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No. _____

Supreme Court, U.S.
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**In The
Supreme Court of the United States**

MEGAN MAREK,

Petitioner,

v.

SEAN LANE, on behalf of himself and
all others similarly situated, et al.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Civil Procedure 23(e)(2) requires that a settlement that binds class members must be “fair, reasonable, and adequate.” In this case, the Ninth Circuit upheld approval of a settlement that disposed of absentee class members’ claims while providing those class members no relief at all. Breaking with decisions of the Second, Third, Fifth, Seventh, and Eighth Circuits, the Ninth Circuit held that the settlement’s award of \$6.5 million to establish a new foundation controlled by the lead defendant and class counsel was a fair and adequate remedy under the trust-law doctrine of *cy pres*. The question presented is:

Whether, or in what circumstances, a *cy pres* remedy that provides no direct relief to class members comports with the requirement of Rule 23(e)(2) that a settlement that binds class members must be “fair, reasonable, and adequate.”

PARTIES TO THE PROCEEDING

Petitioner Megan Marek was an objector in the district court proceedings and appellant in the court of appeals proceedings.

Respondents Sean Lane, Mohannaed Sheikha, Sean Martin, Ali Sammour, Mohammaed Zidan, Sara Karrow, Colby Henson, Denton Hunker, Firas Sheikha, Hassen Sheikha, Linda Stewart, Tina Tran, Matthew Smith, Erica Parnell, John Conway, Phillip Huerta, Alicia Hunker, Megan Lynn Hancock, a minor, by and through her parent Rebecca Holey, Austin Muhs, Catherine Harris, Mario Herrera, and Maryam Hosseiny were named plaintiffs in the district court proceedings and appellees in the court of appeals proceedings.

Respondents Facebook, Inc., Blockbuster, Inc., Fandango, Inc., Hotwire, Inc., STA Travel, Inc., Overstock.com, Inc., Zappos.com, Inc., and Gamefly, Inc. were defendants in the district court proceedings and appellees in the court of appeals proceedings.

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PETITION FOR A WRIT OF CERTIORARI

A \$9.5 million class action settlement that awards absentee class members no relief at all – no money, no guarantee that defendants will not injure them in the exact same manner, not even coupons – is not “fair, reasonable, and adequate” by any measure. Yet the Ninth Circuit upheld such a settlement of class members’ claims because class counsel and the lead defendant agreed to use \$6.5 million to establish a new foundation, controlled by the defendant and class counsel, that also does nothing to combat defendants’ alleged conduct or redress class members’ alleged injuries. (The bulk of the remainder of the settlement proceeds, of course, went to class counsel as fees.) That award, it held, was the “next best distribution” of the settlement funds, short of providing actual payments to class members, and was therefore justified by the *cy pres* doctrine, which lower courts increasingly rely upon to direct class action settlement proceeds to third parties selected by attorneys or by the courts themselves.

For good reason, every other court of appeals to consider class action settlements containing similarly problematic *cy pres* awards has rejected them. See generally Sylvia Hsieh, Class Action Settlements Face Growing Scrutiny by Objectors, Courts, Lawyers USA, Mar. 31, 2013 (noting circuit split). Those courts’ decisions have recognized that *cy pres* awards require special scrutiny because they can facilitate tacit or explicit collusion between defendants, who are eager to settle at the lowest price and with a

minimum of fuss, and class counsel, who are seeking to maximize their fees and may be willing to accommodate defendants' desires in exchange for a "clear sailing" agreement not to challenge the fee request. They recognize that, in this way, *cy pres* awards present a heightened risk of conflict between class counsel and their putative clients, the members of the class. They recognize that open-ended *cy pres* awards, such as to entities without a track record of service or those controlled by class counsel or defendants, may provide little or no benefit to class members. And above all else, they recognize that *cy pres* awards to third parties are not appropriate when any reasonable opportunity remains to compensate class members directly for their injuries – always the first-best use of settlement funds.

By contrast, the Ninth Circuit's opinion in this case brushed aside all such concerns. Addressing them, it said, would be "an intrusion into the private parties' negotiations" and therefore "improper and disruptive to the settlement process." App. 14. It is "unremarkable," the court said, that a *cy pres* award may actually serve to advance the defendant's interests. App. 16. Even the availability of \$2,500 in statutory damages for some class members' claims, it said, does not render a settlement that directs every last dollar to third parties or class counsel unfair in any respect. App. 18-19. All that matters is that a *cy pres* award "bears a substantial nexus to the interests of the class members," App. 14, which in this case the court viewed broadly to encompass a campaign –

again, controlled in part by defendants – to educate the public about “user control” over Internet privacy, when class members’ complaint was that the defendants had unlawfully *denied them control* over disclosure of their personal information.

If allowed to stand, the circuit split created by the Ninth Circuit’s decision creates an enormous incentive for forum-shopping by plaintiffs’ attorneys seeking to sue and settle nationwide class actions like this one. Bringing suit within the Ninth Circuit’s footprint now guarantees that minor things like compensating class members for their injuries, holding defendants liable to the extent the law allows, and preventing defendants from injuring class members in the exact same manner will not stand in the way of reaching a quick settlement to the mutual benefit of defendants and class counsel, at the expense of class counsel’s putative clients. The Court should grant certiorari to resolve this circuit conflict, provide guidance to the lower courts on the use of *cy pres* awards, and correct a serious abuse of the class action mechanism that puts the interests of those it is intended to benefit, class members, dead last.

OPINIONS BELOW

The Ninth Circuit’s opinion is reported at 696 F.3d 811 and reproduced at App. 1. The opinions of the United States District Court for the Northern

District of California are unpublished and reproduced at App. 48 and App. 63.

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JURISDICTION

The judgment of the court of appeals was entered on September 20, 2012. A timely petition for rehearing *en banc* was denied on February 26, 2013. App. 75. Justice Kennedy extended the time in which to file a petition for certiorari to and including July 26, 2013. *See* No. 12A1112. This Court has jurisdiction under 28 U.S.C. § 1254(1). As a class member who objected to the settlement, Petitioner has standing to appeal the final judgment. *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

◆

RULE INVOLVED

Federal Rule of Civil Procedure 23(e)(2) provides, with respect to a proposed settlement:

If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

STATEMENT OF THE CASE

A. The *Cy Pres* Doctrine in Class Action Settlements

The *cy pres* doctrine originated in the law of trusts and estates. The term is short for the French “*cy pres comme possible*,” or “as near as possible.” Historically, it referred to a court’s power, typically under statute, to reform a trust or charitable gift that has become impossible to administer according to its terms. *See generally* Martin H. 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, 625 (2010) [hereinafter “Redish”]. For example, a 19th-century court applied the doctrine to repurpose a trust that had been created to support the abolition movement to instead provide assistance to poor African Americans. *Jackson v. Phillips*, 96 Mass. 539 (1867).

The application of the *cy pres* doctrine, or something resembling it, to class action settlements is a more recent phenomenon. The “most adventuresome” of the 1966 amendments to Federal Rules of Civil Procedure was the addition of Rule 23(b)(3)’s provision for “class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614-15 (1997). That provision empowered attorneys, armed with a few representative plaintiffs, to file actions on behalf of large and diffuse classes, aggregating members’

paltry claims into litigation well worth an attorney's time. When these suits prevail, whether through settlement or judgment, the proceeds typically flow into a fund out of which are made disbursements to individual class members.

It is a unique feature of opt-out class actions that, unlike in other civil litigation, funds often remain unclaimed, particularly where class members' claims are small or the claims process is burdensome. "Traditionally, such funds would revert to a defendant – often an unpopular result because reversion of the funds undermines the deterrent effect of the suit and leaves the defendant largely with the benefit of his illegal activity." Redish at 631. In the 1970s, the *cy pres* doctrine was proposed as a solution for this "problem" of unclaimed settlement funds that could achieve the "next best" result to compensation by indirectly compensating absentee class members, without undermining the deterrent effect of liability. *Id.* at 631-34.

The use of *cy pres* awards in class actions quickly moved beyond these modest origins to become an integral component of many settlements. In these cases, settlement agreements expressly provide for awards to charities or foundations in addition to, or in place of, funds earmarked for distribution to class members. Used in this fashion, *cy pres* awards facilitate the filing, certification, and settlement of class actions that would otherwise be infeasible to litigate due to unmanageability or questionable merit. Redish at 639-40; *In re Agent Orange Prod. Liab. Litig.*, 818

F.2d 179, 184-85 (2d Cir. 1987) (discussing *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1019 (2d Cir. 1973)).

As critics have documented, these types of *cy pres* awards “create the potential for conflicts of interest by ensuring that class attorneys are able to reap exorbitant fees regardless of whether the absent class members are adequately compensated.” John Beisner, Jessica Miller & Jordan Schwartz, *Cy Pres: A Not So Charitable Contribution to Class Action Practice* 13 (2010) [hereinafter “Beisner”]. “Indeed, in many class actions it is solely the use of *cy pres* that assures distribution of a class settlement or award fund sufficiently large to guarantee substantial attorneys’ fees and to make the entire class proceeding seemingly worthwhile.” Redish at 621. Despite these concerns, the use of *cy pres* awards in class action settlements has grown quickly since the 1980s, accelerating sharply over the past decade. *Id.* at 653. The settlement at issue in the instant case is fairly representative of this trend.

B. Facebook’s Beacon Program

Facebook operates the eponymous social networking website that millions of Americans (and more abroad) use to share updates on their lives with other users whom they have designated as “friends.” Facebook, in turn, earns money by selling advertising tailored to its members based on the information they have disclosed to the service. Thanks to this *quid pro*

quo – users trade personal information for access to the service – Facebook has been at the center of nearly every recent debate over technology’s impact on personal privacy. If anything, the company has courted controversy through frequent changes to its privacy policies and aggressive efforts to extract more information from its members to make its service more valuable to both them and its advertisers.

To date, the most controversial of those efforts was Facebook’s “Beacon” program, launched in November 2007. The idea of Beacon was to make every Facebook member a personal pitchman for approximately forty companies engaged in online commerce that had signed on to the program, including Blockbuster (movie rentals), Overstock.com (discount merchandise), and Zappos.com (shoes and apparel). Each company would send Facebook the details whenever a logged-in Facebook member made a purchase on its website. Facebook would then broadcast the details to that member’s friends – after all, what could be more persuasive than a personal endorsement from a trusted friend? Facebook, of course, would collect revenue from these intimate advertisements, while its members would have yet another thing to share and discuss with their friends on the service.

But Facebook’s members were less enthusiastic about Beacon than its advertisers. Almost immediately, members complained about all kinds of inadvertent and sometimes embarrassing disclosures. Beacon was indiscriminate, for example, in broadcasting

news that a member had rented a blockbuster movie versus racier fare. It spoiled gifts by broadcasting not only that they had been purchased, but also whether they had been bought on sale or from a discounter. Thanks to Beacon, spouses learned of their significant others' stinginess in spending on presents and pricy self-indulgences, each of which probably caused less friction than indulgent purchases apparently intended for others, which Beacon equally revealed.

The cause of these unintended disclosures was that, to encourage uptake, Facebook had made Beacon an opt-out program and then made it exceedingly difficult for its members to opt out. Doing so "required video game skills": "The user would get a pop-up on his screen asking whether he wanted to opt out, but the pop-up would disappear in about ten seconds. Too slow reading the pop-up or clicking the mouse, and all a user's 'friends' would know exactly what he had bought." App. 27-28. Accustomed to dismissing intrusive pop-ups almost automatically, many Facebook members were unaware that their purchases would be broadcast to their Facebook friends and never knew that there was any way to opt out.

A few weeks after launching Beacon, Facebook gave in to its members' demands and made Beacon opt-in. In this version of the program, purchases on partner websites remained private unless a member authorized Facebook to publicize them. Unsurprisingly, given all the negative publicity, Beacon usage waned among members and advertisers. In September 2009, Facebook shuttered the program altogether,

and Facebook's CEO later declared the entire episode a "mistake."¹

C. The District Court Approves a Settlement That Provides No Relief to Class Members, Only a *Cy Pres* Award

In August 2008, nineteen plaintiffs filed a putative class action in the United States District Court for the Northern District of California against Facebook and its Beacon advertising partners, alleging violations of various federal and California privacy and consumer protection statutes. Notably, one of those statutes, the Video Privacy Protection Act – enacted in response to the disclosure of Judge Robert Bork's video rental records – provides liquidated damages of \$2,500 for the disclosure of a consumer's video rental and sale records without his or her "informed, written consent." 18 U.S.C. § 2710 (2008). The complaint challenged only the earlier opt-out version of Beacon, which had been curtailed nearly a year before, and not the revised opt-in program.

Before the district court had a chance to rule on Facebook's motion to dismiss the plaintiffs' claims, the parties entered into settlement negotiations. In September 2009, they submitted a settlement agreement for the court's approval. That agreement provided

¹ Mark Zuckerberg, Our Commitment to the Facebook Community, The Facebook Blog (Nov. 29, 2011), <https://blog.facebook.com/blog.php?post=10150378701937131>.

that Facebook would pay \$9.5 million to a settlement fund in exchange for a release of class members' claims. At the same time, it dramatically expanded the class to include Facebook members who might have claims relating to the opt-out version of Beacon, and provided for certification of this expanded class. Facebook and its advertisers would thereby be immunized against all future claims regarding Beacon.

Other than "incentive payments" of a few thousand apiece to the named plaintiffs, class members would receive no compensation at all. Instead, approximately \$6.5 million of the settlement fund would be used to establish a new grant-making organization called the Digital Trust Foundation ("DTF"), with a mission to "fund and sponsor programs designed to educate users, regulators[,] and enterprises regarding critical issues relating to protection of identity and personal information online through user control, and the protection of users from online threats." App. 6. This foundation would be run by a three-member board of directors selected by Facebook and class counsel. The initial board consisted of Facebook's chief lobbyist, a journalist who already served on Facebook's "Safety Advisory Board," and a law professor.

Class counsel and Facebook agreed that attorney fees would be drawn out of the settlement fund. Facebook also agreed not to oppose an attorneys' fee claim of up to \$3,166,667, or one-third of the fund. App. 32. Ultimately, the district court awarded

\$2,364,973 in fees and expenses, twice the alleged lodestar. App. 67.

The settlement also provided that Facebook would end the moribund “Beacon” program, which Facebook did months before the district court acted on the proposed settlement. But, as class counsel explained to the district court, Facebook refused to sign off on any agreement “limiting their future actions as a corporation,” and it would agree only to terminate “the program launched by Facebook on November 6, 2007 and all iterations thereof bearing the ‘Beacon’ name.” App. 31-32. Facebook therefore “remained free to do what it had done before, under a different name.” App. 32.

The district court certified the class and approved the settlement over the Petitioner’s objection that it was not “fair, reasonable, and adequate,” as required by Rule 23(e)(2), because it awarded class members nothing while providing millions in dubious *cy pres* “relief” and millions in attorneys’ fees. The court agreed with class counsel that “the immediate benefits represented by the Settlement outweighed the possibility – perhaps remote – of obtaining a better result at trial.” App. 58. As for the availability of liquidated damages for violation of the Video Privacy Protection Act and other statutes, the court said only that those claims “implicate factual issues that would likely be vigorously disputed” and that the court was not aware of “any cases in which plaintiffs have been awarded multiple liquidated damages.” App. 55. On that basis, the court concluded that the proposed *cy*

pres award, establishment of the DTF, “provides more meaningful relief to the Class” than would litigation seeking statutory damages. App. 59.

The court also rejected objections that the settlement created a new organization, in a field that is far from underserved, and placed its control in the hands of the defendant and class counsel. The objectors, it said, had failed to make a “persuasive showing that the Foundation will be a mere publicity tool for Facebook, or in any meaningful sense under Facebook’s direct control.” App. 61. Regardless, such arguments, it said, are “beyond the purview of the Court” because parties are free to structure their own settlements. App. 61.

D. A Split Panel of the Ninth Circuit Affirms

In affirming approval of the settlement, the Ninth Circuit essentially adopted the district court’s reasoning. To begin with, it denied that the *cy pres* doctrine requires “settling parties [to] select a *cy pres* recipient that the court or class members would find ideal. On the contrary, such an intrusion into the private parties’ negotiations would be improper and disruptive to the settlement process.” App. 14. Instead, it explained, the district should approve a class action settlement containing a *cy pres* award if “it bears a substantial nexus to the interests of the class members.” App. 14.

Here, it held, that requirement was satisfied because the “distribution of settlement funds to

entities that promote the causes of online privacy and security will benefit absent class members and further the purposes of the privacy statutes that form the basis for the class-plaintiffs' lawsuit." App. 15.

The panel majority rejected each of the objectors' challenges to the adequacy of the settlement. First, even while recognizing that some class members may "have successful claims for \$2,500 in statutory damages under the VPPA," it reasoned that not all class members had such claims and that the total settlement amount, \$9.5 million, "was substantial in this case" and therefore adequate "to the class *as a whole*." App. 21 (emphasis in original). In any case, it held, paying out to class members the \$6.5 million that remained after fees and costs would be "burdensome' and inefficient" because "each class member's recovery under a direct distribution would be *de minimis*." App. 23. It did not address that these factors – the size of the fund, the number of class members, the absence of subclasses – were components of the settlement itself.

Second, the panel majority saw no problem that the recipient of settlement funds would be controlled, in part, by the defendant. It was only understandable, the court explained, that Facebook "insisted on preserving its role in the process of selecting the organizations that would receive a share of that substantial settlement fund. . . . so as to ensure that the funds will not be used in a way that harms Facebook." App. 16. For the district court to question this aspect of the *cy pres* award would have been to

“undermine” the parties’ negotiations and impermissible “second-guessing [of] the parties’ decision.” App. 16.

Third, the panel majority was also untroubled by the settlement’s creation of a new organization with no record of service that would at least suggest likely benefit to absentee class members. It was enough, the court said, that DTF has a mission statement, which “tell[s] us exactly how funds will be used.” App. 17. That mission, in turn, “bears a direct and substantial nexus to the interests of absent class members.” App. 15. The court dismissed concerns that the organization might not carry out its stated mission as “unsupported speculation.” App. 17 n.4.

Finally, the panel majority rejected the objection that the settlement’s provision for Beacon’s termination provided no benefit to class members as moot because it was enough that “the \$9.5 [sic] settlement award substantially furthers the interests of the class.” App. 24.

Having bulldozed every objection, the panel majority affirmed the district court’s holding that a settlement that provided no direct relief to class members, only a questionable *cy pres* award, was “fundamentally fair.” App. 25.

Judge Kleinfeld dissented, arguing that the “settlement perverts the class action into a device for depriving victims of remedies for wrongs, while enriching both the wrongdoers and the lawyers purporting to represent the class.” App. 27. The class

action procedure, he explained, “has obvious attendant risks, because class counsel’s ‘clients’ are not clients at all in the traditional sense; they do not hire the lawyer, they do not agree on a fee with him, and they do not control whether he settles their case. They are in no position to prevent class counsel from pursuing his own interests at their expense.” App. 34.

Cy pres awards only accentuate these risks because they can facilitate the “pursuit of self-interest rather than the class’s interests.” App. 44. In particular:

A defendant may prefer a *cy pres* award to a damages award, for the public relations benefit. And the larger the *cy pres* award, the easier it is to justify a larger attorneys’ fees award. The incentive for collusion may be even greater where, as here, there is nothing to stop Facebook and class counsel from managing the charity to serve their interests and pay salaries and consulting fees to persons they choose.

App. 45.

To prevent that result, Judge Kleinfeld explained, “the district court must ensure that a *cy pres* award targets the plaintiff class.” App. 45. Here, however, the district court failed to do so. There was no “established record of performance by the charity of acts beneficial to people in the wronged class.” App. 46. Indeed, “an ‘educational program’ amounting to an advertising campaign for Facebook” would appear

to satisfy DTF's court-approved mission statement. App. 46.

The only apparent benefit of the *cy pres* award in this case, Judge Kleinfeld concluded, was to aid Facebook and class counsel in facilitating a collusive settlement between the lead defendant and class counsel. As for any benefit to class members, the most that could be said "is that in exchange for giving up any claims they may have, the exposed Facebook users get the satisfaction of contributing to a charity to be funded by Facebook, partially controlled by Facebook, and advised by a legal team consisting of Facebook's counsel and their own purported counsel whom they did not hire and have never met." App. 47.

The court subsequently denied panel rehearing, over Judge Kleinfeld's dissent, and denied rehearing *en banc*, over the dissent of Judge Milan Smith, joined by Chief Judge Kozinski, and Judges O'Scannlain, Bybee, Bea, and Ikuta. App. 75. Judge Smith protested that the *cy pres* award here failed to "(1) be reasonably certain to benefit the class, and (2) advance the objectives of the statutes relied upon in bringing suit." App. 76. Instead, under the panel opinion's approach, "an open-ended, one-sentence mission statement is all it takes to earn *cy pres* settlement approval." App. 78. Worse still, that mission bore little relationship to the wrongs alleged by the plaintiffs, because no amount of education on privacy protection though "user control" could "teach users how to protect themselves from Facebook's deliberate misconduct" in wrongfully disclosing

personal information they had already shared with Facebook. App. 80.

As a result, Judge Smith concluded, “this case creates a significant loophole in our case law that will confuse litigants and judges, while endorsing *cy pres* settlements that in no way benefit class members.” App. 76.



REASONS FOR GRANTING THE PETITION

This petition presents an ideal and timely opportunity for the Court to resolve a circuit split over the use of *cy pres* awards in class action settlements and provide much-needed guidance to the lower courts on a recurring issue of substantial importance.

I. The Ninth Circuit’s Decision Squarely Conflicts with the Decisions of Other Circuits Limiting the Use of *Cy Pres* Awards

The Ninth Circuit’s decision conflicts with numerous decisions of the other circuits on the fundamental question of when it is “fair, reasonable, and adequate” for a class action settlement to award money not to class members but to third parties unconnected to the litigation. This Court’s intervention is warranted to establish a nationwide standard for the use of *cy pres* awards in class action settlements and thereby prevent counsel bringing nationwide class actions from shopping for forums that provide their putative clients the weakest protections

against collusive settlements facilitated by *cy pres* awards.

A. The most fundamental conflict created by the Ninth Circuit's decision concerns whether a *cy pres* distribution is appropriate and should be treated as equivalent to direct monetary recovery in determining the fairness of a settlement, especially when the defendant indirectly benefits from the *cy pres* award. On this point, the Ninth Circuit is now in conflict with decisions of the Second, Third, Fifth, and Seventh Circuits.

1. The Third Circuit has emphasized that the critical factor in evaluating a proposed settlement containing a *cy pres* award is "whether the settlement provides sufficient direct benefit to the class," *i.e.*, money compensation. *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 176 (3d Cir. 2013). Thus, the district court must consider things like "the number of individual awards compared to both the number of claims and the estimated number of class members, the size of the individual awards compared to claimants' estimated damages, and the claims process used to determine individual awards" before it may approve such a settlement. *Id.* at 174. The district court has an obligation to "affirmatively seek out such information." *Id.* And having made such findings, the district court must then determine whether the "compensation going directly to class members" is sufficient. *Id.* at 176.

Cy pres awards, it explained, are no substitute for direct compensation:

The private causes of action aggregated in this class action – as in many others – were created by Congress to allow plaintiffs to recover compensatory damages for their injuries. *Cy pres* distributions imperfectly serve that purpose by substituting for that direct compensation an indirect benefit that is at best attenuated and at worse illusory. *Cy pres* distributions also present a potential 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. Where a court fears counsel is conflicted, it should subject the settlement to increased scrutiny.

Id. at 173 (citations and footnote omitted).

Applying such scrutiny, the court vacated a class action settlement that awarded only \$3 million of a \$35 million settlement to a class of consumers who alleged that they had paid inflated prices for baby products due to unlawful collusion, with the remainder going to charity as a *cy pres* award. This distribution was due, in large part, to the structure of the settlement, which required class members seeking more than a \$5 award to submit extensive documentation. As a result, even class members who had suffered overcharges of \$50 or more, and would be entitled by the Clayton Act to treble damages, had no real

incentive to file claims. *Id.* at 176. “Class members are not indifferent to whether funds are distributed to them or to *cy pres* recipients, and class counsel should not be either.” *Id.* at 178. Accordingly, the court remanded the case for the district court to “determine whether the class received sufficient direct benefit to justify the settlement as fair, reasonable, and adequate.” *Id.* at 176. *Accord In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 354-55 (3d Cir. 2010) (vacating and remanding approval of a class action settlement involving a *cy pres* award of excess funds because the district court had no factual basis to determine whether a cap on individual awards to class members was reasonable based on class members’ likely recovery in litigation).²

By contrast, the settlement approval affirmed by the Ninth Circuit makes no attempt to estimate the value of class members’ claims before approving a *cy pres* award that entirely depletes the settlement fund. Instead, it simply accepts class counsel’s conclusion that the settlement outweighs any possibility of recovery through actual litigation, App. 58, and assumes that class members would be entitled to only “de minimis amounts,” App. 59, despite the availability

² See also *Pet Food Prods.*, 629 F.3d at 363 n.4 (Weis, J., concurring and dissenting) (citing the American Law Institute’s Principles of the Law of Aggregate Litigation § 3.07 (2010) (“ALI Principles”) for the recommendation that “courts make numerous inquiries as to the viability of additional payments to the class before consideration of the *cy pres* remedy”).

of statutory liquidated damages for some class members that are far more than *de minimis*. In this way, the Ninth Circuit's decision conflicts with the Third Circuit's requirement that district courts scrutinize whether a settlement provides adequate direct compensation to class members before authorizing a *cy pres* award of excess funds.

2. Similar to the Third Circuit, the Seventh Circuit has held that a settlement that denies all direct relief to class members, in favor of a *cy pres* remedy, can be justified only if "careful scrutiny indicated that the class had no realistic prospect of sufficient success to enable an actual distribution to the class members." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785-86 (7th Cir. 2004). "Because class actions are rife with potential conflicts of interest between class counsel and class members, district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole." *Id.* at 785 (citations omitted).

On that basis, the court reversed approval of a settlement that relied on the doctrine of *cy pres* to deny direct compensation to a subclass of mortgageholders whose bank had transmitted their financial information to telemarketing companies selling dubious financial services. Class counsel and defendants maintained that the settlement amount was too little, and the subclass too large, for distributions to its members. Its members, they argued, received a *cy*

pres benefit from additional distributions to members of a smaller subclass of mortgage-holders who had actually purchased financial services from the telemarketers, because that remedy promoted deterrence and carried out the purpose of the consumer-protection statutes underlying their claims.

The court met that argument with incredulity:

Would it be too cynical to speculate that what may be going on here is that class counsel wanted a settlement that would give them a generous fee and Fleet wanted a settlement that would extinguish 1.4 million claims against it at no cost to itself? The settlement that the district judge approved sold these 1.4 million claimants down the river. Only if they had no claim – more precisely no claim large enough to justify a distribution to them – did they lose nothing by the settlement, and the judge made no finding that they had no such claim.

Id.

The court of appeals reversed the district court's approval of the settlement and remanded with instructions for it to estimate the value of the subclass's claims and reconsider the settlement's fairness to class members. *Accord Mirfasihi v. Fleet Mortgage Corp.*, 450 F.3d 745, 749 (7th Cir. 2006) (rejecting, on identical grounds, a revised settlement that also denied the subclass any direct relief, while awarding funds to various charities).

The settlement approval affirmed by the Ninth Circuit certainly never found that class members “had no claim,” even as it endorsed a settlement that sold them down the river by extinguishing their claims without any direct compensation, only a *cy pres* award to a third party. To the contrary, both the district court and the Ninth Circuit recognized that at least some class members had potentially valuable claims for statutory liquidated damages. App. 59, 21. For that reason, the Ninth Circuit’s decision conflicts with the Seventh Circuit’s in *Mirfasihi*.

3. Reasoning that “settlement-fund proceeds, having been generated by the value of the class members’ claims, belong solely to the class members,” the Fifth Circuit has held that a *cy pres* award is permissible “only if it is not possible” to compensate class members directly. *Klier v. Elf Autochem N. Am., Inc.*, 658 F.3d 468, 474-75 & nn.15, 16 (5th Cir. 2011). It therefore rejected a *cy pres* award of excess funds that had been allocated to one subclass, where members of another subclass had not been fully compensated for their injuries caused by exposure to arsenic and other toxins. *Id.* at 478-79. *Cy pres* awards, it said, are not permitted outside of the narrow circumstance where “it is not possible to put those funds to their very best use: benefitting the class members directly.” *Id.* at 475. Chief Judge Edith Jones concurred, arguing that *cy pres* awards should be strongly disfavored due to the inevitable conflicts of interest and abuses associated with application of the doctrine to class action settlements. *Id.* at 480-81.

The Second Circuit has held essentially the same as the Fifth, directing a district court to ensure that class members “have been compensated for their actual losses” before considering a *cy pres* award. *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007). See also *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 35 (1st Cir. 2009) (endorsing a district court’s insistence that a “settlement pay class members treble damages [as provided by the underlying statute] before any money is distributed through *cy pres*”).

The opinion below conflicts with *Klier* and *Masters* because it authorizes *cy pres* relief where providing additional direct compensation to at least some class members was possible. In that respect, *Klier* and *Masters* are also in conflict with the Third Circuit’s decision in *Baby Products*. 708 F.3d at 173-74.

B. The Ninth Circuit’s decision also creates a circuit split regarding the required nexus between a *cy pres* award and class members’ interests. On this point, the Ninth Circuit is now in conflict with the Second, Seventh, and Eighth Circuits.

The American Law Institute recommends that *cy pres* awards, when otherwise appropriate, go to “recipient[s] whose interests reasonably approximate those being pursued by the class” and lists that as an absolute requirement for settlements that deny class members any direct compensation. ALI Principles § 3.07. In general, the courts of appeals have adopted this as a baseline requirement for approval of *cy pres*

awards. See *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 33-34 (1st Cir. 2012) (citing ALI Principles and listing cases).

Applying that rule, the Eighth Circuit invalidated a *cy pres* award to the National Association for Public Interest Law from excess funds remaining after the settlement of antitrust claims against the major airlines because the award was not tailored “to the nature of the underlying lawsuit.” *In re Airline Ticket Comm’n Antitrust Litig.*, 307 F.3d 679, 683 (8th Cir. 2002). The evidence and the district court’s findings had shown that the airlines colluded to cap commissions available to travel agents in Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands, but only agents in Alaska and Hawaii had been compensated. *Id.* Accordingly, “travel agencies in Puerto Rico and the U.S. Virgin Islands were clearly the next best recipients of the funds” that remained after the class of Alaskan and Hawaiian agents had been fully compensated, not a generic ‘public interest’ organization. *Id.*

Applying similar logic, the Seventh Circuit invalidated a settlement agreement, in a nationwide antitrust class action, featuring a *cy pres* distribution to local law schools and directed the district court to “consider to some degree a broader nationwide use of its *cy pres* discretion.” *Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989). Previously, the same court had disapproved of an earlier *cy pres* award in the case that would have established a private antitrust research foundation because “[t]here

has already been voluminous research” on the subject and so additional funding would not achieve the class’s interests. *In re Folding Carton Antitrust Litig.*, 744 F.2d 1252, 1253-54 (7th Cir. 1984).

The Second Circuit has adopted an even stricter standard than the Seventh and Eighth, requiring that a *cy pres* award actually advance class members’ interests. *Eisen*, 479 F.2d 1005, *vacated and remanded on other grounds*, 417 U.S. 156 (1974). Applying that standard in a later case, it approved the establishment of a “class assistance foundation . . . to fund projects and services that will benefit the entire class,” consisting of persons who had been exposed to Agent Orange. *Agent Orange*, 818 F.2d at 184-85 (quotation marks omitted) (discussing *Eisen*). Key was that the foundation’s benefits would flow to “the class that claims injury from Agent Orange,” not third parties. *Id.* at 185.

As described in Judge Smith’s dissent from denial of rehearing *en banc*, the *cy pres* award in this case does not at all “approximate” class members’ interests. See App. 77-78. The class complained that Facebook and its advertising partners wrongfully exposed members’ private information “in ways that even educated users cannot anticipate, prevent, or direct,” in violation of numerous statutory requirements. App. 79. By contrast, the *cy pres* recipient proposes to fund public education on protecting Internet privacy through “user control,” App. 6, which is the very thing that Facebook and its partners denied to class members, causing their injuries.

While education on “user control” may further Facebook’s interests – certainly more so than research and public awareness campaigns critical of privacy abuses by service providers like Facebook – it does absolutely nothing to advance anything like class members’ interests, and it certainly does not benefit them. For that reason, the Ninth Circuit’s decision is in conflict with ALI’s ‘approximate interest’ standard, conflicts with decisions of the Seventh and Eighth Circuits applying that standard, and falls far short of the Second Circuit’s more rigorous ‘actual benefit’ standard.

C. Finally, the Ninth Circuit’s decision also splits with the Second Circuit’s decision in *Agent Orange* and First Circuit’s decision in *Lupron* regarding the duty of the district court to supervise the administration of an open-ended *cy pres* award to ensure that it achieves its intended purpose. Although approving of the idea of a grant-making “class assistance program,” the Second Circuit held that the “district court must . . . designate and supervise, perhaps through a special master, the specific programs that will consume the settlement proceeds.” 818 F.2d at 185. The power to pick and choose remedies paid for with class members’ money, it explained, belongs to the district court alone, and “there is no principle of law authorizing such a broad delegation of judicial authority to private parties.” *Id.* And there could be “no assurance that [a] self-governing and self-perpetuating board of directors . . . will possess the independent, disinterested judgment required to

allocate limited funds to benefit the class as a whole.” *Id.* (quotation marks omitted). Instead, “only direct judicial supervision can assure that the settlement fund is expended for appropriate purposes.” *Id.* at 186. *Accord Lupron*, 677 F.3d at 38-39 (modifying *cy pres* order to include annual audit requirement). *But see Baby Prods.*, 708 F.3d at 181 (endorsing *cy pres* distribution to third parties to be named later without new notice to the class and suggesting that class members might intervene later to challenge improper distributions).

By contrast, the settlement upheld by the Ninth Circuit vests all control over the disbursement of class members’ funds in a three-member board of directors controlled by the defendant and class counsel. There is absolutely no reason to believe that this board, which includes Facebook’s chief lobbyist, will exercise “independent, disinterested judgment” or that it will allocate funds “to benefit the class as a whole” – indeed, its mission is unrelated to any class members’ benefit. *See App.* 41-42.

Moreover, by permitting a *cy pres* award to a Facebook-affiliated foundation, the Ninth Circuit rejects the ALI Principles’ requirement that *cy pres* recipients have no “significant prior affiliation with the intended recipient that would raise substantial questions about whether the award was made on the merits.” ALI Principles § 3.07 cmt. (b); *cf. Lupron*, 677 F.3d at 36-37.

II. The Question Presented Is Important and Frequently Recurring

Having long recognized that Rule 23(b)(3) opt-out class actions are an “adventuresome” innovation fraught with potential conflicts, *e.g.*, *Amchem*, 521 U.S. at 614, 625-26, in recent terms the Court has policed abuses of this procedural mechanism to skirt the limitations of substantive law, *e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011), and to undermine class members’ rights, *e.g.*, *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1349 (2013). The availability of *cy pres* relief only accentuates these pathologies of the class-action procedure by facilitating settlements that provide substantial benefits to defendants and class counsel, often at the expense of class members. Not only does this case present the Court with an opportunity to resolve a circuit split with nationwide implications, it would also further the Court’s efforts to ensure that the lower courts appropriately enforce the requirements of Rule 23.

A. The unfettered use of *cy pres* awards has been subject to substantial criticism by courts and scholars alike. They have identified at least five specific concerns regarding the type of *cy pres* award upheld in this case.

1. As in this case, *cy pres* awards typically fail to redress class members’ alleged injuries. Judge Richard Posner stated the problem plainly: “There is no indirect benefit to the class from the defendant’s

giving the money to someone else.” *Mirfasihi*, 356 F.3d at 784. Yet settlements that do just that are disturbingly routine. For example, in exchange for their claims that major music labels engaged in unlawful price-fixing, class members received coupons for discounts on further CD purchases, while all settlement funds went to pay attorneys’ fees and to make a *cy pres* award to the National Guild of Community Schools of the Arts to develop an arts-related website. *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. 2:00MD1361-PH, 2005 WL 1923446, at *3 (D. Me. Aug. 9, 2005). According to the district court, this award actually benefitted class members by promoting the “development of future musical artists.” *Id.*

Even worse was a settlement resolving challenges to Google’s unauthorized disclosure of its users’ email contacts when it launched its “Buzz” social network. Class members – some of whom had suffered disclosures that aided stalkers, jeopardized confidential journalist sources, or hinted at affairs – received no part of the \$8.5 million settlement, while class counsel received over \$2 million and the remainder was divided among fourteen charities, including the local YMCA and the Brookings Institution – and, by the *sua sponte* order of the district court, a center at a university where the district court judge taught as a visiting professor at its law school.³

³ While not present in this case, the problem of *cy pres* being designated for local charities at the expense of a national
(Continued on following page)

In re Google Buzz Privacy Litig., No. C 10-00672 JW, 2011 WL 7460099, at *3 (N.D. Cal. June 2, 2011); Pamela A. MacLean, *Competing for Leftovers*, California Lawyer 15 (Sept. 2011). *See also In re Netflix Privacy Litig.*, No. 5:11-CV-00379 EJD, 2013 WL 1120801 (N.D. Cal. Mar. 18, 2013) (relying on the Ninth Circuit's opinion in the instant case to justify a \$9 million settlement that denied class members any monetary compensation, instead directing funds to various charitable organizations); *SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 414-15 (S.D.N.Y. 2009) (collecting numerous cases where *cy pres* awards in class action settlements “stray[ed] far from the ‘next best use’”).

If “funds generated through the aggregate prosecution of divisible claims are presumptively the property of the class members,” ALI Principles § 3.07 cmt. (b) – something that would unquestionably be the case had class members pursued individual litigation under the same substantive law – it is at

class is also persistent. *Compare Houck*, 881 F.2d at 502 (rejecting *cy pres* designated for local law schools and remanding for “broader nationwide use”), *with, e.g., Perkins, infra, and In re Easysaver Rewards Litig.*, ___ F. Supp. 2d ___, No. 09-cv-2094 AJB (WVG), 2013 WL 435032 (S.D. Cal. Feb. 4, 2013) (\$3 million to local San Diego schools including *alma mater* of counsel for both parties); *see generally* Sam Yospe, Note, *Cy Pres Distributions in Class Action Settlements*, 2009 Colum. Bus. L. Rev. 1014, 1030-31; Examination of Litigation Abuse: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary, 113th Cong. (Mar. 13, 2013) (written testimony of Theodore H. Frank).

the least troubling that some lower courts claim the discretion to distribute that property to third parties before class members have been compensated and, more generally, to approve settlements structured so as to stymie or preclude class members' recovery.

2. *Cy pres* awards drive a wedge between the interests of class members and their putative counsel. The chief problem is that, when attorneys settle a class action, they are negotiating both their own fees and class recovery. But *cy pres* awards divorce attorneys' fees (typically based on the total value of the settlement) from their clients' recovery, "ensuring that class attorneys are able to reap exorbitant fees regardless of whether the absent class members are adequately compensated." Beisner at 13. Thus, class counsel are financially indifferent as to whether a settlement is structured to compensate their clients or direct settlement proceeds to third parties. In some cases, class counsel may actually prefer a *cy pres* award that advances their own interests, such as by funding the development of future litigation, making a sizable donation to counsel's *alma mater*, or even both. See, e.g., Ashley Roberts, Law School Gets \$5.1 Million to Fund New Center, GW Hatchet, Dec. 3, 2007 (describing \$5.1 million *cy pres* award to George Washington University School of Law to create a "Center for Competition Law").

Arguably, "[b]y disincentivizing class attorneys from vigorously pursuing individualized compensation for absent class members, *cy pres* threatens the due process rights of those class members." Redish at

650 (citing *Hansberry v. Lee*, 311 U.S. 32, 45-46 (1940), and Fed. R. Civ. P. 23(a)(4) (requiring adequacy of representation)).

3. Defendants, facing no resistance from class counsel, use *cy pres* awards to structure settlements to minimize costs or even benefit themselves. Such awards create the illusion of relief that can “increase the likelihood and absolute amount of attorneys’ fees awarded without directly, or even indirectly, benefiting the plaintiff.” Redish at 661. Google and Facebook, for example, have directed *cy pres* awards in privacy-breach cases to the Electronic Frontier Foundation, a nonprofit that “is often an ally of Google and Facebook when it comes to staving off liability to rights holders over user-generated infringing content” and on other public policy issues. Roger Parloff, Google and Facebook’s New Tactic in the Tech Wars, CNNMoney, July 30, 2012; *see also* MacLean, *supra*, at 15 (noting that *Google Buzz* settlement distributed *cy pres* to six charities Google had given money to in previous year). At the same time, those companies have apparently vetoed awards to privacy-focused nonprofits that they view as “too aggressively devoted to combatting the wrongs that allegedly harmed the class.” Parloff, *supra*.

Even if Google and Facebook ultimately receive no direct benefit from these awards, they still are able to take credit for their charity. *See Molski v. Gleich*, 318 F.3d 937, 954 (9th Cir. 2003) (observing that “it seems somewhat distasteful to allow a corporation to fulfill its legal and equitable obligations

through tax-deductible donations to third parties”); *Dennis v. Kellogg Co.*, 697 F.3d 858, 867-68 (9th Cir. 2012) (noting that *cy pres* awards that overlap with charitable gifts to which the defendant has already committed are a “paper tiger,” in terms of deterrence).

In the instant case, Facebook stands to benefit by funding a public education campaign that emphasizes users’ ability to block disclosure of personal information, while commensurately minimizing the perceived risk of disclosure due to the actions of services like Facebook. And that is a best-case scenario; as Judge Kleinfeld explained, “For all we know [the DTF] will fund nothing but an ‘educational program’ amounting to an advertising campaign for Facebook.” App. 46. Nothing in the settlement forbids it.

4. The Second Circuit has expressed concern that the availability of *cy pres* relief “would have allowed plaintiffs to satisfy the manageability requirements of Rule 23 where they otherwise could not.” *Agent Orange*, 818 F.2d at 185. This, in turn, “would have induced plaintiffs to pursue ‘doubtful’ class claims for ‘astronomical amounts’ and thereby ‘generate . . . leverage and pressure on defendants to settle.’” *Id.* (alteration in original) (quoting *Eisen*, 479 F.2d at 1019). In this way, *cy pres* incentivizes both the bringing of ‘strike suits’ and their settlement on terms mutually agreeable to class counsel and the defendant. *Cf. Amchem*, 521 U.S. at 620 (stating that the Rule 23 prerequisites “demand undiluted, even heightened, attention in the settlement context.”).

5. Finally, *cy pres* awards often create the appearance or reality of judicial conflicts of interest. New York University's Samuel Issacharoff, Reporter for ALI's Principles of the Law of Aggregate Litigation, has described *cy pres* relief as "an invitation to wild corruption of the judicial process." Adam Liptak, Doling Out Other People's Money, N.Y. Times, Nov. 26, 2007. As the *New York Times* has documented, charities are increasingly lobbying judges for a cut of the proceeds in class action settlements. *Id.* And "[a]s part of their effort to secure judicial approval of proposed settlements, the parties often include a *cy pres* award that benefits a charity with which the judge or his or her family is affiliated." Beisner at 13.

While greasing the wheels of justice, these tactics create a substantial conflict between the interests of the presiding judge and those of class members, who may be better served by direct compensation or some other mode of relief. See *Klier*, 658 F.3d at 482 (Jones, C.J., concurring) ("[D]istrict courts should avoid the legal complications that assuredly arise when judges award surplus settlement funds to charities and civic organizations."); *Bear, Stearns*, 626 F. Supp. 2d at 415 ("[W]hile courts and the parties may act with the best intentions, the specter of judges and outside entities dealing in the distribution and solicitation of large sums of money creates an appearance of impropriety."). Compare *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011) (criticizing *cy pres* distributions to *alma mater*), with *Perkins v. Am. Nat'l Ins. Co.*, No. 3:05-CV-100 (CDL), 2012 WL 2839788 (M.D. Ga. July

10, 2012) (approving \$1.5 million *cy pres* award to the presiding judge's *alma mater*). Indeed, it is even conceivable that "parties can effectively judge-shop by selecting *cy pres* recipients that would force recusal." Ted Frank, *Fraley v. Facebook* update, Point of Law (July 12, 2012) (noting district judge recusal for unspecified reasons after parties proposed *cy pres* settlement that named charitable beneficiaries affiliated with judge and her husband).

A more fundamental problem is that an open-ended *cy pres* doctrine is incompatible with the judicial role. "Federal judges are not generally equipped to be charitable foundations: we are not accountable to boards or members for funding decisions we make; we are not accustomed to deciding whether certain nonprofit entities are more 'deserving' of limited funds than others; and we do not have the institutional resources and competencies to monitor that 'grantees' abide by the conditions we or the settlement agreements set." *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 236 F.R.D. 48, 53 (D. Me. 2006). Yet those things are exactly what federal judges are asked to do with increasing frequency.

B. Given the convenience of *cy pres* awards to defendants and class counsel, it should not be surprising that their use in class action settlements is growing at a rapid clip. A recent paper surveying *cy pres* awards in federal court cases from 1974 through 2008 reports the following findings:

First, the prevalence of class action cy pres awards has increased steadily by decade since the 1980s and has accelerated noticeably after 2000. Second, since 2000, the majority of class action cy pres awards are associated with cases that were certified solely for the purposes of settlement, over one-third of class action cy pres awards are associated with faux class actions, and approximately two-thirds of class action cy pres awards are associated with either settlement or faux class actions. Third, in a quarter of cy pres class actions, the amount and recipient of the cy pres award was determined *ex ante*, or prior to giving absent class members the opportunity to make claims on the fund. Fourth, the average cy pres award was \$5.8 million and accounted on average for 30.8% of total compensatory damages. Finally, not only do cy pres awards have the potential to increase the total available fund and legitimize cases where the class might not otherwise be certified, but they can also increase the likelihood and absolute amount of attorneys' fees awarded without directly, or even indirectly, benefiting the plaintiff.

Redish at 661.

The question presented by this petition is therefore both important and frequently recurring.



CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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