

IN THE SUPREME COURT OF THE UNITED STATES

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No. 17-961

THEODORE H. FRANK, ET AL., PETITIONERS

v.

PALOMA GAOS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY  
SITUATED, ET AL.

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

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MOTION OF THE UNITED STATES FOR LEAVE TO  
PARTICIPATE IN ORAL ARGUMENT AS AMICUS CURIAE  
AND FOR DIVIDED ARGUMENT

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Pursuant to Rules 28.4 and 28.7 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves that the United States be granted leave to participate in oral argument and be allowed ten minutes of argument time. The United States has filed a brief as amicus curiae supporting neither party. Petitioners and respondents do not object to this motion, and both have agreed to cede five minutes of argument time to the United States, for a total of ten minutes.

1. This case concerns whether a class-action settlement that provides no direct relief to unnamed class members, but instead distributes settlement funds to non-parties on a cy pres

theory, should be approved as "fair, reasonable, and adequate" under Federal Rule of Civil Procedure 23(e)(2).

The United States has filed a brief as amicus curiae supporting neither party. The government's brief explains that there is considerable doubt whether the Court has Article III jurisdiction to address the question presented in this case because the class-action plaintiffs (now respondents) may have lacked standing in the district court. The government's brief accordingly suggests that the Court may wish to remand the case for the lower courts to address standing in the first instance.

If the Court addresses the merits, the government contends that it should vacate the decision below and remand for more rigorous scrutiny of the cy pres relief in the settlement. In the government's view, a court should approve a class-action settlement that includes cy pres relief only if the cy pres distributions redress plaintiffs' injuries and only if there is no non-arbitrary way to distribute settlement funds to allegedly injured class members. Because the courts below applied an overly permissive standard in approving the cy pres settlement in this case, the government contends that this Court should vacate and remand for further proceedings.

2. The United States has a substantial interest in the resolution of the question presented. Under 28 U.S.C. 1715, class-action defendants seeking court approval of settlements must

notify the Attorney General or other designated federal official of the settlement terms. Consistent with its interests in protecting consumers and ensuring the fair disposition of class actions, the United States has filed statements of interest in district courts raising concerns about particular settlements. The Attorney General has also issued a memorandum directing Department of Justice litigating entities not to enter cy pres settlements. Many of the principles underlying that decision are relevant to the question presented here.

The government has participated in argument as amicus curiae in multiple cases before this Court involving class-action rules and practices. See, e.g., Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036 (2016); Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016); Amgen Inc. v. Connecticut Ret. Plans & Trust Funds, 568 U.S. 455 (2013). In light of the substantial federal interest in the question presented and the government's discussion of the potential jurisdictional question, the government's participation at oral argument could materially assist the Court in its consideration of this case.

Respectfully submitted.

NOEL J. FRANCISCO  
Solicitor General  
Counsel of Record

SEPTEMBER 2018