No. 17-961

IN THE
Supreme Court of the United States

THEODORE H. FRANK, ET AL.,
Petitioners,

v.

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

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CLASS RESPONDENTS' RESPONSE TO PETITIONERS' SUPPLEMENTAL BRIEF

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On October 23, 2018—eight days before argument—petitioners filed a supplemental brief discussing a then 20-day old court of appeals decision, which petitioners' counsel had briefed and argued. According to petitioners, the decision in *In re EasySaver Rewards Litigation*, No. 16-56307 (9th Cir. Oct. 3, 2018), confirms that the court below's "permissive approach to *cy pres* has exactly the pernicious effects" petitioners purport to identify in their brief. Supp. Br. 1. *EasySaver* has no bearing on the issues before this Court.

1. The primary issue in *EasySaver* has no relationship to the question presented in this case. The vast majority of the decision in *EasySaver* addresses an issue of statutory interpretation: whether $20 credits given to class members as part of a settlement agreement constitute "coupons" within the meaning of the Class Action Fairness Act ("CAFA"). See *EasySaver*, slip op. 10-21; 28 U.S.C. §1712. The settlement in this case does not involve coupons. The Ninth Circuit's interpretation of the CAFA provision at issue in *EasySaver* thus has little to do with this case.

To the extent CAFA is relevant, it demonstrates that Congress is active in this area. For example, the CAFA provision at issue in *EasySaver* shows that, when Congress wishes to establish rules to limit attorney's fee awards in class actions based on the nature of the relief afforded to the class in the settlement, it does so expressly. Class Br. 42; see 28 U.S.C. §1712(a) ("[T]he portion of any attorney's fee award to class counsel that is attributable to [an] award of the coupons shall be based on the value to class members of the coupons that are redeemed."); see 15 U.S.C. §77z-1(a)(6) (limiting fees in securities class actions to "a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class"). But neither Congress nor the Federal Rules anywhere adopt such a rule for all class actions. "Federal courts * * * lack authority to substitute for Rule 23's" express terms "a standard never adopted." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 622 (1997). And even CAFA's fee provisions are of dubious relevance here, as fees are not properly before the Court. Fees are governed by Rule 23(h)—not the fair, reasonable, and adequate standard applicable to settlements under Rule 23(e)—and the settlement in this case ex-

pressly *excludes* the fee amount from its scope, even if no fee is awarded of any sort. See Pet. App. 92-93 ("It is not a condition of this Settlement that any particular amount of attorneys' fees * * * be approved by the Court, or that such fees * * * be approved at all.").

2. Petitioners characterize *EasySaver* as evidence that courts cannot be trusted to "reliably police the day-to-day interests of absent class members in the absence of bright-line rules." Supp. Br. 5 (quotation marks omitted). *EasySaver* shows the opposite. First, *EasySaver* itself was primarily *about* a bright-line rule—that, when determining fees in coupon settlements, courts must categorically exclude the value of coupons that are not redeemed. Slip op. 11; see 28 U.S.C. § 1712(a). Petitioners' complaint is that the bright-line rule was not enforced in district court. Second, the court of appeals did enforce the bright-line rule, unflinchingly. It reversed the district court, holding that the unexercised "credits" at issue qualify as "coupons" and must be excluded from fee calculations. Slip op. 14. Third, and finally, the dispute was primarily about statutory construction—whether particular credits qualify as "coupons" under the statute. The court of appeals' correct conclusion that they are coupons evidences the proper functioning of our judicial process. *Id.* at 14-17. It does not support efforts to characterize district or appellate courts as unwilling to apply governing law in the class-action context.

3. Petitioners assert that *EasySaver* is symptomatic of broader problems with *cy pres* settlements. Petitioners once again conflate complaints about other cases with the issues before the Court in this case. Petitioners complain that the *EasySaver* claims process was "designed to depress the number of refund claims." Supp. Br. 2. But they do not claim any such argument in this

case. Nor does that complaint have any relevance to the propriety of *cy pres*. Petitioners also decry *EasySaver*'s approval of San Diego-based *cy pres* recipients to benefit a nationwide class. *Id.* at 2-3. But petitioners concede that issue is "not present in this case." Pet. Br. 34 n.3. And petitioners criticize the *EasySaver* court for not adopting their "proportionality rule." Supp. Br. 5. But that court had no reason to consider such a rule: It vacated the fee award on other grounds. Slip op. 21.

The only parts of *EasySaver* with conceivable relevance do not aid petitioners. The Ninth Circuit found no abuse of discretion in the district court's rejection of the "bare allegation" that a *cy pres* recipient's selection was tainted because some attorneys for the parties went to school at the institution that received the distribution. Slip op. 25; cf. Supp. Br. 2-3, 4. Petitioners' disagreement with that commonsense reasoning does not get more persuasive with repetition. See Class Br. 52-53 (rebutting *alma mater* argument). District court judges do not need to recuse merely because their *alma mater* is party to a suit before them; that alone does not create an appearance of bias. See, *e.g.*, *Roe* v. *St. Louis Univ.*, 746 F.3d 874, 886 (8th Cir. 2014) ("Alumni connections are not a reasonable basis for questioning a judge's impartiality, even if alumni contribute financially or participate in educational activities."); *Brody* v. *President & Fellows of Harvard Coll.*, 664 F.2d 10, 11 (1st Cir. 1981) (per curiam) ("[A] judge's having attended or graduated from a school, which is a party, without more, is not a reasonable basis for questioning his impartiality."). Besides, in this case, the district court addressed petitioners' concerns about *alma maters*. It took evidence, heard live from counsel, evaluated the detailed proposals, and found "no indication" that supposed loyalty to any

alma mater even "factored into the selection process." Pet. App. 59. *EasySaver* has no bearing on whether such consideration can be reversed as an abuse of discretion.

Petitioners also assail *EasySaver*'s factbound conclusion that *cy pres* distribution of unclaimed residue was permissible based on "the amount each [class member] might receive compared to the administrative costs of distribution." Slip op. 23. But that, too, has little bearing here. The class members in this case are 100 times as numerous as in *EasySaver*; their names and addresses are not already known; and processing millions of claims would require building a claim system to receive them—and verification of each submitted claim. Compare slip. op. 8, 22-23 (noting parties would already be sending coupons to the 1.3 million class members enrolled in the rewards program at issue), with C.A. S.E.R. 152 ¶20 ("names and addresses for Class Members are not readily available"); see Opening Brief of Appellant 47 n.7, *In re EasySaver Rewards Litig.*, No. 16-56307 (9th Cir. May 1, 2017) (acknowledging that the fact that *EasySaver* class members were already identified distinguishes that case from this one); see also Class Br. 50 n.11.[1]

EasySaver thus teaches little of utility for this matter. That is not to say the decision is entirely correct. This Court will have an opportunity to consider that case if petitioners (as counsel there) seek this Court's review. The Court may find the case worthy of review (particularly if it lacks the jurisdictional and vehicle defects that

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[1] In *EasySaver*, there was an additional risk not present here—that claimants who had already received settlement payments would be overcompensated by future distributions. Slip op. 22; *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 35 (1st Cir. 2012) (noting general acceptance of rule against further distributions to fully compensated class members).

plague this case). In the meantime, it is a late-arriving and less-than-fully explored anecdote. It provides no basis for displacing the text of Rules 23(b) and (e) with policy-based proposals that Congress and the Rules Advisory Committee have not vetted or adopted. Class Br. 26, 30, 47.

Respectfully submitted.

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