No. 18-1074

IN THE

Supreme Court of the United States

BRIAN PERRYMAN,

Petitioner,

v.

JOSUE ROMERO, *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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I. That the seven-figure *cy pres*, exceeding class cash recovery by more than an order of magnitude, is nominally "residual" does not resolve the multiple circuit splits.

The parties have settled the claims of 1.3 million known and identifiable class members alleging tens of millions of dollars of fraud damages by creating a $12.5 million cash fund. But those class members will receive only $225,000, less than 2% of the fund, with 99.8% of the class members receiving no cash. Over $12 million will be split between attorneys and *cy pres*, with between $3 million and $9 million going to three San Diego schools in the district court's and attorneys' hometown, instead of to the nationwide class. Such self-dealing ratios where "most of the settlement fund was devoted to *cy pres* payments"[1] and attorneys' fees, shock the conscience, are impermissible as a matter of law in the Seventh Circuit, and discouraged by the Third Circuit. Yet these bottom-line figures are entirely absent from Romero's brief.

"Residual" *cy pres* generally refers to a few thousand dollars left over from uncashed checks. Here it is questionable to call *cy pres* "residual" when the damages and identity of every member of a class certified as having common claims are known, and can receive a direct distribution, but the settlement structure throttles that distribution so that *cy pres* is predictably several times larger than actual class recovery. Romero protests (Br. 2) that this case is "materially different" than *Frank* because the settlement gave some cash to class members rather than $0. But this $225,000 difference does not change the circuit split caused by

[1] *Frank v. Gaos*, 136 S. Ct. 1041, 1047 (2019) (Thomas, J., dissenting).

the Ninth Circuit's idiosyncratic approach. The Third, Fifth, Seventh, and Eighth Circuits have all rejected residual *cy pres* distributions where class members received much more than $225,000—even when the ratio of *cy pres* to class cash recovery was smaller than the ratio here. *E.g.,*

Case	**Class recovery**	***Cy pres***	**Fees**
In re EasySaver Rewards Litig. (1.3M class members)	$0.2M	$3M+ to $9M+	$3.1M to $8.85M
Pearson v. NBTY, Inc., 772 F.3d 778 (7th Cir. 2014) (12M class members)	$0.9M	$1.1M	$1.9M
In re Baby Prods. Antitrust Litig., 708 F.3d 163 (3d Cir. 2013) (unknown class size)	~$3M	~$18.5M	$14M

See generally Pet. 16. Even in a case with a real, rather than manufactured, "residual," the Eighth Circuit repudiated *cy pres* to dispose of a $2.5 million remainder of a $333.2 million settlement fund. *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060, 1062 (8th Cir. 2015).

Every systematic problem with *cy pres* that Perryman identifies in his petition (Pet. 16–29) leads to inevitable abuse whether the *cy pres* is the sole relief

in the settlement or the result of a claims process that failed to distribute sums to the class. And if a claims process exercised by 0.2% of the class is a deciding factor that inoculates millions of dollars of *cy pres* from Rule 23(e) scrutiny on appeal—a position no court of appeals, including the Ninth Circuit, takes—why not $1 to a single class member? What principle of law, policy, or economics, distinguishes multi-million-dollar *cy pres* in a settlement with the $225,000 distribution from a $1 settlement from a $0 settlement? If *cy pres* is problematic, as every court of appeals other than the Ninth Circuit holds, it is not cured by devoting 2% of the settlement fund to cash payments to the class. "*[C]y pres* awards should generally represent a small percentage of total settlement funds." *Baby Prods.*, 708 F.3d at 174.

The Ninth Circuit's idiosyncratic approach of treating *cy pres* as identical to cash distributions for both purposes of settlement fairness and attorneys' fees leads to the abuses we see here, in *Frank*, and in *Marek v. Lane*, 134 S. Ct. 8 (2013) (Roberts, C.J., concurring). In both the all-*cy pres* context and the residual *cy pres* context, as *Pearson* recognized, tying attorneys' fees to actual class recovery incentivizes class counsel to "maximize the settlement benefits actually received by the class" as happened on remand in *Pearson* and *Baby Products*, and would happen here if the Court adopts the Seventh Circuit's objective standard and vacates settlement approval. 772 F.3d at 781; Pet. 26–27.

This is not an "interlocutory appeal" as Romero misrepresents. Br. 2. (Provide tellingly does not make the claim.) If the Court denies *certiorari*, there is no further appeal of final judgment, and as much as $9 million will go to *cy pres* instead of the class, with no

further opportunity to challenge the fairness of the settlement that created that result or to challenge the limited geography of the recipients. Meanwhile, existing Ninth Circuit law ensures class counsel will receive *at least* $3.125 million[2] and perhaps even a full reinstatement of the $8.85 million award vacated by the Ninth Circuit. Pet. 9–10. Indeed, the Ninth Circuit's affirmance of settlement approval without knowing the ultimate ratio of class recovery to *cy pres* recovery to attorney recovery is a circuit split with *Pearson* and *Baby Products*, which makes that ratio a central question of the Rule 23(e) inquiry. *Compare* 772 F.3d at 781 and 708 F.3d at 169–70 ("troubling … allocation") *with* Pet. App. 25a.

Plaintiffs argue (Br. 12–13) *Pearson* is consistent because it was "factbound." But those facts cut in the opposite direction. *Pearson* involved a $1.1 million *cy pres* residual and 12 million class members, not all of whom were known to the parties—less than ten cents per class member, a small fraction of the $2.30 to $7 at issue here. This case involves millions of dollars

[2] Ninth Circuit law presumptively entitles class counsel to a benchmark 25% of any *cy pres* award. *Compare In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 747–48 (9th Cir. 2017) *with Frank*, 136 S. Ct. at 1047 (Thomas, J., dissenting). Romero tries to have it both ways when he denies (Br. 13 n.2) the attorneys will receive $8.85 million. He repeatedly characterizes (*e.g.*, Br. 15) the *cy pres* as equal to $2 payments to every class member, but that is only so if the attorneys receive the full $8.85 million they are currently requesting (without opposition from Provide (Dkt. 342)) in district court. A fee reduction only means millions more to *cy pres*. Pet. App. 25a. Whether the $6 million difference still being collaterally litigated about ends up in the pocket of attorneys or local San Diego schools, it will not be going to the nationwide class that has compromised its claims, and that result contravenes the law of the Third, Fifth, Seventh, and Eighth Circuits.

more in *cy pres* and 1.3 million identifiable class members. If nothing else, this is a circuit split over whether "feasible" is judged by payment to *every* class member or *some* class members. Pet. 14, 28.

And while *Pearson* criticized that settlement's claims process, Romero misrepresents its holding when he claims this criticism was the "highly case-specific reason" (Br. 12) for rejecting settlement fairness. Rather, *Pearson* was indignant that the attorneys were impermissibly "selfish" in receiving twice as much as the class. 772 F.3d at 787; *id.* at 781 (noting Seventh Circuit rule requiring proportionate ratio). This is an *objective* bright-line rule for Rule 23(e) that can be applied to this, or any other settlement, and would require rejection of the settlement the Ninth Circuit approved. Here, attorneys will receive *more* than the *Pearson* attorneys, while absent class members will receive *less* than the *Pearson* class. Because of *Google Referrer,* attorneys here will receive over 90% of the cash benefit (with a request for 97.5% pending) under the *Pearson* test rather than the 69% that doomed *Pearson*. Suggesting *Pearson*'s subjective criticisms of the claims process distinguishes it from the Ninth Circuit's affirmance is a red herring: *Pearson*'s rule of decision is an *objective* one that the Ninth Circuit disclaims.[3] To the extent this case is distinguishable from *Pearson*, it is because the settlement here is

[3] Indeed, *Pearson*'s reasoning for criticizing the claims process involved a jurat "under penalty of perjury" and the risk of an "audit"—which are both present here. *Compare* 772 F.3d at 783 *with* Pet. App. 92a, 101a ("Right to Verify"). Romero's characterization (Br. 12) of *Pearson* claims as being "no more than $5 per claimant" is false: 30,245 class members claimed $865,284. 772 F.3d at 780. Note also that *Pearson*'s 30,245 claims/12,000,000 class members is objectively a slightly better claims rate than the 3,000 claims/1,300,000 class members here.

considerably more "selfish," even before we get to the geographically narrow and *alma mater* diversion of a substantially larger *cy pres* distribution.

Romero argues (Br. 15) that the small number of claimants are "fully compensated" (never mind the 99.8% of the class who received no cash at all). But this isn't even true for the other 0.2%: Perryman and other claimants are "reimbursed," but receive no compensation for punitive damages claims or the time-value of money lost. Every circuit to consider the question of "fully compensated" looks at the terms of the complaint, not the agreed-upon settlement amounts dictating compensation. *BankAmerica*, 775 F. 3d at 1065–66; *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 479 (5th Cir. 2011); *Masters v. Wilhelmina Model Agency, Inc*., 473 F.3d 423, 436 (2d Cir. 2007). In contrast, the Ninth Circuit did not consider—and was not required to under its precedent—the possibility of a second distribution of punitive damages. Pet. App. 21a–22a; *Google Referrer*, 869 F.3d at 742 (no requirement to consider "possible" alternatives to *cy pres*). Respondents' arguments about "overcompensation" simply highlight the circuit split over when further distributions to class members are required and when *cy pres* is appropriate. And Provide never explains why a cash distribution to some absent class members who failed to make a claim is any less "appropriate" (Br. 28) than the automatic distribution of coupons, much less more arbitrary than the *cy pres* recipients. *Contrast Frank* Oral Arg. Tr. 59–60 (Justice Kavanaugh suggesting lottery to class members might be preferable to *cy pres*).[4] Provide

[4] Provide's continued assertion (Br. 27) that the nearly-worthless coupons in this settlement should be considered "$20 credits" is "audacious." Howard M. Erichson, *Aggregation as*

stipulated and the court found that named plaintiffs' claims were typical of the class. Dkt. 252 at 2; Pet. App. 54a. It is estopped from claiming absent class members are not equally entitled to refunds.

Provide acknowledges (Br. 17) that the Ninth Circuit followed a "*de minimis*" standard. Perryman agrees: the Ninth Circuit's idiosyncratic definition of "feasibility" is one of the circuit splits he complains about. Pet. 12–13 (noting *Pearson* rejected *cy pres* of about 10 cents per class member); Pet. 28 (noting dramatic effects of application of *de minimis* rule). The Ninth Circuit made no finding that a distribution to every class member, much less some class members, would be infeasible—especially when the settlement already distributed coupons to every class member through email, and digital payments of small sums are possible, as other settlements demonstrate. Elizabeth Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. Rev. 846, 854 n.27 (2017).

II. The issue is important.

Respondents do not deny that a circuit split will cause forum shopping. Instead, they assert a lack of a circuit split, but the existing split has only widened

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Disempowerment, 92 Notre Dame L. Rev. 859, 880–81 (2017) (criticizing Provide's argument and district court's settlement approval); Pet. 5–6; Pet. App. 15a.

Furthermore, Romero's assertion (Br. 4, citing Pet. App. 5a) of the coupon relief as meant "to replace the $15-off coupon they had been promised but denied" mischaracterizes the nature of the complaint. The complaint does not demand delivery of undelivered $15-off coupons, or even allege that Provide failed to provide such coupons on a classwide basis. Dkt. 221 at 46–47. The complaint is for breach of contract and fraud for the unauthorized credit-card charges. *Id.* at 21–46. Class members who used $15-off coupons get the same relief as those who did not. Pet. App. 93a.

with this decision because of the expanded definition of "*de minimis*" to encompass $7/class member. Provide argues (Br. 23–24) that Perryman does not demonstrate "actual widespread gaming of settlements." This is refuted by Romero's assertion (Br. 2, 9) that the millions of dollars of *cy pres* going to local charities instead of a class that received only $225,000 of its alleged tens of millions of damages is a "garden-variety" "ordinary application" of *cy pres*, rather than an outlier. Yes: the scandal is how "ordinary" it is for class attorneys to divert substantial sums of their clients' money.

Indeed, if the Court denies *certiorari*, not only will the class members here be deprived of millions, but the Ninth Circuit's *de minimis* rule will signal that anything goes in the future—including in future versions of settlements that currently pay the class tens of millions of dollars, but average only a couple of dollars per class member. Pet. 28. Neither respondent rebuts, or even addresses, Perryman's analysis of the future implications of the Ninth Circuit's rule. Even a narrow decision here defining "feasible" to mean "feasible" can shift hundreds of millions from attorney slush funds to their clients.

Provide argues (Br. 25) there is no appearance of impropriety in a district court judge ratifying settling parties' preference to funnel millions of dollars to institutions in the judge's hometown rather than to a nationwide class. The proposition is self-refuting. Indeed, Provide repeatedly relies (*passim*) on a First Circuit decision Perryman criticizes (Pet. 24) that affirmed a judge's approval of *cy pres* to a local institution where he sat on the board. *In re Lupron Mktg. & Sales Pract. Litig.*, 677 F.3d 21, 36 (1st Cir. 2012). Even when judges do not pick the *cy pres*

recipients, their known charitable activities—or natural proclivities to favor hometown institutions—can create an appearance of impropriety, and only the Seventh Circuit and a handful of district courts have explicitly constrained the judiciary and the problems the Chief Justice identified in *Marek* and at oral argument in *Frank*. Pet. 23–24.

Respondents similarly fail to address other circuits' approaches regarding geographic mismatch of *cy pres* recipients. Here *cy pres* goes to three San Diego schools in Provide's hometown to endow chairs in Provide's name. Pet. 5. Provide excuses (Br. 31) this parochialism because of a "nationwide presence" of the schools. In comparison, the Seventh Circuit rejected a residual *cy pres* distribution to local Chicago law schools, and instructed the district court to consider "a broader nationwide use." *Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989); Pet. 14. Neither respondents nor the Ninth Circuit make any claim that the University of San Diego Law School has a broader "nationwide reach" (Pet. App. 23a) than the University of Chicago Law School. *Cf. also BankAmerica*, 775 F.3d 1060 (reversing district court's approval of residual *cy pres* to local Missouri legal aid societies without addressing question of geographic mismatch). Geographic favoritism is the sort of corruption of the judicial process identified by the Chief Justice in *Marek* and in the *Frank* oral argument, and the Court should address it here.

III. This is a better vehicle than *Frank*.

This case is a better vehicle for resolving *cy pres* questions than *Frank*. Respondents do not dispute Article III jurisdiction, controversy over which precluded this Court from reaching the merits in *Frank*. Moreover, unlike *Frank*, where the difficulties of proof

for an individualized intangible harm meant the litigation was merely a nuisance suit, this case involved an allegedly fraudulent practice outlawed by Congress and the release of tens of millions of dollars of damages claims for improper credit-card charges, as well as any punitive damages claims. Pet. 3. Provide was sufficiently concerned by the claims that they agreed to pay class counsel $8.85 million to release the class's claims, forbidding itself from challenging the fee request. Pet. 4. The settlement costs class members millions and waives colorable claims.

Moreover, the *Frank* respondents implausibly asserted for the first time at the Supreme Court that the settlement's injunction justified settlement approval and fees notwithstanding the *cy pres*. *Cf. Frank,* 136 S. Ct. at 1047 n.* (Thomas, J., dissenting). Here, there is no injunction, because Congress outlawed the challenged practice before settlement. Pet. 3.

Romero argues (Br. 9) "this case is no replacement for *Frank*" because it cannot "clarify the limits on the use" of *cy pres*. *Marek*, 134 S. Ct. at 9 (Roberts, C.J., concurring). Not so. The case squarely raises many issues and circuit splits that can clarify the limits on the use of *cy pres*, including at least one that was not raised in *Frank*:

- Is *cy pres* "a form of relief to the absent class members"? *Frank*, 136 S. Ct. at 1047 (Thomas, J., dissenting). In other words, can a settlement of consumer claims designed to pay class counsel millions of dollars more than their clients be fair, so long as there is a sufficiently large *cy pres* award? *See* Pet. 13; *cf. also In re Motor Fuel Temp. Sales Pract. Litig.*, 872 F.3d 1094, 1120–21 (10th Cir. 2017) (rejecting *Pearson* proportional-

ity requirement in $0 settlement paying attorneys $20 million).

- Is the question of "feasibility" of additional distribution determined by whether additional distribution to some class members is feasible, or whether payment to every single class member is "*de minimis*"? Pet. 13–14.
- May class counsel and a district court approve *cy pres* with a geographic mismatch with the class, and if so, when? Pet. 14, 22–23.
- What is "sufficient justification" for *cy pres* awards to exceed "a small percentage of total settlement funds"? Pet. 15–16.
- What limits should courts place on *cy pres* or awards for *cy pres* so that rules do not incentivize lead class counsel to steer *cy pres* to his *alma mater* instead of prioritizing direct distribution to his clients? Pet. 26 (quoting *Pearson*'s discussion of incentives).
- In addition, as discussed above, respondents raise another circuit split: when does a secondary distribution "overcompensate" absent class members, including absent class members who have received no cash at all? *See* pp. 4–5 above.
- Is *cy pres ever* appropriate? Pet. 18; *see also Klier*, 658 F.3d at 480–82 (Jones, C.J., concurring).

Respondents give no reason why this case cannot resolve these important circuit splits and vindicate absent class members' rights.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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