties of counsel precluded *cy pres* awards to these recipients, especially since none of these potential conflicts were disclosed to the class. Pet. App. 126–28. They asked the Court to "require the parties to certify that the beneficiaries have no ties to the parties or the lawyers." Pet. App. 128.

The parties did not make any such certification. Google filed no response to Petitioner's objection. While the class attorneys each asserted in one line of declarations submitted after the objections that they "have no affiliation" with the recipients (Joint App. 108–10), they did not deny that the *alma mater* status played a part in their selection of some of the recipients, instead arguing that selecting an *alma mater* *cy pres* beneficiary did not demonstrate a conflict of interest, that Ninth Circuit precedent permitted parties to self-deal in selecting beneficiaries, and that there was no requirement to choose the best possible beneficiaries. Joint App. 101–06, 133–36.

Petitioners also objected to being compelled as a class member to subsidize the AARP's advocacy and lobbying on controversial policy issues, which Petitioner Frank often opposes. Pet. App. 131.

Finally, Petitioners objected to the $2.125 million fee request, on the basis that its "percentage-of-recovery" approach assumed that the district court should treat *cy pres* funds as equivalent to actual monetary compensation. Pet. App. 134–39.

E. Relying on Ninth Circuit precedent, the district court approves the settlement.

Although the district court at the fairness hearing stated it probably would not approve the settlement (Joint App. 166), repeatedly expressed "disappointment" (Joint App. 135, 160), criticized the parties' conflicts of interest and "lack of transparency" in selecting *cy pres* recipients (Joint App. 133, 137, 156–57, 166), compared the amounts chosen per recipient to "point shaving" (Joint App. 127–28), and mused that the alumni contributions raised a "red flag" and did not "pass the smell test" (Joint App. 133), it ultimately overruled all of Petitioners' objections. Their objections to the approval of a *cy pres*-only settlement, it stated, were inconsistent with "the law of this circuit which permits cy pres settlements such as this one." Pet. App. 58 (citing *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012)).

As for the selection of the *cy pres* recipients, it was enough that their activities were "sufficiently related" to the subject matter of the case. Pet. App. 59. While "the potential for a conflict of interest is noted, there is no indication that counsel's allegiance to a particular alma mater factored into the selection process" because beneficiaries' identity "was a negotiated term included in the Settlement Agreement and therefore not chosen solely by Harvard alumni." Pet. App. 59–60.

As for the fee award, the court stated simply that it disagreed with Petitioners and believed the amounts approved were consistent with Ninth Circuit authority. Pet. App. 60.

F. A split panel of the Ninth Circuit affirms.

In affirming approval of the settlement, the Ninth Circuit agreed with the district court that its own precedents disposed of all objections.

On the threshold question of whether an all-*cy pres* settlement was permissible, it found that the court's "prior endorsement of *cy pres* awards that go to uses consistent with the nature of the underlying action" carried the day. Pet. App. 10. Whether or not there are " 'possible' alternatives" that compensate class members, a district court may approve a *cy pres*-only settlement that it finds to be " 'fair, adequate, and free from collusion.' " Pet. App. 9–10 (quoting *Lane*, 696 F.3d at 819). And the district court satisfied that standard when it found that dividing $5.3 million in net settlement proceeds among all of the estimated 129 million class members would be "infeasible." *Id*.

The court likewise made quick work of the objection that a class action is not "superior" to other means of adjudication, and that class certification is therefore improper, when a money-damages class is structured to preclude actually compensating class members. To the contrary, it thought, the very same features that can make individual litigation "economically infeasible" and thereby support class adjudication also provide "the rationale for the *cy pres*-only settlement." Pet. App. 11.

As to the particular *cy pres* beneficiaries, the panel majority was untroubled by the appearance of a conflict of interest based on their prior relationships with class counsel and the defendant. Pet. App. 14–18. That Google was already funding and working with several of them was of no moment "without something more, such as fraud or collusion." Pet. App. 17. And the majority categorically "reject[ed] the proposition that the link between the *cy pres* recipients and class counsel's *alma maters* raises a significant question about whether the recipients were selected on the merits." Pet. App. 18. Echoing *Lane*, the panel explained that any closer scrutiny of the settling parties' selection of *cy pres* recipients would be "an intrusion into the private parties' negotiations" and therefore "improper and disruptive to the settlement process." Pet. App. 15 (quoting *Lane*, 696 F.3d at 820–21). Instead, it required only that *cy pres* "be[] tethered to the objectives of the underlying statute and the interests of the silent class members," a standard that it found satisfied here. Pet. App. 12.

Finally, the panel summarily rejected the objection "that the settlement should have been valued at a lower amount for the purposes of calculating attorneys' fees simply because it was *cy pres*-only." Pet. App. 21. A fee equal to 25 percent of the settlement fund, it held, was generally permissible as a "benchmark" whether or not class counsel obtains any actual compensation for its putative clients, class members. Pet. App. 22.

Judge Wallace dissented in part. He took no issue with the panel majority's application of circuit precedent to resolve the challenges to the use of *cy pres* relief and the fee award, but was troubled by the district court's failure to probe the preexisting relationships between class counsel and the *cy pres* recipients. Pet. App. 23–29. The "burden should be on class counsel to show … that the prior affiliation played *no role* in the negotiations, that other institutions were sincerely considered, and that the participant's alma mater is the proper *cy pres* recipient." Pet. App. 27.

The court subsequently denied rehearing and rehearing en banc. Pet. App. 67–68.

SUMMARY OF ARGUMENT

Petitioners ask this Court to hold:

1. A settlement that compromises a class's claims, but seeks to pay class counsel an amount disproportionate with the actual and direct benefit to the class, is not fair or reasonable under Rule 23(e). (Section I.)

2. *Cy pres* awards are inappropriate in class-action settlements where it is feasible to distribute settlement proceeds to class members. Whether it is feasible to distribute settlement proceeds is determined by whether such relief can be distributed to some identifiable class members (through a claims process or other means) and not whether the proceeds could be distributed to *every* potential class member. (Section II.A.)

3. If a class-action settlement cannot provide direct relief to the class, the settlement class cannot be certified. (Section II.B.)

4. If *cy pres* is to be permitted at all, there should be strict restrictions against the payment of money to

recipients with any significant current or prior relationship with the parties, attorneys, or judge. (Section II.C.)

5. At a minimum, courts should substantially discount *cy pres* distributions relative to direct payments to class members for purposes of calculating attorneys' fees based on a percentage of the recovery. (Section II.D.)

As applied here, where the class receives no direct benefit, but the attorneys are to receive over $2 million, the settlement must be rejected. "Because the settlement yields fees for class counsel and zero benefits for the class, the class should not have been certified and the settlement should not have been approved." *In re Subway Footlong Sandwich Mktg. Litig.*, 869 F.3d 551, 557 (7th Cir. 2017) (Sykes, J.) (cleaned up).

I. The problem of *cy pres* is part of a larger problem of conflicts of interest in class-action settlements, where perverse incentives tempt class attorneys to breach their fiduciary duty to class members.

A. There are recognized conflicts of interest between class counsel and the class, because the defendant cares only about its total cost of settlement, while every dollar going to class members is a dollar that will not go to class counsel's fees. In the absence of legal rules explicitly forbidding such gamesmanship, class counsel and settling defendants have a variety of gimmicks available in a class-action settlement to maximize class counsel's proceeds while minimizing the cost of settlement to the defendant. And when courts permit the gimmicks, class attorneys have every incentive to use such subterfuge, because scrupulous class counsel would sacrifice millions of dollars by demonstrating fidelity to the class by engaging in more straightforward settlements. Some courts have stepped in to rectify these problems, but many others defer to abuses of the system, mistakenly thinking that the lack of explicit collusion is enough to protect absent class members.

B. *Cy pres* is a square manifestation of this conflict of interest, and one that raises a number of other fundamental concerns. When courts treat a dollar of *cy pres* as equivalent to a dollar of direct class recovery, class attorneys' natural preference will be to favor their favorite charities and causes over thousands or millions of anonymous class members. This is especially true when, as here, the defendant has a similar preference to benefit charities it likes. But "settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members." *Klier*, 658 F.3d at 474. Courts and class counsel should not have the authority to divert that property to third parties any more than attorneys for individual clients do.

Cy pres presents other systemic problems. The availability of an illusory *cy pres* remedy incentivizes meritless class actions that a class counsel might otherwise not be able to bring and settle profitably; many abusive class actions and settlements that other courts have legitimately struck could be restored, validated, and insulated by the illusory *cy pres* the Ninth Circuit endorsed here. *Cy pres* can also infringe upon the First Amendment rights of class members by requiring them to subsidize political organizations they disapprove of without their explicit consent. And *cy pres* is an invitation to corrupt the judicial process by involving judges in the legislative task of grant-making.

C. Rejecting settlements that do not tie class counsel's fee award to the direct and actual recovery by class members properly aligns the interests of class attorneys with those of their clients. When courts establish such rules, class attorneys find ways to distribute settlement proceeds to their clients, and millions of dollars more flow to class members.

II.A. The Ninth Circuit's decision exacerbates the problems of conflicts of interest in class-action settlements, and should be rejected. By holding that a settlement fund is "non-distributable" if every class member cannot be feasibly compensated, the Ninth Circuit sweeps nearly every consumer class-action settlement—potentially billions of dollars—into a *cy pres*-only category, because such settlements rarely compensate more than a tiny fraction of class members. It is almost always possible to find a mechanism to distribute money to *some* class members. The Ninth Circuit's refusal to require class counsel to prefer such distributions to *cy pres* ignores class counsel's fiduciary duty to the class and class members' property rights.

B. Moreover, if it is really the case that it is impossible to distribute settlement proceeds to class members, class certification is inappropriate. "If the class settlement does not provide effectual relief to the class and its principal effect is to induce the defendants to pay the class's lawyers enough to make them go away, then the class representatives have failed in their duty under Rule 23 to fairly and adequately protect the interests of the class." *Subway Footlong*, 869 F.3d at 556 (cleaned up). Likewise, the class device cannot be a superior means of resolving litigation if settlement benefit does not distinguish between class members and non-class members: a faithful agent for the class would costlessly opt out every single absent class member from the settlement rather than waive their rights.

C. Even if *cy pres* were sometimes permissible, the Ninth Circuit's disregard for class counsel's fiduciary duty to absent class members pollutes its conflict-of-interest inquiry. *Cy pres* recipients with significant prior affiliations with the parties or class counsel that create even the appearance of impropriety raise substantial questions about the selection process and tar the judicial system. Requiring absent class members to show collusion relating to undisclosed conflicts of interest fails to adequately protect absent class members and encourages collateral litigation that would unfairly penalize parties settling in good faith, because such collusion could only be demonstrated with intrusive discovery. The settlement should have been rejected for this independent reason.

D. At a minimum, the Ninth Circuit errs in refusing to create *any* incentive for class counsel to prefer distributions to the class over *cy pres*, especially if defendants are permitted to steer *cy pres* contributions to preferred allies. A defendant will always prefer to give more to an affiliated charity than to absent class members, and if doing so invariably increases the attorneys' fee, the defendant can, without any collusion, seduce class counsel into agreeing to an illusory settlement at class members' expense.

ARGUMENT

I. This *cy pres*-only settlement is not fair or reasonable under Rule 23(e) because it provides no direct or actual compensation to the class in consideration for compromising the class's claims.

Class actions play a vital role in the judicial system. Often, they are the only way plaintiffs can be compensated and defendants held to account for serious misdeeds with widely diffuse harms. *Amchem*, 521 U.S. at 617.

But as this Court has recognized, class-action *settlements* create special problems for our adversary system. *See, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852 (1999); *Amchem*, 521 U.S. at 619–620. "Class-action settlements are different from other settlements. The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require court approval." *Dry Max Pampers*, 724 F.3d at 715.

Class attorneys, like other attorneys, have a fiduciary duty to their clients, the class members; so do class representatives with respect to the absent class members. *Id.* at 718; *In re General Motors Corp. Pick-Up Truck Litig.*, 55 F.3d 768, 801 (3d Cir. 1995) (Becker, J.); American Law Institute, *Principles of the Law of Aggregate Litigation* § 1.05 cmt. (f) (2010) ("*ALI Principles*")); *cf. also Standard Fire*, 568 U.S. at 594 (citing *Back Doctors Ltd. v. Metropolitan Property & Cas. Ins. Co.*, 637 F.3d 827, 830–31 (7th Cir. 2011) (Easterbrook, C.J.)); *see also* Rule 23(a)(4), (g)(4). But in the absence of sufficient judicial scrutiny under Rule 23(e), it is simple for class counsel to game class-action settlements to self-deal at the expense of their clients, be it with *cy pres* or other gimmicks. When courts permit class counsel to use class settlements to self-deal freely, it improperly enriches class attorneys at the expense of their clients. Furthermore, because class attorneys no longer have to fairly share the settlement value of the case with their clients, it becomes profitable to bring cases that have little to no merit, and whose settlement value is solely the litigation expenses plaintiffs can force the defendant to incur.

Rule 23(e)'s mandate requires courts to only approve settlements if they are "fair, reasonable, *and* adequate" (emphasis added). But, as with class certification decisions, those decisions must constitute more than simple "appraisals of the chancellor's foot kind … dependent upon the court's gestalt judgment or overarching impression." *Amchem*, 521 U.S. at 621. Instead, the integrity of class-action suits is contingent on *how* courts scrutinize such settlements. Courts must determine, with rigor, whether class attorneys are fulfilling their fiduciary duty.

Courts that have insisted on holding class counsel to that duty have achieved materially superior results both in increasing compensation to class members with relatively meritorious claims of injury and in discouraging dubious and unmeritorious litigation. All that courts need to accomplish this result is to apply a simple principle to the Rule 23 fairness hearing: regardless of whether a settlement is "adequate," it is not fair or reasonable if the settlement pays attorneys' fees that are disproportionate to the *actual* and *direct* benefit realized by the class compromising its claims. A court must reject settlements structured to preclude judicial correction of this allocation problem. This rule not only addresses the vast majority of problems related to *cy pres*, but deters other forms of gamesmanship in the settlement process.

A. *Cy pres* is part of a larger problem of conflicts of interest in class-action settlements where gamesmanship exploits recognized incentive problems.

1. While both class counsel and a defendant have an incentive to bargain fairly over the *size* of a settlement, they critically lack similar incentives to decide how to divvy it up—including the portion allocated to counsel's own fees. The defendant cares only about the bottom line, and will take any deal that drives it down. Meanwhile, class attorneys have an obvious incentive to seek the largest possible portion for themselves, and will accept bargains that are worse for the class if their share is sufficiently increased. "From the selfish standpoint of class counsel and the defendant, … the optimal settlement is one modest in overall amount but heavily tilted toward attorneys' fees." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) (Posner, J.).

While a defendant and a class counsel might happily agree to a settlement where the defendant simply writes a check to class counsel in exchange for the release of the class's claims, something so blatant is rarely seen outside of John Grisham novels. The problem, however, is that class counsel have various tools for obscuring some of the allocative decisions that get made between counsel and class recovery, and can very subtly trade benefits to defendants for bigger fees. These tools primarily function by inflating the settlement's *apparent* relief, which will in turn justify outsized fee requests absent rigorous doctrinal tests designed to weed them out, accomplishing a result that is effectively economically equivalent to more blatantly abusive settlements.

To see this, imagine a hypothetical settlement where class counsel tried to compromise the consumer class action *Coyote v. Acme* with a straightforward cash settlement paying him $14 million, while paying the class a total of $3 million in compromise of the class's much larger claims. Most courts would reject that deal. *See, e.g., Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (counsel receiving even 38.9% of settlement benefit is "clearly excessive"). Accordingly, to have any chance of surviving review, settling parties must structure the deal to obfuscate the true allocation. This is accomplished by larding the analysis with hypothetical class recoveries and amorphous "benefits" that ultimately have little value to the class, but are cheap for defendants to provide and so easy to include in the deal.

2. One tool to game class-action settlements is spurious injunctive relief. The defendant agrees to something that makes no material difference to the class, or to something it was doing anyway, and class counsel releases class claims for damages and uses the injunction to rationalize attorneys' fees. Erichson at 874–78. For example, in *Poertner v. Gillette Co.*, 618 F. App'x 624 (11th Cir. 2015), Gillette "agreed to a labeling change on a product that it no longer manufactured, marketed, or sold." Erichson at 875; Erin L. Sheley & Theodore H. Frank, *Prospective Injunctive Relief and Class Settlements*, 39 Harv. J. L. & Pub. Pol'y 769, 783–84 (2016) ("Sheley/Frank"). Indeed, until 2016, there were dozens of class actions every year challenging nearly every merger of publicly-traded companies with the intent of settling quickly for meaningless disclosures and attorneys' fees. *In re*

Walgreen Co. Stockholder Litig., 832 F.3d 718, 721 (7th Cir. 2016); Jill E. Fisch *et al.*, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 Tex. L. Rev. 557 (2015); Sheley/Frank at 779–80. Courts split on whether district courts have the discretion to find that spurious injunctions benefit the class. *Compare, e.g., Subway Footlong*, 869 F.3d at 556 ("No class action settlement that yields zero benefits for the class should be approved") (quoting *Walgreen*, 832 F.3d at 724) *with In re Motor Fuel Temp. Sales Practices Litig.*, 872 F.3d 1094, 1118 (10th Cir. 2017) (no error for district court to ignore evidence that injunction would make class as a whole worse off economically),[2] *and Poertner*, 618 F. App'x 624. *See also Pearson v. NBTY, Inc.*, 772 F.3d 778, 784–86 (7th Cir. 2014) (Posner, J.) (expressing appropriate skepticism about value of "superfluous" labeling changes) ("*Pearson I*").

3. The most infamous tool to create the illusion of relief is the coupon settlement. The settlement awards the class expiring coupons or vouchers or credits to purchase defendants' goods or services; class counsel seeks a fee award based on the face value of the coupons; the parties know that the vast majority of the coupons will expire unused, costing the defendant nothing, while the redeemed coupons may be viewed by the defendant as simply a marketing cost. Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor's Clothes of Class Actions*,

[2] *See generally* Lester Brickman, *Lawyer Barons* 348, 366 n.58 (2011) (calling *Motor Fuel* injunctive relief "economically worthless" and noting California Energy Commission's cost-benefit analysis found proposed injunctive relief "negative or a net cost to society"); Sheley/Frank at 795–800 (same).

18 Geo. J. Legal Ethics 1343 (2005); James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 Geo. J. Legal Ethics 1443, 1445, 1448 (2005) (coupon redemption rates are typically less than 3%); *e.g., Rouse v. Hennepin County*, 2016 WL 3211814 (D. Minn. Jun. 9, 2016) (only 45 vouchers redeemed in 283,000 member class, with class counsel receiving over fifty times as much as absent class members); Perry Cooper, *Charity Loses $700K Award After Complaining About Gift Cards (Corrected)*, BNA (Aug. 16, 2017) (describing *Hochstetler v. Pac. Gateway Concession, LLC*, No. 14-cv-04748 (N.D. Cal.), where class claimed only $700 worth of gift cards, while attorneys were paid $200,000). So a settlement might provide "$100 million" worth of coupons, supposedly rationalizing class counsel's $14 million fee request. But the class will typically actually receive less than $3 million in benefit—the same upside-down ratio as our obviously unacceptable hypothetical *Acme* settlement above.

4. Similar to the coupon settlement is a "claims-made" structure where defendants agree to make a large amount of money hypothetically *available* but pay out only on the claims that class members actually file, retaining the rest. Erichson at 889–93; Daniel Fisher, *Banner Ads Are A Joke In The Real World, But Not In Class-Action Land*, Forbes (Sep. 15, 2016). The defendant agrees to make an amount available to all of the many people who might be eligible to make a claim—say, $5 each for 10 million possible claimants in our *Acme* hypothetical. The settling parties then call this a $50 million settlement in press releases and court papers based on the amount "available," and the fee request is made on this basis. *E.g.,* Neil M. Gorsuch & Paul B. Matey, *Settlements in Securities Fraud Actions: Improving Investor Protection* 7 (2005)

(noting AT&T/Lucent consumer class settlement characterized as worth "$300 million," though class members received only $8 million from the claims process, while lawyers received over $80 million).

But the predictable result is that most class members go totally uncompensated because they don't file a claim: so predictable that third-party services offer to forecast the cost of a claims-made class-action settlement with actuarial certainty and assume 100% of the risk should payouts be higher. Ted Frank, *Settlement Insurance Shows Need for Court Skepticism in Class Actions*, OpenMarket blog (Aug. 31, 2016). "[A]mong defense counsel, low participation rates under claims-made class action settlements are both common knowledge and a selling point: class members recover—and a defendant pays—much less when class members opt in than when a defendant disburses funds directly to class members." *Gascho v. Global Fitness Holdings LLC*, 822 F.3d 269, 298–99 (6th Cir. 2016) (Clay, J., dissenting).

Claims rates are rarely disclosed, but Respondent Google's counsel of record's firm performed a study that suggested claims rates are typically in the single-digit percentages. Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* 7–8 (Dec. 11, 2013). "Single-digit percentage" is probably an overstatement: one settlement administrator acknowledged that the median claims rate is far less than 1% in settlements without direct notice and without easy claims processes. *See, e.g.*, *In re Carrier IQ, Inc., Consumer Privacy Litig.*, 2016 WL 4474366 at *4 (N.D. Cal. Aug. 25, 2016) (citing authorities); *Pearson I,* 772 F.3d at 782 (same); Alison Frankel, *A Smoking Gun in Debate over Consumer Class Actions?*, Reuters (May 9, 2014); Daniel Fisher, *Odds Of A Payoff In Consumer Class Action? Less Than A Straight Flush*, Forbes (May 8, 2014). Even when the class is directly mailed, response rates "rarely exceed seven percent." *Sullivan v. DB Investments*, 667 F.3d 273, 329 n.60 (3d Cir. 2011) (*en banc*).

Courts have split on whether district courts are permitted—or even required—to value a settlement based on the hypothetical recovery. *Compare Pearson I*, 772 F.3d at 780–81, *and Allen v. Bedolla*, 787 F.3d 1218, 1224 n.4 (9th Cir. 2015), *with Gascho*, 822 F.3d at 283–88, *and Wilson v. EverBank, N.A.*, 2016 WL 457011, at *18 (S.D. Fla. Feb. 3, 2016) (*Poertner* forbids consideration of actual recovery). Because many courts honor the fiction that a claim that will never be made is as valuable as a check that is actually cashed, the resulting "class action math" allows the "fee collected by the plaintiffs' attorneys [to] outsize the benefit paid to consumers, an outcome that is increasingly more common." Jacob Gershman, *Value of Beck's Beer Settlement a Case Study in Class Action Math*, Wall St. J. (Oct. 22, 2015); *see also* Roger Parloff, *Should Plaintiffs Lawyers Get 94% of A Class Action Settlement?*, Fortune (Dec. 15, 2015).

5. No explicit collusion is needed to accomplish such results. All that is required to allow such gamesmanship are legal rules that do not forbid such settlements, and settling parties responding to the resulting incentives to benefit themselves at the expense of absent class members. Indeed, when legal rules permit such behavior, class attorneys would punish themselves if they sought a better settlement for their clients: every dollar reserved to the class is a dollar that will not be paid to class counsel. *Pearson I*, 772 F.3d at 783, 787. A rule requiring evidence of collusion before rejecting a class-action settlement—as the

Ninth Circuit required here—will green-light many abusive settlements. Erichson at 871; *Dry Max Pampers*, 724 F.3d at 717–18 (non-collusive adversarial process does not protect absent class members from class counsel's breach of fiduciary duty).

This case involves *cy pres*, another option in the toolkit to create the illusion of relief to minimize settlement cost to defendants while increasing attorneys' fees to class counsel, all at the expense of absent class members.

B. *Cy pres* is especially prone to abuse.

As the Chief Justice recognized in *Marek v. Lane*, *cy pres* settlements raise "fundamental concerns." 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting denial of certiorari). Unfettered use of *cy pres* awards has been subject to substantial criticism by courts and scholars alike. There are at least six specific concerns regarding the type of *cy pres* award upheld in this case.

1. When courts award attorneys' fees based on the size of the *cy pres* fund rather than on the amount the class actually directly received, it "ensur[es] that class attorneys are able to reap exorbitant fees regardless of whether the absent class members are adequately compensated." Beisner at 13. Such awards create the illusion of relief that can "increase the likelihood and absolute amount of attorneys' fees awarded without directly, or even indirectly, benefitting the plaintiff." Redish at 661. As a result, class attorneys are financially indifferent as to whether a settlement is structured to compensate their clients or direct settlement proceeds to third parties. Where *cy pres* can be used to facilitate an early settlement with a profitable

fee award, class attorneys are encouraged to sell their putative clients down the river.

Cy pres can also be an enticing settlement feature for lawyers interested in promoting their own personal political or charitable preferences. It is not uncommon to see publicity photographs of attorneys handing oversized checks to their selected *cy pres* recipients or to see recipients issue public statements of gratitude to the class attorneys. *E.g.,* Florida Bar Foundation tweet (Jun. 8, 2018), archived at http://archive.li/h0YaV; *see also* Chris J. Chasin, *Modernizing Class Action Cy Pres Through Democratic Inputs*, 163 U. Penn. L. Rev. 1463, 1484 (2015) ("Many law firms tout their cy pres victories as public service," citing example of self-promotional website of law firm with their *cy pres* recipients) ("Chasin"). Class attorneys have used *cy pres* awards to fund the development of future litigation and to make sizable donations to their *alma mater*. *See, e.g.*, Ashley Roberts, *Law School Gets $5.1 Million to Fund New Center*, GW Hatchet (Dec. 3, 2007) (describing $5.1 million *cy pres* award to George Washington University School of Law to create a "Center for Competition Law").

In one case, the plaintiffs' attorney and an attorney from the *cy pres* recipient even jointly presented a continuing legal education program titled "Cy Pres for Reproductive Justice: Using Class Action Settlements to Get Money for the Movement," promoted with the hashtag "#CyPres4RJ," in which they advised participants on how non-profit organizations could best position themselves for *cy pres* awards. If/When/How Events (May 16, 2018), archived at http://archive.is/8VJ82. The program employed a case study exemplifying some of the problems inherent with allowing attorneys to dole out the class's damages to unrelated third parties of their choosing. In *Ye v. Sephora USA, Inc.*, No. 3:14-cv-05237 (N.D. Cal.), plaintiffs alleged that Sephora discriminated against the class on the basis of race and national origin when Sephora deactivated the loyalty program associated with email addresses with certain Chinese domains. After fewer than 2000 class members filed claims for a capped recovery amount, the court awarded at class counsel's request the "substantial amount" that remained to the National Asian Pacific American Women's Forum, even after the plaintiffs' attorney admitted that the organization did little to address consumer rights (such as those at issue in the litigation) and instead tended to address issues such as "the pay gap, and adverse stereotypes against Asian American women that lead to abortion bans." *Id.,* Tr. of Proceedings 17 (May 30, 2017) (Dkt. 176).

"By disincentivizing class attorneys from vigorously pursuing individualized compensation for absent class members, cy pres threatens the due process rights of those class members." Redish at 650. Class attorneys are tempted to shirk their constitutional duties to adequately defend class members' legal rights because their compensation is no longer tied to such advocacy. *Id*. When courts treat a dollar of *cy pres* as equivalent to a dollar of direct class recovery, class attorneys' all-too-human predilection will prefer to fund their favorite charities or causes over thousands or millions of anonymous and likely ungrateful class members.

2. Defendants, facing no resistance from class attorneys, use *cy pres* awards to structure settlements to minimize costs or even benefit themselves. The *Lane v. Facebook* settlement, for example, directed all of its *cy pres* to a new charity "to be funded by Facebook,

partially controlled by Facebook, and advised by a legal team consisting of Facebook's counsel and their own purported counsel." 696 F.3d at 829, 835 (Kleinfeld, J., dissenting). Microsoft attempted to resolve an antitrust class action by directing a *cy pres* donation of computers and software to schools—which the court suggested was an attempt to flood the educational market with Microsoft products at the expense of then-market leader Apple. *In re Microsoft Corp. Antitrust Litig.*, 185 F. Supp. 2d 519, 528 (D. Md. 2002).

Google and Facebook have directed *cy pres* awards in other privacy-breach cases to the Electronic Frontier Foundation, a nonprofit that "is often an ally of Google and Facebook when it comes to staving off liability to rights holders over user-generated infringing content" and on other public policy issues. Roger Parloff, *Google and Facebook's New Tactic in the Tech Wars*, Fortune (July 30, 2012) (noting criticism in *Google Buzz* case that *cy pres* awards were steered to organizations otherwise paid by Google to lobby or consult for the company). At the same time, those companies have apparently vetoed awards to privacy-focused nonprofits that they view as "too aggressively devoted to combatting the wrongs that allegedly harmed the class." *Id*. Respondent Google, in particular, has been sharply criticized for using its funding decisions to influence the research and advocacy of nonprofits. *See* Kenneth P. Vogel, *Google Critic Ousted From Think Tank Funded by the Tech Giant*, N.Y. Times (Aug. 30, 2017).

In another recent Google *cy pres* settlement, the beneficiaries substantially overlapped with the Google-related beneficiaries in this case. *In re Google Inc. Cookie Litig.*, 2017 WL 446121 (D. Del. Feb. 2, 2017), *appeal pending*, No. 17-1480 (3d Cir.). One small difference between the two settlements was that that settlement benefited Public Counsel, a charity where the *Google Cookie* class counsel was chairman of the board, instead of Chicago-Kent Law School, an *alma mater* of class counsel in this case.

Even if class-action defendants like Google and Facebook ultimately receive no direct benefit from *cy pres* awards, they still are able to take credit for their charity. *See Molski v. Gleich*, 318 F.3d 937, 954 (9th Cir. 2003) ("it seems somewhat distasteful to allow a corporation to fulfill its legal and equitable obligations through tax-deductible donations to third parties"). And defendants have reasons to prefer giving money to *cy pres* to reduce the chances of having their customers learn that they have paid money to resolve claims of wrongdoing. Russell M. Gold, *Compensation's Role in Deterrence*, 91 Notre Dame L. Rev. 1997 (2016).

In some cases, a *cy pres* award may simply redirect money that the defendant would have given to a charity anyway, creating the illusion of relief when all that the settlement changes is the labeling of accounting entries. *Dennis*, 697 F.3d at 867–68 (*cy pres* awards that overlap with charitable gifts to which the defendant has already committed are a "paper tiger" in terms of deterrence). One *cy pres* recipient here, for example, is the Stanford Center for Internet and Society, to which Google has contributed millions of dollars in donations and whose scholars regularly support Google's positions on a variety of policy issues, including privacy litigation. *See* Jeffrey Toobin, *The Solace of Oblivion*, The New Yorker (Sep. 29, 2014); John Hechinger and Rebecca Buckman, *The Golden Touch of Stanford's President*, Wall St. J. (Feb.

24, 2007) ("'It might as well be the Google Center.'" (quoting director of Dartmouth's Ethics Institute)). *Cy pres* awards to organizations that Google already donates to are the functional equivalent of the much-criticized reversion clause where unclaimed class funds revert to defendant. *Cf. Pearson I,* 772 F.3d at 786–87 (finding no "justification" for reversion clause).

3. As in this case, *cy pres* awards typically fail to redress class members' alleged injuries for which they are waiving their rights. The Seventh Circuit stated the problem plainly: "There is no indirect benefit to the class from the defendant's giving the money to someone else." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004). "[S]ettlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members." *Klier*, 658 F.3d at 474 (citing *ALI Principles* § 3.07 cmt. (b)). This would unquestionably be the case had class members pursued individual litigation under the same substantive law. Rule 23 cannot operate to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Neither lower courts nor class attorneys should have the discretion to distribute that property to third parties before class members have been compensated and, more generally, to certify classes structured so as to stymie or preclude class members' recovery. *Cf. Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 628 (1989) ("There is no constitutional principle that gives one person the right to give another's property to a third party.").

The problem is compounded the further away from "next best" the *cy pres* award is. For example, a settlement of securities litigation proposed giving bank shareholder class members' money to a charity that sues banks over foreclosures. *In re Citigroup*

Securities Litig., 199 F. Supp. 3d 845, 852–53 (S.D.N.Y. 2016). A settlement over Pfizer's marketing of the diabetes drug Rezulin donated $2 million to Lubavitch Chabad of Illinois. Ameet Sachdev, *Charities Reaping Lawsuit Dividends*, Chi. Tribune (Sep. 9, 2007).

Even worse was a settlement resolving challenges to Google's unauthorized disclosure of its users' email contacts when it launched its "Buzz" social network. Class members—some of whom had suffered disclosures that aided stalkers, jeopardized confidential journalist sources, or hinted at affairs—received no part of the $8.5 million settlement, while class counsel received over $2 million and the remainder was divided among fourteen charities, including the local YMCA and the Brookings Institution—and, by the *sua sponte* order of the district court, a center at a university where the district court judge taught as a visiting law professor.[3] *In re Google Buzz Privacy Litig.*, 2011 WL 7460099, at *3 (N.D. Cal. Jun. 2, 2011); Pamela A. MacLean, *Competing for Leftovers*, California Lawyer (Sep. 2, 2011); *see also In re San Juan Dupont Plaza Hotel Fire Litig.*, 687 F. Supp. 2d 1 (D.P.R. 2010) (proceeds from hotel fire litigation paid

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[3] While not present in this case, *cy pres* aimed at local charities at the expense of a national class is also a persistent problem. *Compare Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989), *with*, *e.g.*, *Perkins v. Am. Nat'l Ins. Co.,* 2012 WL 2839788 (M.D. Ga. July 10, 2012), *and In re Easysaver Rewards Litig.*, 921 F. Supp. 2d 1040 (S.D. Cal. 2013) ($3 million to local San Diego schools including *alma mater* of counsel for both parties), *rev'd on other grounds*, 599 F. App'x 274 (9th Cir. 2015), *settlement approved again on remand*, 2016 WL 4191048, *appeal pending*, No. 16-56307 (9th Cir.); *see generally* Sam Yospe, *Note, Cy Pres Distributions in Class Action Settlements*, 2009 Colum. Bus. L. Rev. 1014, 1030–31.

as *cy pres* to Animal Legal Defense Fund); *SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 414–15 (S.D.N.Y. 2009) (collecting numerous cases where *cy pres* awards "stray[ed] far from the 'next best use' ").

4. Before succumbing to the administrative convenience of *cy pres* settlements in more recent decisions, the Second Circuit expressed concern that the availability of *cy pres* relief would permit otherwise unthinkable class certifications and would "induce plaintiffs to pursue doubtful class claims for astronomical amounts and thereby generate leverage and pressure on defendants to settle." *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179, 185 (2d Cir. 1987) (cleaned up); *see also Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1124–25, 1129 (9th Cir. 2017) (because *cy pres* remedies are available, class proponents are not required to "demonstrate that there is an administratively feasible way to determine who is in the class"); *cf. also McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231–33 (2d Cir. 2008). In this way, *cy pres* incentivizes both the bringing of otherwise unprofitable "strike suits" that would be infeasible to litigate due to unmanageability or questionable merit and their settlement on terms mutually agreeable to class counsel and the defendant. Redish at 639–40; *cf. also Shady Grove Orthopedic Assoc. v. Allstate Ins.,* 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) (noting that class certification creates "pressure on the defendant to settle even unmeritorious claims"). "Indeed, in many class actions it is solely the use of cy pres that assures distribution of a class settlement or award fund sufficiently large to guarantee substantial attorneys' fees and to make the entire class proceeding seemingly worthwhile." Redish at 621.

For example, the Seventh Circuit in *Walgreen* and *Subway Footlong* rejected illusory injunctive-relief settlements of meritless litigation that provided no material benefit to the class. "The type of class action illustrated by this case—the class action that yields fees for class counsel and nothing for the class—is no better than a racket." *Walgreen*, 832 F.3d at 724; *accord Subway Footlong*, 869 F.3d at 553, 556. But the Ninth Circuit's rule of decision, if affirmed by this Court, would create a loophole for unscrupulous attorneys to resume the "racket" condemned by the Seventh Circuit. All that would be required to transform the *Walgreen* and *Subway Footlong* settlements into appeal-proof paychecks for class counsel in the Ninth Circuit is the sort of illusory *cy pres* settlement in *Lane*. Merger strike suits "substantially" declined after *Walgreen* and a similar Delaware state case. Caleb Hannan, *This Lawyer Is Making It Less Profitable to Sue When Companies Merge*, Bloomberg Businessweek (Aug. 2, 2017). If class counsel can game the system with economically equivalent *cy pres* settlements, such extortionate suits can be expected to return to pre-2016 levels.

5. Many *cy pres* recipients, including some in this case, Pet. App. 131, have political valence sympathetic to the preferences of class counsel or the defendant, but contrary or offensive to a substantial proportion, or even the majority, of class members. *E.g., Citigroup*, 199 F. Supp. 3d at 853–54; *cf. also Motor Fuel Temp.*, 872 F.3d at 1113–14 (affirming settlement that established fund for class counsel to use for political lobbying). Requiring class members to surrender their rights to "subsidize speech by a third party that he or she does not wish to support" raises serious First Amendment concerns. *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014). Settlements' implementations of

the Rule 23(b)(3) opt-out right usually have requirements that would impermissibly burden class members under this Court's precedents, and rarely have any effect on class counsel's ability to transform the class-action procedure into a political funding mechanism. Moreover, silence is not consent. *Knox v. SEIU, Local 1000*, 567 U.S. 298, 312–22 (2012).

6. Finally, *cy pres* awards often create the appearance or reality of judicial conflicts of interest, as in the *Google Buzz* settlement discussed above. New York University's Samuel Issacharoff, Reporter for ALI's *Principles of the Law of Aggregate Litigation*, has described *cy pres* relief as "an invitation to wild corruption of the judicial process." Adam Liptak, *Doling Out Other People's Money*, N.Y. Times (Nov. 26, 2007) ("Liptak, *Doling*"). Charities are increasingly lobbying judges for a cut of the proceeds in class-action settlements. *Id*. And "[a]s part of their effort to secure judicial approval of proposed settlements, the parties often include a *cy pres* award that benefits a charity with which the judge or his or her family is affiliated." Beisner at 13; *see also* Erichson at 885.

These tactics can create a conflict between the interests of the presiding judge and those of class members, who would be better served by direct compensation. *Klier*, 658 F.3d at 482 (Jones, C.J., concurring) ("[D]istrict courts should avoid the legal complications that assuredly arise when judges award surplus settlement funds to charities and civic organizations."); *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 180 n.16 (3d Cir. 2013). "[W]hile courts and the parties may act with the best intentions, the specter of judges and outside entities dealing in the distribution and solicitation of large sums of money creates an appearance of impropriety." *Bear, Stearns*, 626 F. Supp. 2d at 415; *see, e.g.*, *Perkins,* 2012 WL 2839788 (approving $1.5 million *cy pres* award to the presiding judge's *alma mater*).

Indeed, it is even conceivable that "parties can effectively judge-shop by selecting *cy pres* recipients that would force recusal." Ted Frank, Fraley v. Facebook *update*, Point of Law (July 12, 2012) (noting district judge recusal for unspecified reasons after parties proposed *cy pres* settlement that named charitable beneficiaries affiliated with judge and her husband); *but see Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038, 1042 (9th Cir. 2011) (permitting parties to select judge's spouse's charity as *cy pres* recipient without requiring recusal).

More generally, an open-ended *cy pres* doctrine is fundamentally incompatible with the judicial role, which "is limited to providing relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm." *Tyson Foods Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) (cleaned up). If it is untenable to compensate non-injured class members, it is all the more untenable to compensate non-injured third parties, who do not even fall within the zone of risk of injury.

> Federal judges are not generally equipped to be charitable foundations: we are not accountable to boards or members for funding decisions we make; we are not accustomed to deciding whether certain nonprofit entities are more "deserving" of limited funds than others; and we do not have the institutional resources and competencies to monitor that "grantees" abide by the conditions we or the settlement agreements set.

In re Compact Disc Minimum Advertised Price Antitrust Litig., 236 F.R.D. 48, 53 (D. Me. 2006); *accord Keepseagle v. Perdue*, 856 F.3d 1039, 1071 (D.C. Cir. 2017) (Brown, J., dissenting). Yet those things are exactly what federal judges are asked to do when faced with a proposed *cy pres* settlement.

C. Rule 23 standards that align class counsel's interests with those of the class are the best way to prevent conflicts of interest in settlements and require rejection of the settlement here.

1. Any settlement, like this one, that provides no direct benefit to the class, cannot be approved. "Because the settlement yields fees for class counsel and zero benefits for the class, the class should not have been certified and the settlement should not have been approved." *Subway Footlong*, 869 F.3d at 557 (cleaned up).

The solution to the problems created by *cy pres* settlements and by class-action settlement conflicts of interest in general is a simple proportionality rule that aligns class counsel's incentives with the class's interests: a settlement that compromises a class's claims, but seeks to pay class counsel an amount disproportionate with the actual and direct benefit to the class, is not fair or reasonable under Rule 23(e). Any other rule will create perverse incentives to structure a settlement allocation to favor class counsel and the defendant at the expense of the class.

The "'ratio that is relevant'" when assessing a fee award "'is the ratio of (1) the fee to (2) the fee plus what the class members received.'" *Pearson I*, 772 F.3d at 781 (quoting *Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014)). That approach excludes settlement funds dissipated through *cy pres* awards from the calculation, and thereby "gives class counsel an incentive to design the claims process in such a way as will maximize the settlement benefits actually received by the class, rather than to connive with the defendant in formulating claims-filing procedures that discourage filing and so reduce the benefit to the class"—and, as in this case, where the settling parties made it literally impossible to file claims, increase the benefit available to *cy pres* recipients. *Id*.

Pearson I did precisely this, reversing a district court's approval of a settlement where class counsel received $2.1 million, the class received $865 thousand, and $1.13 million went to *cy pres*. (There was also an injunction that *Pearson I* thought superfluous.) *Cy pres* "did not benefit the class" and could not be included in determining the reasonableness of the settlement or fee request. 772 F.3d at 784. Even though there were over 12 million class members, and the settlement as a whole provided only pennies per class member, a *cy pres* beneficiary can "receive money intended to compensate victims of consumer fraud only if it's infeasible to provide that compensation to the victims—which has not been demonstrated" because it was conceivably possible to simplify the claims process, improve notice, or make a direct distribution to class members. *Id.*

This settlement is worse than the one whose approval was reversed in *Pearson I*: class counsel received a similar Rule 23(h) award, but the class received $0 instead of $865 thousand. The injunctive relief involved no change in the practices alleged to be illegal, and involved the sort of "superfluous" disclosure criticized by *Pearson I* and *Walgreen*.[4] To top it all off, the *cy pres* beneficiaries had ties to class counsel or defendant or both. Under Petitioners' proposed proportionality rule, the $2 million to $0 ratio means that the settlement in this case was not fair or reasonable as a matter of law and must be rejected.

Throughout this case, Google has argued that the settlement is "adequate" because the class's claims are low in merit or because damages are remote. *E.g.,* Google Br. in Opp. 11. But this is beside the point: that a settlement is adequate does not mean it is fair and reasonable. Perhaps the class deserves no more than a peppercorn in consideration for releasing their claims, but Google was willing to pay millions of dollars to settle the suit. If that is a windfall because Google overpaid, the fiduciary duty of class counsel, plus Rule 23(e)'s fairness and reasonableness requirements require class counsel to share that windfall with the class. Any other result would have the perverse effect of incentivizing low-merit class actions: the lower the quality of the suit, the less the obligation of class counsel to share settlement proceeds with the class. *Compare*, *e.g.*, *Dry Max Pampers*, 724 F.3d 713, *with id.* at 723 (Cole, J., dissenting).

2. Class counsel will respond to court-imposed incentives of the proportionality rule to "maximize the settlement benefits actually received by the class."

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[4] Injunctive relief can provide direct, actual class benefit. For example, the settlement in *In re Volkswagen "Clean Diesel" Litig.* provided for replacement or repair of class members' vehicles. 2016 WL 6248426 (N.D. Cal. Oct. 25, 2016). This case does not raise the issue of how to value such injunctive relief when assessing a reasonable fee.

Pearson I, 772 F.3d at 781. That is more than abstract theory; it is borne out by experience:

- While *Baby Products* left open the possibility of approving *cy pres* settlements, it reversed a settlement approval and ordered the district court to consider whether class counsel had adequately prioritized direct recovery in both terms of settlement approval and the fee award. 708 F.3d at 178. On remand, the parties arranged for direct distribution of settlement proceeds, and paid an additional $14.45 million to over one million class members—money the parties initially directed to *cy pres* before a successful objection led to an "exponential increase" in class recovery. *McDonough v. Toys "R" Us, Inc.*, 80 F. Supp. 3d 626, 660 (E.D. Pa. 2015).
- In *Fraley v. Facebook*, the district court refused preliminary approval of an all-*cy pres* $20 million settlement, though the class was even larger than the one here, some 150 million in size. Though the settlement fund was less than $0.14 per capita, the parties were, at the behest of the district court, able to create a claims process that distributed $15/claimant to over 600,000 claimants. 966 F. Supp. 2d 939.
- After objection to a claims-made settlement in a consumer class action over aspirin labeling where the vast majority of funds would have gone to *cy pres*, the parties used subpoenaed third-party

retailer data to identify over a million class members (instead of the 18,938 who would have been paid $5 each in the original claims-made structure), and paid an additional $5.84 million to the class. *In re Bayer Corp. Litig.*, No. 09-md-2023, 2013 WL 12353998, at *3 (E.D.N.Y. Nov. 8, 2013); *id.* Dkt. 218-1.

- A similar successful objection to residual *cy pres* in an antitrust settlement increased class recovery from $2.2 million to $13.7 million. *Pecover v. Electronic Arts, Inc.*, No. 08-cv-2820, 2013 WL 12121865 (N.D. Cal. May 30, 2013); *id.* Dkt. 466.
- On remand in *Pearson I*, the parties renegotiated to give class members at least $4 million more in cash. Settlement ¶¶7–8, No. 11-cv-07972, Dkt. 213-1 (N.D. Ill. May 14, 2015).

In short, as *Pearson I* reasoned, if courts make lawyers direct money to clients in order to get paid, that is *exactly* what happens. Alison Frankel, *By Restricting Charity Deals, Appeals Courts Improve Class Actions*, Reuters (Jan. 12, 2015) ("Frankel, *Restricting*"). After appellate courts reject disproportionate settlements, class counsel in colorable class actions like *Pearson I* and *Baby Products* come up with more appropriate settlements; class counsel in meritless class actions like *Dry Max Pampers*, *Walgreen*, and *Subway Footlong* slink away and dismiss their cases. Whether one thinks the main purpose of class actions is to facilitate compensation or to deter bad behavior by defendants, everyone should want the class-action system to promote good cases and discourage bad ones.

3. A common refrain in support of *cy pres* is that it would be too difficult to distribute small sums to class members. But that argument disregards the typically low claims rate in consumer and privacy class-action settlements. If the claims rate in the *Gaos* class was similar to that in *Fraley,* each claimant would receive $7.

Carrier also approved a privacy class-action settlement that distributed a net settlement fund of $5.9 million amongst a 30-million-member class. As *Carrier* observed, "if all 30 million people were to make claims, then each person would get approximately 20 cents. … However, that is not what actually happens under the settlement." 2016 WL 4474366 at *2. The *Carrier* settlement funds were distributed *pro rata* to eligible claimants, with a contingent *cy pres* provision only if distribution proved "economically unfeasible." *Id.* Ultimately, only 42,577 class members (0.14% of the class) filed claims, resulting in individual payments of well over $100. Such a low claims rate is customary. *Id*. at *4; *see* discussion in Section I.A.4 above. Even if the *Carrier* class size had been five times larger, and the claims rate five times higher, claiming class members still would have received over $5.50 each.

Even if claims rates were abnormally high such that it would be prohibitively expensive to distribute money to every claimant, random lottery distribution to a percentage of claiming class members would successfully distribute the fund. Shay Lavie, *Reverse Sampling: Holding Lotteries to Allocate the Proceeds of Small-Claims Class Actions*, 79 Geo. Wash. L. Rev. 1065 (2011). As arbitrary as that sounds, it is less arbitrary to distribute $5 million of settlement money to 50,000 or 1,000,000 class members than nothing to class members and $5 million to third-party charities affiliated with class counsel and Google, and no more arbitrary than the typical claims-made settlement that leaves over 99% of the class uncompensated.

4. Below, Google complained that it would be less just to distribute proceeds directly to a small percentage of the class than to provide indirect benefits to the entire class. But this argument proves too much. As discussed in Section I.A.4, nearly every consumer class-action settlement leaves over 90%, and often over 99%, of the class uncompensated. Google's argument would imply that it is preferable for virtually every consumer class-action settlement to refuse to distribute any funds to the class and be an all-*cy pres* settlement, essentially destroying the village in order to save it. But no appellate court has ever so much as implied that, so long as some class members go uncompensated, it would be unfair to directly compensate *any* class members. Trial courts engage in "judicially impermissible misappropriation" when they conclude that class members are less deserving than a charity. *In re BankAmerica Corp. Securities Litig.*, 775 F.3d 1060, 1065 (8th Cir. 2015).

5. Respondents might argue that Petitioner's proposed rule is unfair because it does not compensate class counsel for achieving larger societal benefits. But that argument ignores class counsel's fiduciary duty to his or her clients.

> The general fiduciary principle requires that the agent subordinate the agent's interests to those of the principal and place the principal's interests first as to matters connected with the agency relationship …. Unless the principal consents, the general fiduciary principle … also requires that an agent refrain from

> using the agent's position or the principal's property to benefit the agent or a third party.

American Law Institute, *Restatement (Third) of Agency* § 8.01, cmt. (b) (2012).

This contrasts with civil rights and discrimination cases where "vindication of important [civil] rights" proceed "under a private attorney general theory" "even when large sums of money are not at stake." *Farrar v. Hobby*, 506 U.S. 103, 121–22 (1992) (O'Connor, J., concurring). In contrast, private-law class actions for consumer injury or statutory damages *do* reflect rights that are pecuniary in nature, and Rule 23 decisions in those cases should reflect that fees—and settlements designed to provide fees—"depend on obtaining substantial monetary relief." *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (plurality opinion of Brennan, J.). The Court may thus reasonably decide here or in another case to limit the extent to which Petitioners' proposed proportionality rule applies to class settlements of 42 U.S.C. § 1983 and other civil rights actions.

This Court's fee-shifting jurisprudence, for better or worse, imposes a number of protections against abusive civil-rights litigation generally not present in private-law class actions today. Multipliers of lodestar are common in fee awards in private-law class-action settlements (including this one, Pet. App. 56), but are only available under federal fee-shifting statutes providing for a "reasonable" fee in extraordinary circumstances. *Perdue v. Kenny A.*, 559 U.S. 542 (2010).[5] This settlement would pay class counsel

[5] Indeed, class counsel received a higher multiplier in this case by settling it than they would have been entitled under *Kenny A.* for winning it outright.

twice their lodestar, but did not give plaintiffs even so much as "the moral satisfaction of knowing that a federal court concluded that their rights had been violated in some unspecified way." *Farrar*, 506 U.S. at 114 (cleaned up). In contrast, in 42 U.S.C. § 1988 cases, there must be *some* private relief before the public benefit to non-parties can justify an award of fees. *E.g., id.*; *Hewitt v. Helms*, 482 U.S. 755 (1987). Section 1988 fee applicants cannot obtain compensation for work related to unsuccessful claims in the litigation. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). Nor can they claim credit for actions voluntarily undertaken by defendants. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Resources*, 532 U.S. 598 (2001). In 42 U.S.C. § 1983 lawsuits, qualified immunity protects defendants from damages against all but clearly established violations of law. *E.g., District of Columbia v. Wesby*, 138 S. Ct. 577 (2018). That jurisprudence gives § 1983 defendants leverage to protect themselves against meritless litigation that private-law defendants do not have. The topsy-turvy result in the Ninth Circuit is that it is more lucrative—and often less risky—to bring and quickly settle a low-merit private-law class action that returns little or nothing to the class than it is to litigate a fully meritorious civil rights claim. Petitioners' proposed proportionality rule would begin to restore the balance intended by Congress in passing 42 U.S.C. § 1988.

An arm's-length settlement reflects a case's settlement value, be that the expected value of fully litigating the case (the probability of success multiplied by the potential recovery), the value to the defendant of avoiding the financial and publicity burden of continuing litigation, or some combination of the two. When the parties allocate that settlement value amongst the class, the class counsel, and non-class members, every dollar going to "larger societal benefits" is a dollar that isn't going to class members. Notwithstanding the preferences of some academics, Rule 23 is merely a procedural joinder device. *Shady Grove*, 559 U.S. at 408 (plurality opinion of Scalia, J.) (class action is a "species" of joinder). It does not expand substantive rights and class attorneys in private-law cases are not deputized private attorneys general. *Microsoft Corp. v. Baker*, 137 S. Ct. at 1717 (Thomas, J., concurring). Instead, class attorneys are attorneys with clients and fiduciary duties to those clients. *Dry Max Pampers*, 724 F.3d at 718. Class members are supposed to be the "foremost beneficiaries" of class settlements. *Baby Products*, 708 F.3d at 179. The rules for determining the reasonableness of fees and settlements under Rule 23 should reflect that, and not reward breaches of fiduciary duty.

6. The reason a rule of decision applying to all Rule 23 settlements is preferable to a narrower rule applying only to *cy pres* settlements is because the conflicts of interest that lead to *cy pres* abuses do not go away if only *cy pres* is barred or limited. Just as parties could get around bars on spurious injunctive relief settlements of low-merit class actions by structuring them as *cy pres* settlements (Section I.B.4, above), parties will be able to use other tools in the abusive-settlement toolbox (Section I.A, above) to construct functionally economically equivalent settlements with the same self-dealing and lack of benefit to class members.

A decision applying only to *cy pres* settlements merely continues the game of whack-a-mole, where settling parties move on to the next tactic to self-deal at the expense of class members. *Cf.* Rodriguez, *Era* (suggesting that *cy pres* settlements rose in popularity in response to increased restrictions on coupon settlements).

II. The Ninth Circuit's holdings create serious perverse incentives and should be rejected.

In the alternative, if the Court declines to adopt a ruling applying to all Rule 23 settlements, it should still reverse the Ninth Circuit's judgment, which exacerbates the conflict-of-interest problem in class actions. A bright-line rule is required because of "the substantial history of district courts ignoring and resisting circuit court *cy pres* concerns and rulings in class action cases." *BankAmerica Corp.*, 775 F.3d at 1064; *cf. also* Hillary A. Sale, *Judges Who Settle*, 89 Wash. U. L. Rev. 377, 411 (2011). And here, the district court spoke of a desire to reject the settlement, but felt constrained by Ninth Circuit law to approve it.

A. *Cy pres* is a breach of fiduciary duty when it is feasible to distribute settlement funds to some class members.

Cy pres awards are inappropriate in class-action settlements if it is feasible to distribute cash to *any* absent class members. Under the standard set by the Ninth Circuit, it is not considered "feasible" to provide any compensation to class members when it would be infeasible to compensate *all of them*. The result is that, by defining a sufficiently large (or unascertainable) class, class counsel can ensure that direct compensation is *never* required, opening the door to a *cy pres*-only settlement that denies class members any real relief. Most other courts to consider the question hold that "because the settlement funds are the property of the class, a *cy pres* distribution to a third party of unclaimed settlement funds is permissible only when it is not feasible to make further distributions to class members" who have not yet been fully compensated with what the complaint requested. *BankAmerica Corp.*, 775 F.3d at 1064 (cleaned up); *accord Klier*, 658 F.3d at 475; *Pearson I*, 772 F.3d at 784; *Ira Holtzman, CPA v. Turza*, 728 F.3d 682, 689 (7th Cir. 2013) (Easterbrook, C.J.). That a class counsel claims identifying class members would be "difficult and costly" is insufficient to justify *cy pres*. *BankAmerica Corp.*, 775 F.3d at 1064. As discussed in Section I.C.3, it is nearly always feasible to distribute settlement funds to *some* class members.

The Ninth Circuit's definition of feasibility would permit *almost every consumer class-action settlement* to completely ignore payments to class members. The vast majority of consumer and privacy class-action settlements are for less than a dollar or two per class member. The settlement of a 2015 data breach of insurer Anthem was for a record $115 million—but after attorneys' fees and settlement administration costs, there would be only about $0.65 per class member for the 79-million member class. Editorial Board, *The Anthem Class-Action Con*, Wall St. J. (Feb. 11, 2018). The Ninth Circuit's test would have permitted the parties to divert all of that money to *cy pres*.

Similarly, the Ninth Circuit recently affirmed a settlement of an antitrust suit that established a $27 million gross fund and paid class members about $14.1 million net in cash and gift cards to 35 million class members. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 941 (9th Cir. 2015). $27 million divided by 35 million class members is less than 80 cents a class member. Under the rationale of the decision below, it would not be economically viable for the *Online DVD* parties to distribute money to the class. But they did. It was feasible through a *pro rata* claims process that ultimately paid 1.1 million class members a little over $12 each. An affirmance here would permit the settling parties in a similar case to give zero dollars to the class and donate the entire $14.1 million to their favorite charities.[6]

Even the $135,400,000 settlement fund in *Sullivan v. DB Investments* would qualify as "non-distributable" under the Ninth Circuit's approach. After attorneys' fees, there would be less than $1-$2/class member left for each of the 67 to 117 million consumer subclass members. 667 F.3d at 290.

Cy pres to an outside beneficiary (or better yet, escheat under 28 U.S.C. § 2042) may be appropriate as administrative convenience when, in a large class action, there is a five-digit sum left over from the settlement fund because of uncashed checks. But class attorneys owe a fiduciary duty to class members. Section I.C.5, above. Thus, *cy pres* distribution when distribution to some of the class is possible is "contrary to the interests" of the class. *BankAmerica Corp.*, 775 F.3d at 1068. "Class members are not indifferent to whether funds are distributed to them or to *cy pres* recipients, and class counsel should not be either."

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[6] As it was, the settling parties attempted to divert over $2 million in uncashed checks to charities such as the Geena Davis Institute on Gender in Media; an objection resulted in that money being distributed to the class. *In re Online DVD-Rental Antitrust Litig.*, No. 09-md-2029, Dkt. 659, 661, 668 (N.D. Cal. 2016).

Baby Products, 708 F.3d at 178. It should be "unfathomable that the class's lawyer would try to sabotage the recovery of some of his clients." *Pierce v. Visteon Corp.*, 791 F.3d 782, 787 (7th Cir. 2015) (Easterbrook, J.). The ruling below both ignores class counsel's fiduciary duty to the class, and incorrectly holds there's no reason to require a cash distribution if class counsel prefers *cy pres*. These holdings are both error, and create perverse incentives. Section I.B, above.

There was no factual dispute in this case that it was feasible to distribute the settlement fund to some class members. Pet. App. 120–123. The Ninth Circuit simply refused to require consideration of possible alternatives, Pet. App. 9–10, and this was error.

The Chief Justice's expression of interest in *cy pres* in *Marek* deterred a number of potential *cy pres* settlements. Frankel, *Restricting*. But if the Court affirms the Ninth Circuit's permissive standard, we can expect a boom in *cy pres* settlements nationwide, even for settlements the size of *Sullivan* or *Anthem*. Indeed, Google in another class action has just filed under seal a settlement with *cy pres* recipients likely overlapping the ones here, with proceedings stayed pending the resolution of this case. *In re Google Street View Elec. Commc'ns Litig.*, No. 3:10-md-2184 Dkt. 154 (N.D. Cal. Jun. 15, 2018).

B. A court cannot certify a settlement class if the settlement cannot provide any direct benefit to class members.

Even if one credits the *ipse dixit* claims of Respondents that it is somehow impossible to make any distribution to the class, that simply suggests that it was error to certify this settlement class. There is no benefit accruing to class members in this settlement that is not equally accruing to non-class members and opt-outs. In other words, class members are receiving no marginal benefit in consideration for the waiver of their claims. A faithful fiduciary agent of the class would choose to opt out every single class member so that class members would obtain the settlement benefit while retaining their right to sue; only a breach of that fiduciary duty results in the waiver of the class's claims. (And here, unlike in, say, *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 333 (2013), a meritorious individual action is not negative-value given the statutory damages and entitlement to attorneys' fees. 18 U.S.C. § 2707(c).)

In short, the class action is not "superior to other available methods for fairly and efficiently adjudicating the controversy" because every single class member is worse off than if they opted out and reserved their claims to litigate individually. Rule 23(b)(3) is not satisfied, and it is error to certify the class.

The Second Circuit affirmed a district court's rejection of certification under Rules 23(b)(3) and (a)(4) where the costs of litigation "would be disproportionate to the benefit accruing to the class members"—a 16.5-cent payment. *Gallego v. Northland Group*, 814 F.3d 123, 129–30 (2d Cir. 2016). It "appeared that the intended result of the settlement was 'mass indifference, a few profiteers, and a quick fee to clever lawyers,'" and the district court was correct to refuse to certify. *Id.* If one is to credit Respondents' claims that it was never feasible to compensate the class, then this was litigation brought primarily to benefit the attorneys and their favored third-party beneficiaries, and is an abuse of the class-action system.

Faced with a similar holding from a district court, the Seventh Circuit held that Rule 23(b)(3) is the wrong paradigm to object to class certification, but nonetheless affirmed and rejected class certification under Rule 23(a)(4). "A representative who proposes that high transaction costs (notice and attorneys' fees) be incurred" when no incremental relief to the class was possible "is not adequately protecting the class members' interests." *In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748, 751–52 (7th Cir. 2011) (Easterbrook, J.); *accord Subway Footlong*, 869 F.3d at 557; *Walgreen*, 832 F.3d at 724.

Whether characterized as a (b)(3) issue or an (a)(4) issue, if Respondents persist in asserting that any distribution to the class is infeasible, then the settlement class should not be certified.

C. When selecting *cy pres* recipients, class counsel must avoid even the appearance of impropriety and disclose any conflicts.

Because class counsel owes a fiduciary duty to the class—and because absent class members have little or no say who represents them—courts should not allow even the appearance of divided loyalties or "potentially conflicting interests." *Hansberry v. Lee*, 311 U.S. 32, 44 (1940) (class representatives); *cf. also Young v. United States ex rel. Vuitton et Fils SA,* 481 U.S. 787 (1987) (prosecutors). The distribution of *cy pres* funds to class counsel's *alma mater* instead of the class cannot stand—especially when there was no claim that that decision was merely a coincidence, and especially where the class attorneys hid their relationship with the beneficiary from the court and failed to disclose it in the class notice.

The district court's reasoning for finding no conflict of interest was a *non sequitur*. Pet. App. 59–60. True, the decision to donate to Chicago-Kent was not made solely by Chicago-Kent alumni, but by the district court's reasoning, it would be appropriate to designate *cy pres* to a charity run by a class attorney's husband, because not everyone negotiating the deal was married to the same man.

The Ninth Circuit's requirement that class members must show fraud or collusion before they can undo such a blatant undisclosed conflict has the additional problem of creating unnecessary collateral litigation. If *cy pres* is permissible, and settling parties have no obligation to disclose prior relationships, but class members have the affirmative obligation of demonstrating fraud or collusion, then the only way class members can protect themselves is through engaging in expensive discovery on the attorneys and the parties in every *cy pres* settlement. This unfairly burdens absent class members and the judicial system faced with the inevitable motions practice and collateral discovery disputes. An "agent has the power to conceal his fraud and hide the injury done his principal. It would be a dangerous precedent to lay down as law that unless some affirmative fraud or loss can be shown, the agent may hold on to any secret benefit he may be able to make out of his agency." *United States v. Carter*, 217 U.S. 286, 305–06 (1910).

The better rule is to require settling parties to have the burden to demonstrate that neither the court nor 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." *ALI Principles* § 3.07, cmt. (b). "Conflict of interest" refers to the *risk* of *potential* impairment. The Ninth Circuit's holding that a selection where the conflict exists might be hypothetically proper because of "compromise" and the supposed sufficiency of the programs selected thus misses the point. Even if there were no reason to doubt evidence demonstrating a proper selection and the attorneys' claim to have acted in good faith, "this is irrelevant to the appearance of impropriety." *Wright v. United States*, 732 F.2d 1048, 1055 (2d Cir. 1984) (Friendly, J.); *accord Wendt v. Fischer,* 243 N.Y. 439, 443–44 (1926) (Cardozo, J.); *Meinhard v. Salmon*, 249 N.Y. 458, 465, 467–68 (1928) (Cardozo, J.). The "'appearance' of divided loyalties refers to differing and potentially conflicting interests and is not limited to instances manifesting such conflict." *Keyes v. Pacific Lumber Co.*, 51 F.3d 1449, 1465 (9th Cir. 1995).

Distribution to an *alma mater* is the archetypical example of a conflict, identified as a problem in *cy pres* years before this settlement was executed. Liptak, *Doling*; George Krueger & Judd Serotta, *Our Class-Action System Is Unconstitutional*, Wall St. J. (Aug. 6, 2008); *Bear, Stearns*, 626 F. Supp. 2d at 415; *see also* Erichson at 885; Chasin at 1473. The Ninth Circuit's holding must be rejected.

D. At a minimum, Rule 23(h) fees should entirely or substantially discount the value of *cy pres* to better align class counsel's incentives and deter abusive litigation.

"The class benefit conferred by cy pres payments is indirect and attenuated. That makes it inappropriate to value cy pres on a dollar-for-dollar basis." *In re Heartland Payment Sys., Inc. Customer Data Sec.*

Breach Litig., 851 F. Supp. 2d 1040, 1077 (S.D. Tex. 2012) (Rosenthal, J.). The Ninth Circuit's dollar-for-dollar valuation of *cy pres* for the purposes of calculating attorneys' fees leads to perverse incentives, because class attorneys will generally prefer donations to their favorite charities over diffuse distributions to absent class members. Section I.B.1, above. If *cy pres* is not to be valued at zero, as *Pearson I* holds, it should at least be heavily discounted in the fee calculation to better align incentives.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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

Counsel for Petitioners

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