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

## BRIEF OF THE ATTORNEYS GENERAL OF ARIZONA, ALABAMA, ALASKA, ARKANSAS, GEORGIA, IDAHO, INDIANA, LOUISIANA, MICHIGAN, MISSISSIPPI, MISSOURI, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, AND TEXAS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF AMICI CURIAE[1]

Amici's interest arises from two responsibilities. *First*, as their respective states' chief law enforcement or legal officers, amici have an overarching responsibility to protect their States' consumers. *Second*, amici have a responsibility to protect consumer class members under CAFA, which prescribes a role for state Attorneys General in the class action settlement approval process. *See* 28 U.S.C. § 1715 (Pub. L. No. 115-281); *see also* S. REP. 109-14, 2005 U.S.C.C.A.N. 3, 6 (requirement "that notice of class action settlements be sent to appropriate state and federal officials," exists "so that they may voice concerns if they believe that the class action settlement is not in the best interest of their citizens."); *id.* at 34 ("notifying appropriate state and federal officials ... will provide a check against inequitable settlements"; "Notice will also deter collusion between class counsel and defendants to craft settlements that do not benefit the injured parties.").

Amici submit this brief to further these interests, speaking for consumers who will benefit from the Court hearing this case and providing badly needed guidance on the acceptable contours of *cy pres* class action settlement arrangements, in particular if *Frank v. Gaos*, now pending, is decided without reaching the *cy pres* question.

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[1] Pursuant to Rule 37.6, amici certify that no parties' counsel authored this brief and only amici or their offices made a monetary contribution to the brief's preparation or submission. Counsel of record for all parties received notice of amici's intent to file at least ten days prior to this brief's due date and have given written consent.

## SUMMARY OF ARGUMENT

Certiorari is warranted because the question raised relates to a concerning example of an important, pressing issue—growing use of *cy pres* to resolve class actions—and there is a circuit split on this important issue that calls for this Court's guidance. Recently Amici submitted a brief to this court in *Frank v. Gaos* urging strict limitations on the use of *cy pres* in class action settlements. If *Frank v. Gaos* reaches the *cy pres* issue, then the petition here should be granted with summary relief vacating the Ninth Circuit decision below and remanding for further proceedings consistent with the *Gaos* decision. But, if *Gaos* does not reach the *cy pres* question (e.g. because standing analysis is believed to necessitate otherwise) then the petition here should be granted and this case heard because this case provides the perfect avenue for this court to reach the *cy pres* issues first raised by *Gaos* without any underlying standing concerns.

As in *Gaos*, the Ninth Circuit's approach to *cy pres* here places consumers nationwide at risk by amplifying a circuit split and blessing a class action settlement arrangement that allows class counsel and defendants to reach a mutually beneficial settlement to the detriment of class members, who receive only $225,000 and coupons while ~$3M to $9M is set for *cy pres* to San Diego area schools. Given the nature of nationwide class action litigation, and the ability of class counsel to forum shop cases, even one circuit applying an under-protective standard to *cy pres* class action settlement arrangements will detrimentally affect consumers across the nation and undercut any efforts (by amici

or others) to protect consumers from class action settlement abuse.

Absent *cy pres* guidance in *Gaos*, the petition presents an ideal vehicle for the Court to address the important question presented and provide its first guidance on the appropriate uses of *cy pres* settlement arrangements. The allowability of the *cy pres* arrangement here was put to the district court by the objectors and was one of the chief issues on appeal. Pet. App. 8a. The record relating to *cy pres* in this case is clear, the legal conclusions straightforward, and resolution of the circuit split on the question presented will control as to the settlement's validity. The Court should therefore take this opportunity, grant certiorari, and depending on the outcome of *Gaos*, either provide summary relief or hear this case in order to provide needed guidance on the analysis courts should use in weighing when (if ever) *cy pres* may be judicially approved.

## ARGUMENT

### I. THE QUESTION PRESENTED IS IMPORTANT, AFFECTS CONSUMER INTERESTS IN CLASS ACTION SETTLEMENTS ACROSS THE NATION, AND WARRANTS THE COURT'S ATTENTION, IN PARTICULAR IF THE COURT DOES NOT REACH THE CY PRES ISSUE IN GAOS

#### A. *Cy Pres* Diverts Compensation From The Class Members To Whom It Belongs, Who Are Already Disadvantaged In The Class Action Settlement Context

Directing settlement funds to class members wherever feasible is important. Class actions are largely resolved through settlement. *See* Robert G.

Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1285 (2002) ("most class action suits settle"). And since class members extinguish their claims in exchange for settlement funds, those "settlement funds are the property of the class[.]" *In re BankAmerica Corp. Sec. Litig.,* 775 F.3d 1060, 1064 (8th Cir. 2015); *see also Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) ("[S]ettlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members."); American Law Institute, *Principles of the Law of Aggregate Litigation* § 3.07, cmt. b (2018) ("funds generated through the aggregate prosecution of divisible claims are presumptively the property of the class members").

Yet in dividing settlement funds, the interests of class members and other participants can diverge. Class counsel has an incentive to obtain a large fee, causing potential conflicts with the class. *See, e.g., In re HP Inkjet Printer Litigation*, 716 F.3d 1173, 1178 (9th Cir. 2013) ("interests of class members and class counsel nearly always diverge")*; In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 175 (3d Cir. 2013) ("'class actions are rife with potential conflicts of interest between class counsel and class members'"). And defendants rarely help. "[A] defendant who has settled a class action lawsuit is ultimately indifferent to how a single lump-sum payment is apportioned between the plaintiff's attorney and the class." William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 TUL. L. REV. 813, 820 (2003). The fee and class award "represent a package deal," *Johnston v. Comerica*

*Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996), with a defendant "'interested only in the bottom line: how much the settlement will cost him.'" *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 712 (7th Cir. 2015); *see also In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 820 (3d Cir. 1995) ("[A]llocation ... is of little or no interest to the defense.").

*Cy pres* arrangements can present a particularly stark illustration of this divergence. *Cy pres* settlement arrangements represent a "conflict of interest between class counsel and their clients because the inclusion of a *cy pres* distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class." *In re Baby Prods.*, 708 F.3d at 173; *see also Lane v. Facebook, Inc.*, 696 F.3d 811, 834 (9th Cir. 2012) (Kleinfeld, J., dissenting) (noting "incentive for collusion" in *cy pres* class settlements; "the larger the *cy pres* award, the easier it is to justify a larger attorneys' fees award."). And Defendants may prefer *cy pres* as opposed to providing direct relief to the class. *See, e.g., Lane*, 696 F.3d at 834 (Kleinfeld, J., dissenting) ("A defendant may prefer a *cy pres* award ... for the public relations benefit").

It is no surprise that *cy pres* arrangements "'have been controversial in the courts of appeals.'" *In re BankAmerica,* 775 F.3d at 1063. "The opportunities for abuse have been repeatedly noted." *Klier*, 658 F.3d at 480 (Jones, J., concurring). And circuit judges have explained that, "[w]hatever the superficial appeal of *cy pres* in the class action context may have been, the reality of the practice has undermined it." *Id.* at 481.

### B. *Cy Pres* Fails Under Rule 23(e) Because *Cy Pres* Does Not Provide A Direct Class Benefit

Because *cy pres* amounts do not provide a direct class benefit, they cannot be treated as providing an adequate basis for approving a settlement or awarding fees in a class action—it is critical that any settlement purporting to use *cy pres* is able to stand on its own, without considering the *cy pres* sums. Clarifying this will ensure that (1) consumers are protected from imbalanced settlements, such as the settlement here, where *cy pres* dwarfs the direct class benefit, and (2) the interests of class counsel and defendants are aligned toward the key goal of class action settlements: ensuring that class members receive the benefits bargained for in exchange for the release of their claims.

The *cy pres* problem goes well beyond *cy pres*-only cases. A claims-made settlement with a *cy pres* provision for unclaimed funds, like the one here, can ultimately end up directing almost all funds to *cy pres* (here $225,000 was claimed and ~$3M to $9M will be distributed *cy pres*). And this case is not unique. *See, e.g.*, *Zeisel v. Diamond Foods, Inc.*, No. 10-01192, Dkt. 243 at 2 (N.D. Cal.) (distributing ~$2.2 million worth of donations to *cy pres* recipient where the class only recovered ~$370,000); *Hartless v. Clorox Co.*, No. 06-cv-02705, Dkts. 137 at 1, 138 (S.D. Cal) (approving distribution of ~$3.9 million to *cy pres* recipients after only ~$2.3 million was received by the class).

These types of settlements do not comport with Rule 23, particularly as amended in 2018. The direct class benefit is central to the fairness of a settlement; in weighing direct benefit the question must not be merely whether there is *any* direct class benefit, but

whether there is *adequate* direct class benefit to warrant the release of the class members' claims and approval of the proposed settlement.

### C. *Cy Pres* Arrangements Have Become More Common, Necessitating Guidance On Its Contours

As recent empirical analysis has noted, federal courts have been granting *cy pres* awards to third party charities in increasing frequency. Martin Redish, Peter Julian, & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 653-656 (2010). "Over the last three decades, the number of class action cy pres awards in the dataset has increased, especially after 2000." *Id* at 653. Prior to 2000, these arrangements came at a paltry rate—approximately one per year. *Id.* Yet even a few years later that number jumped to about eight per year. *Id.* at 653; *see also* Natalie Rodriguez, *Era of Mammoth Cases Tests Remedy Of Last Resort*, Law360 (May 2, 2017) ("A Lexis Advance search for 'cy pres' or 'fluid recovery' … yielded ... decisions in 266 cases since 2000, the majority of which arose in the last decade."). And there has been an increase in the proportion of funds going to *cy pres*. As the Redish study found, "cy pres awards generally make up a non-trivial portion of total compensatory damages awarded, and in some cases comprise the entire compensatory award." Redish at 658-59.

Yet as Chief Justice Roberts has noted, even as *cy pres* is a "growing feature of class action settlements," the Court has not yet addressed the

use of *cy pres* in the class action context. *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting the denial of certiorari). As the Chief Justice well noted, there are important, foundational *cy pres* settlement questions that could use the Court's guidance, "including when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on." *Id.* *Frank v. Gaos* provides an important opportunity to provide such guidance. But, should standing concerns thwart the Court in addressing *cy pres* in *Gaos*, the petition here provides an opportunity for the Court to speak on *cy pres* nonetheless and provide much needed *cy pres* guidance.

### D. The Lower Courts Are Divided

As the petition well details, there is divergence in the Courts of Appeal on the most foundational *cy pres* question—how to measure when *cy pres* can be allowably used. Pet. App. 11-16. And this divergence will likely result in significant harm to consumers nationwide. Pet. App. 16-17. Class actions are often national in scope. Therefore, there is significant risk that class counsel will forum shop cases into circuits—such as the Ninth Circuit—that take less rigorous approaches to the review of proposed *cy pres* settlement arrangements. This will undermine the protections usually afforded by our system of divided appellate jurisdiction—by choosing a forum favorable to their own interests (rather than their class clients'

interest) class counsel will be able to obtain favorable review of *cy pres* arrangements that present inherent conflicts, even as they lock in class members from across the nation, including those residing in circuits with substantially more robust protections for class members.

## II. THE PETITION PRESENTS AN IDEAL VEHICLE FOR THE COURT TO ADDRESS WHEN (IF EVER) *CY PRES* CLASS ACTION SETTLEMENT ARRANGEMENTS ARE ACCEPTABLE

As it stands, the settlement will send $225,000 and highly restrictive coupons to consumers; between ~$3M and $9M to *cy pres*; and $8.7M to class counsel. Pet. App. 4-8. The question of whether a *cy pres* distribution here was fair and reasonable or an abuse of discretion was a central issue on appeal. Pet. App. 67a-68a. And the Ninth Circuit expanded on existing, flawed *cy pres* precedent, stating that *cy pres* distributions such as this are "reasonable" and although "[i]t might be technically feasible to distribute the funds" each non-claimants recovery would be "de minimis[.]" Pet. App. 8a.

And there are no standing questions here, where the focus of the underlying claims is fraudulent charging for a customer loyalty and coupon program through a scheme that has since been banned by Congress. Put simply, if the court does not reach the *cy pres* issue in *Gaos*, the full spectrum of *cy pres* questions are open for this Court to address here "including when, if ever, such relief should be considered; how to assess its fairness as a general matter; ... how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; how closely the goals of any enlisted organization must correspond to the

interests of the class; and so on." *Marek*, 134 S. Ct. at 9 (Roberts, C.J., respecting denial of certiorari).

## CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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