No. 17-961

IN THE

Supreme Court of the United States

THEODORE H. FRANK and MELISSA ANN HOLYOAK,

Petitioners,

—v.—

PALOMA GAOS, on behalf of herself and all others similarly situated, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION AND TECHNET IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Cases

PAGE(S)

Statutes

Other Authorities

PAGE(S)

INTEREST OF AMICI CURIAE[1]

The Computer & Communications Industry Association (CCIA) represents more than twenty large, medium-sized, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services—companies that collectively generate more than $500 billion in annual revenues.

TechNet is the national, bipartisan network of technology CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50-state level. TechNet's diverse membership includes dynamic American companies ranging from startups to the most iconic companies on the planet and represents over three million employees and countless customers in the fields of information technology, e-commerce, the sharing and gig economies, advanced energy, cybersecurity, venture capital, and finance. TechNet has offices in Albany, Austin, Boston, Chicago, Olympia, Sacramento, San Francisco, Silicon Valley, Tallahassee, and Washington, D.C.

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[1] All parties have consented to the filing of this amici brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person other than amici, their members, and their counsel contributed money that was intended to fund the preparation or submission of this brief.

Amici trade associations represent businesses with billions of users. Given the scale of the services offered by Amici's members, they are prime targets for putative class actions claiming users have been subjected to wrongful conduct under statutes out of step with the complexities of modern online services and the expectations of users. While these cases rarely allege any actual harm to anyone, they threaten Amici's members with substantial liability for statutory damages on behalf of a supposed class that has likely suffered little concrete injury. *Cy pres* settlements are one option Amici's members have for resolving such claims.

INTRODUCTION AND SUMMARY OF ARGUMENT

Technology companies with large user bases often face or are threatened with putative class actions, ostensibly on behalf of some segment of those user bases. These actions result from a number of factors: technology companies' ability to offer innovative products and services at scale to millions of users, outdated and ambiguous statutes that carry the threat of massive statutory damages, and lower courts' reluctance to follow this Court's precedents setting requirements for class certification and mandating that lower courts dismiss cases where no actual harm is shown.

Plaintiffs' attorneys are incented to bring these actions by the theoretical availability of statutory

damages. For their part, defendants are incented to settle these actions given the risk, however remote, of substantial statutory liability and the certainty of millions in litigation costs.

However, settling these cases is complicated by the fact that the putative classes are comprised of unidentified and, in many cases, unidentifiable members, none of whom has likely suffered real harm. Even if identifying and notifying these putative class members were feasible, it would cost millions of dollars and consume most—if not all—of the expected value of the case. A claims process at the required scale would cost millions more.

Cy pres settlements can be a beneficial option in these situations. *Cy pres* settlements allow for resolution of claims involving marginal or inchoate injuries that might otherwise be litigated for years. When targeted appropriately, they can benefit putative class members and society at large by supporting public interest organizations whose objectives are consistent with the policy aims of the litigation. And while these benefits are indirect, in cases like this one, they typically afford more value than an inefficient notice and claims process would yield.

Eliminating or substantially curtailing *cy pres* settlements, as petitioners and their amici urge, unfortunately would not prevent the filing of misguided class actions. Defendants would face the same costs, risks, and settlement pressures, but they would lose a key means of resolving those cases

efficiently to the parties' mutual satisfaction. Not only are defendants worse off when these cases cannot be settled, but putative class members would likewise be worse off in many cases. Instead of the indirect benefits they receive from *cy pres* payments to public interest groups, they may see nothing if a court rejects certification, or they may receive a *de minimis* award when the agreed-upon settlement is consumed by a notice and claims process.

This brief does not address the substantive concerns surrounding class certification or the particular merits of the claims in this case. Instead, Amici argue where class claims likely involve bare statutory violations or allege inchoate harms—which describes many contemporary class actions—*cy pres* settlements can present a valid and workable resolution. In such cases, defendants face claims alleging unproven, nominal injuries for which potential statutory liability and litigation costs may be substantial, but for which putative class members would only receive nominal relief. Amici submit that in the absence of clarification of the scope of this Court's holding in *Spokeo, Inc. v. Robins*, *cy pres* settlements are a critical option for resolving putative class actions based on dubious, but high-stakes, claims.

ARGUMENT

I. Today's Class Action Landscape Is Perilous For Technology Companies.

Technology companies face a challenging environment when it comes to litigating class actions. Many class actions are based on statutes that predate the Internet, featuring statutory damages that do not reflect the realities and scale of modern online services. Further, those actions often allege inchoate harms or bare statutory violations at best. Such claims are seemingly precluded by this Court's dictates in *Spokeo, Inc. v. Robins*, but continue to find purchase in many lower courts. As a result, the propriety of class certification in technology cases is often suspect, but the potential liability can be extreme. In light of the surrounding legal context, *cy pres* settlements are a reasonable means of achieving a mutually beneficial result for plaintiffs and technology company defendants who would otherwise have to resort to costly and fruitless litigation.

A. Outdated Statutes Meant To Address Real Concerns Have Not Been Updated To Consider Advances In Technology.

Neither technology companies nor users are served by Congress' failure to update laws to respond to technological changes. Statutes written decades ago to address legitimate consumer concerns have not been updated to consider advances in technologies that might render their provisions obsolete or

incompatible with how users and companies expect digital services to function. As a result, the applicability of requirements in those statutes to new technologies is uncertain at best. *See, e.g.*, *Microsoft Corp. v. United States*, 829 F.3d 197 (2d Cir. 2016) ("When it passed the Stored Communications Act almost thirty years ago, Congress had as reference a technological context very different from today's Internet-saturated reality. . . . [A] globally-connected Internet available to the general public for routine e-mail and other uses was still years in the future when Congress first took action to protect user privacy."), *vacated as moot by United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018) (en banc); *see also Pinchem v. Regal Med. Grp., Inc.*, 228 F. Supp. 3d 992, 997 (C.D. Cal. 2017) ("Since Congress enacted the TCPA, however, technological advances have made this definition somewhat obsolete, for modern dialers tend to make calls from call lists rather than from self-generated numbers.").

Plaintiffs' lawyers routinely invoke statutes like the Stored Communications Act (SCA) (as in this case), the Telephone Consumer Protection Act (TCPA), the Video Privacy Protection Act (VPPA), and others in contexts that the statutes' drafters could not have anticipated. *See infra* Part I.B. Indeed, Plaintiffs' counsel in this case admitted that "[t]he primary claim here is for statutory damages under a statute that is hopefully [sic] outdated." JA 143.

These outdated statutes often carry the prospect of statutory damages for each violation. *See, e.g.*, 18 U.S.C. § 2702(c) (statutory damages of $1,000 per violation under the SCA). This incents plaintiffs to bring questionable cases, in the hopes of obtaining windfall settlements. *See Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003) ("[I]issues arise from the effects of combining a statutory scheme that imposes minimum statutory damages awards on a per-consumer basis—usually in order to encourage the filing of individual lawsuits as a means of private enforcement of consumer protection laws—with the class action mechanism that aggregates many claims—often because there would otherwise be no incentive to bring an individual claim.").

Technology companies are particularly susceptible to such allegations because of the very characteristics that make them appealing to users. Online services utilize the Internet to offer innovative products at scale—reaching billions of consumers. Any perceived slight in their operations, no matter how minor, can trigger a claim alleging some statutory violation untethered to any actual injury, under which a putative class demands enormous statutory damages awards. *See* Brief for eBay Inc. et al. as Amici Curiae Supporting Petitioner at 13–14, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339) ("[I]t is the very efficiency and worldwide reach of amici's operations that enable them to deliver such enormous value at such low (sometimes no) cost to their users. At the same time, however, amici's huge

volume of daily interactions with millions of different people renders them particularly vulnerable to putative class actions that allege bare statutory violations and claim statutory damages for enormous putative classes. Any process or practice that applies to a particular user of services or websites provided by any one of the amici may well be alleged to apply equally or similarly to many thousands or millions of other users.").

B. Courts Have Not Consistently Applied *Spokeo, Inc. v. Robins.*

This Court's holding in *Spokeo, Inc. v. Robins* ought to offer technology companies and other defendants some relief from unproven or inchoate claims of injury. For Article III standing, *Spokeo* requires plaintiffs to show that they have suffered an injury in fact that is traceable to the defendant's challenged conduct and is likely to be redressed by a favorable decision in court. *See* 136 S. Ct. 1540, 1547 (2016); Bijan Madhani, *The Supreme Court Clarifies Digital Privacy Harms in Spokeo v. Robins*, Disruptive Competition Project (June 6, 2016), http://www.project-disco.org/privacy/060616-the-supreme-court-clarifies-digital-privacy-harms-in-spokeo-v-robins/#.W4m17M5KiUk. Bare procedural violations of a statute are insufficient. A "concrete injury" is required, which may include some "intangible" harms. 136 S. Ct. at 1549–51. However, many cases are allowed to go forward even when it is not at all

evident whether the plaintiff or putative class members have suffered any actual harm or a concrete injury.

This is the case because courts have applied *Spokeo* inconsistently at best and sometimes have disagreed with its holding outright. *See* Alison Frankel, *3rd Circuit Says* Spokeo *Can't Kill Data Breach Class Actions*, Reuters (Jan. 20, 2017), https://www.reuters.com/article/us-otc-spokeo-idUSKBN1542TN (explaining that "it's looking more and more like appellate courts disagree" that *Spokeo* held that individuals without injury did not have standing); Travis LeBlanc, *A Wake-Up Call: Data Breach Standing Is Getting Easier*, CyberSecurity Law Report (Jan. 17, 2018), https://www.bsfllp.com/images/content /2/9/v2/2995/2018-01-17-Cyber-Security-Wake-Up-Call-Data-Breach-Standing-Is.pdf ("[M]any federal courts post-*Spokeo* (and particularly appellate courts) have found standing for plaintiffs even though the plaintiffs alleged little-to-no pecuniary harm and any future harm was not clearly tied to the defendant's conduct."); Allison Grande, Spokeo *2 Years Later: As Split Grows, High Court Redo Looms*, Law360 (May 18, 2018), https://www.law360.com/articles/1045039/spokeo-2-years-later-as-split-grows-high-court-redo-looms ("For attorneys defending cases brought under the TCPA, *Spokeo* has done little to change their clients' fortunes at the outset of litigation . . . .").

Many courts continue to allow cases to proceed in the absence of any actual injury, leaving

companies unable to rely on the clear standing limitations this Court recognized are inherent in Article III. Courts have outright ignored *Spokeo* or tried to distinguish the plaintiffs' claims before them on factual or statutory grounds. *See, e.g.*, *In re Horizon Healthcare Servs., Inc. Data Breach Litig.*, 846 F.3d 625, 639 (3d Cir. 2017) (holding plaintiffs had standing to pursue purported Fair Credit Reporting Act (FCRA) violations "whether or not the disclosure of th[e] information increased the risk of identity theft or some other future harm"); *Perry v. Cable News Network, Inc.*, 854 F.3d 1336, 1340 (11th Cir. 2017) (holding that a putative class plaintiff had standing even though he "d[id] not allege any additional harm beyond the statutory violation"); *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 984 (9th Cir. 2017) (distinguishing VPPA claims from *Spokeo* and holding that plaintiff need not allege any further harm to have standing); *Dunham v. Robert Crane & Assocs., LLC*, No. 1:16-cv-2100-SEB-MPB, 2017 U.S. Dist. LEXIS 95492, at *12–13 (S.D. Ind. June 20, 2017) ("*Spokeo* and other cases relying on *Spokeo* involve alleged violations of other statutes."); *Ung v. Universal Acceptance Corp.*, 198 F. Supp. 3d 1036, 1039 (D. Minn. 2016) (holding that a putative class representative had standing to sue under the TCPA even if defendant had manually dialed his number); *Fraser v. Wal-Mart Stores, Inc.*, No. 2:13-cv-00520-TLN-DB, 2016 U.S. Dist. LEXIS 147025, at *12 (E.D. Cal. Oct. 18, 2016) (holding that there was subject-matter jurisdiction to consider the class's claims

under a California state law for the bare procedural violation of allegedly collecting the putative class members' zip codes).

C. The Often Suspect Propriety Of Class Certification In Technology Cases Encourages Companies To Seek *Cy Pres* Settlements.

Technology companies' inability to reliably predict whether claimants alleging inchoate or unproven harms have standing is compounded by uncertainty over certification of classes seeking statutory awards.

While the possibility of losing such marginal cases on the merits is low, the combination of litigation expenses with the extraordinary maximum liability associated with statutory damages is enough to convince any defendant, no matter their resources, to consider settling. The liability associated with statutory damages is often entirely unrelated to the injuries claimed by plaintiffs. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("When representative plaintiffs seek statutory damages, pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury.").

With what they stand to lose in theory, and with nothing to gain from protracted litigation, technology companies often see prompt settlements

as the most rational response to a putative class action. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); *Stillmock v. Weis Mkts., Inc.*, 385 F. App'x 267, 281 (4th Cir. 2010) ("In addition to the risk of bankrupting entire companies for violations in which no identity theft resulted, there is an additional problem with combining statutory damages and class certification. Companies may be forced to settle in the face of such annihilating liability, even if they have a strong defense."); *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003) ("It may be that the aggregation in a class action of large numbers of statutory damages claims potentially distorts the purpose of both statutory damages and class actions. If so, such a distortion could create a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may induce unfair settlements."); *Matter of Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (expressing concern with "forcing these defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability").

The facts in this case are representative of the problem. The putative class sought trillions of dollars

for hundreds of millions of potential class members without ever showing (or being able to show) that anyone suffered any real injury. *See* JA 93–94 n.4 ("Plaintiffs point out that the full amount of statutory damages available through the CCAC is likely in the trillions of dollars considering the size of the class. This is an amount in excess of what Defendant could ever pay considering it is much more than its value as a company.").

This case is not unique. There are numerous recent cases that present defendants with a similar economic calculus. *See, e.g.*, *Trans Union LLC v. FTC*, 536 U.S. 915, 917 (2002) (Kennedy, J., dissenting from denial of certiorari) (noting that Trans Union was the defendant in FCRA class actions in which it "face[d] potential liability approaching $190 billion"); *Beaudry v. TeleCheck Servs.*, 579 F.3d 702, 703–06 (6th Cir. 2009) (plaintiff sought to represent a class of millions of Tennesseans requesting statutory damages of $1,000 each); Am. Compl. ¶ 46, Prayer for Relief ¶ D, *In re Netflix Privacy Litig.*, No. 5:11-cv-00379-EJD (N.D. Cal. Sept. 12, 2011), ECF No. 61 (seeking $2,500 in statutory damages for each of "millions of individuals and other entities"); Second Am. Compl. ¶ 73, Prayer for Relief ¶ D, *In re Netflix Privacy Litig.*, No. 1:11-cv-05807 (N.D. Ill. Jan. 31, 2013), ECF No. 61 (seeking $1,000 in statutory damages for each of "thousands, if not millions, of individuals and other entities"); *see also* U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl* (Aug. 2017) ("Over 1,000 of the

3,121 cases tracked were brought as putative class actions seeking statutory damages ranging from tens of millions to billions of dollars.").

After recognizing that a putative class action should be settled, parties must determine how to settle the case. Where putative class members are difficult to ascertain, the costs of identifying and notifying those individuals can themselves be prohibitive. Running a claims process thereafter can cost millions more. Together these expenses can exhaust whatever funds that the parties agree is an appropriate value of the putative class's claims, given the remote probability of success. Therefore it is no surprise in these circumstances that parties turn to *cy pres* settlements to eliminate certain transaction costs associated with settlement, thereby preserving some indirect value for the putative class through payments to public interest beneficiaries.

II. Abolishing Or Circumscribing *Cy Pres* Settlements Would Leave Plaintiffs And Defendants Without Recourse And Is Contrary To Public Policy.

Petitioners argue that the Court should eliminate *cy pres* settlements because they are prone to abuse and treat only the symptoms of class action maladies. However, without *cy pres* awards, defendants, putative class members, and the judiciary all would suffer.

With respect to allegations of *cy pres* abuse, Petitioners argue that abuse is inherent in *cy pres* settlements and offer a few anecdotal examples of self-dealing by class counsel. Brief for Petitioners at 28–39. A few cases do not make an epidemic. *See* Christine P. Bartholomew, *Saving Charitable Settlements*, 83 FORDHAM L. REV. 3241, 3270 (2015) ("[C]ollusion concerns in the charitable settlement context are more perception than reality."). Regardless, such concerns can be addressed through careful judicial review of settlement terms. *Id.* at 3270–71. In fact, in this case the settlement was further scrutinized by "an experienced private mediator . . . , a fact which undermines any possible collusion between Plaintiffs' counsel and Defendant." JA 93.

Eliminating *cy pres* settlements would create far more problems than it would solve. Defendants would face potentially ruinous litigation costs and exorbitant potential liability from statutory damages without alternative means of resolving disputes. Defendants would have to incur these massive expenses even in cases where they caused no actual harm, and even where both plaintiffs and defendants agree that the case stands little chance of success on the merits. And defendants would ultimately spend far more on legal fees than the mutually agreed expected value of the case—when the entire limited expected value could otherwise be put toward indirect relief in a *cy pres* settlement. *See, e.g.*, *Lane v. Facebook*, 696 F.3d 811, 825 (9th Cir. 2012) ("[T]here

is no dispute that it would be 'burdensome' and inefficient to pay the $6.5 million in *cy pres* funds that remain after costs directly to the [more than 3.6 million member] class because each class member's recovery under a direct distribution would be *de minimis*.").

Cy pres settlements themselves can have inherent positive impact. If they were generally eliminated, the putative class would lose the public interest benefits of *cy pres* awards, which can include behavioral modifications by defendants, educational resources to help deter future actions by similarly positioned companies, and funding of public interest organizations whose interests and activities are likely consistent with the aims of the litigation.

Eliminating the recourse of *cy pres* settlements would also thwart parties' good-faith, mutual desire to resolve their dispute, contrary to the public interest in amicable settlement of litigation. *See, e.g.*, *Marek v. Chesny*, 473 U.S. 1, 10 (1985) ("[S]ettlements rather than litigation will serve the interests of plaintiffs as well as defendants."); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982) ("[V]oluntary conciliation and settlement are the preferred means of dispute resolution.").

And finally, the judiciary's already limited resources would be further stretched with complex, time-intensive class action litigations lingering on dockets far longer than if they had been settled to parties' mutual satisfaction.

CONCLUSION

The issue before the Court is not the substantive concerns surrounding class certification or even the particular merits of the claims in this case. Rather, the question is simply whether *cy pres* settlements have a role to play in the current class action environment. They do.

Technology companies, Respondents included, face a particularly challenging environment when it comes to litigating class actions. Many class actions are based on statutes that predate the Internet, featuring statutory damages that do not reflect the realities and scale of modern online services. Further, those actions are often based on allegations of unproven, inchoate harms or bare statutory violations at best. As a result, the propriety of class certification in technology cases is often suspect, but the potential liability can be extreme.

In light of the surrounding legal context, Amici submit *cy pres* settlements can be an effective means of achieving a mutually beneficial result for plaintiffs and technology company defendants who would otherwise have to resort to costly and fruitless litigation to resolve putative class actions based on marginal, but high-stakes, claims.

* * *

Amici ask that the Court affirm the public interest benefits of *cy pres* settlements, and the judgment below.

Respectfully submitted,

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