No. 17-961

IN THE

Supreme Court of the United States

THEODORE H. FRANK and MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, on behalf of herself and all others similarly situated, et al.,

Respondents.

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

BRIEF OF THE NEW JERSEY CIVIL JUSTICE INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND RULES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The New Jersey Civil Justice Institute ("NJCJI") is a non-profit, non-partisan group whose members include individuals, small businesses, business associations, and professional organizations that are dedicated to improving the civil justice system in New Jersey. Part of the NJCJI's mission is to advocate for the sound development of the law, including federal law, which is critical to ensuring the fair resolution of conflicts and the fostering of economic growth.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party funded this brief in whole or in part. Sup. Ct. R. 37.6. Counsel for all of the parties were consulted and have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Rule 23 of the Federal Rules of Civil Procedure is a procedural device that must always remain subordinate to the resolution of whatever the underlying claims might be. The judicial approval of a *cy pres*-only class action settlement in which class counsel and the defendant agreed upfront that the unnamed plaintiffs would get nothing, class counsel would be entitled to a fee award in the millions of dollars, and non-party organizations would receive the bulk of the multi-million-dollar settlement fund has the effect of elevating Rule 23 into a substantive remedial scheme. This result cannot be countenanced.

The Court should hold that a proposed class action settlement fails to satisfy Rule 23(b)(3)'s superiority requirement if the proposed settlement will provide no direct benefit to the unnamed plaintiffs. Abusive *cy pres*-only settlements like the one in this case will remain commonplace if the Court does not alter the incentive structures that make such settlements possible.

ARGUMENT

I. Rule 23 Cannot Function as a Substantive Remedial Scheme.

Rule 23 of the Federal Rules of Civil Procedure is a purely procedural device that is "ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). The rule is intended to provide an efficient way to litigate alleged harms involving numerous plaintiffs who cannot or would not file individual lawsuits. *See Carnegie v.*

Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."). For that reason, the right of a plaintiff "to employ Rule 23 is a procedural right only." *Roper*, 445 U.S. at 332. Rule 23 is not a stand-in for, and should not be used as, a substantive remedial scheme. This principle should be top of mind for a district court when the unnamed plaintiffs—who are, after all, the owners of the substantive claims underlying any Rule 23 class action—get no benefit at all under the terms of a class action settlement.

The Court should hold in this case that a proposed class action settlement necessarily flunks Rule 23(b)(3)'s requirement that a "class action [be] superior to other available methods for fairly and efficiently adjudicating the controversy" where class counsel and the defendant have agreed that the proposed settlement will provide no benefit at all to the unnamed plaintiffs. Class-action treatment cannot be a superior method under such circumstances because the unnamed plaintiffs would necessarily be better off retaining their individual claims, no matter how large or small those claims might be. *See Hoffer v. Landmark Chevrolet Ltd.*, 245 F.R.D. 588, 602-05 (S.D. Tex. 2007) (suggesting that the use of "*cy pres* as a substitute for distributing damages to individual class members" fails to satisfy Rule 23(b)(3)'s superiority requirement).

Procedure has always existed in service of substance. *See* Charles E. Clark, *History, Systems and Functions of Pleading*, 11 Va. L. Rev. 517, 542 (1925)

(observing that procedure "is a means to an end, not an end in itself—the handmaid rather than the mistress of justice") (cleaned up). No procedural device, no matter how lucrative it might be to lawyers or how doctrinally complex the device might become over time, can be or should be an end in itself. *See Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) ("Process is not an end in itself."); *see also* topdoggjb, *Herm Edwards You Play to Win*, YouTube (Jan. 22, 2013), https://bit.ly/UMCet2 ("You play to win the game. Hello? You play to win the game. You don't play to just play it."). Indeed, although the case law construing Rule 23 spans thousands of pages in the United States Reporter, the Federal Reporter, and the Federal Supplement, Rule 23 cannot abridge, enlarge, or modify any substantive right, nor can it override the requirements of Article III. *Amchem Prods., Inc. v. Windsor*, 523 U.S. 591, 613 (1997); 28 U.S.C. § 2072(b).

Here, when the Ninth Circuit affirmed the approval of a class action settlement in which no compensation whatsoever was paid to a class consisting of approximately 129 million people, most of the $8.5 million settlement fund was funneled to organizations handpicked by class counsel and the defendant, and class counsel were rewarded with millions of dollars' worth of attorneys' fees, the Ninth Circuit encouraged the filing of class action lawsuits that, from all outward appearances, exist for the purpose of generating an award of attorneys' fees for class counsel.

Blessing a settlement in which only non-party organizations share in the damages award, the tens of millions of unnamed plaintiffs receive no benefit at

all, and class counsel (who bargained away the class members' supposedly valuable substantive rights) reap millions of dollars in fees has the effect of elevating Rule 23 into a substantive remedial scheme intended to compensate class counsel and (maybe) punish wrongdoers, all at the victims' expense. A mere procedural device cannot and should not be elevated in this way.

It cannot be overemphasized that class actions present a heightened risk of collusion, self-dealing, and similarly nefarious conduct. *Mirfasihi v. Fleet Mortg. Co.*, 356 F.3d 781, 785 (7th Cir. 2004) (Posner, J.). Defendants, as economically rational actors, have two goals; they want to obtain a broad release at a bargain price. *See* Richard A. Posner, Divergent Paths: The Academy and the Judiciary 149 (2016) (explaining that from a class action defendant's standpoint an "optimal settlement is one that is modest in overall amount") ("Posner Book"). Class counsel, who often represent thousands or millions of people they will never meet, have a natural incentive to maximize their own fees at the expense of obtaining a better recovery for their faceless clients. *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013) (Kethledge, J.). Defendants are also typically indifferent as to the issue of how a settlement fund is divvied up between class members and class counsel. *Id.* at 717.

All of the above is why district courts are tasked with probing the terms of proposed class action settlements. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 780 (7th Cir. 2014) (Posner, J.) (characterizing district judges as a "fiduciary of the class, who is subject therefore to

the high duty of care that the law requires of fiduciaries") (cleaned up). Yet the rule requiring district judges to go over proposed class action settlements with a fine-tooth comb is more often honored in the breach than in the observance. *See Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014) (Posner, J.) ("A trial judge's instinct, in our adversarial system of legal justice, is to approve a settlement, trusting the parties to have negotiated to a just result as an alternative to bearing the risks and costs of litigation. But the law quite rightly requires more than a judicial rubber stamp when the lawsuit that the parties have agreed to settle is a class action."). District judges are sometimes too passive when proposed class action settlements land on their desks. *See* Posner Book at 137 ("[S]ome judges appear to shirk their duty to scrutinize settlements in class action cases carefully."); *see also id.* at 149 (emphasizing that "[i]t's up to the judge to make sure that the settlement doesn't give class counsel an exorbitant share of the settlement proceeds, thus selling out the class—an endeavor in which the defendant is happy to join.").

Cy pres-only class action settlements like the one approved by the district court and affirmed by the Ninth Circuit in this case offer a particularly troubling example of procedure rising above, and even displacing, substance. Where a "settlement benefits class counsel vastly more than it does the consumers who comprise the class," then the proposed settlement should almost always be rejected. *In re Dry Max Pampers Litig.*, 724 F.3d at 721. This rule plainly applies where the proposed settlement contemplates no direct payments to any of the absent class members. *Id.*

(concluding that the district court abused its discretion in approving a settlement where the "relief that [the] settlement provides to unnamed class members is illusory"); *see also In re Hotel Tel. Charges*, 500 F.2d 86, 92 (9th Cir. 1974) ("When, as here, there is no realistic possibility that the class members will in fact receive compensation, then monolithic class actions raising mind-boggling manageability problems should be rejected. If, as appellees maintain, the suit would not be litigated except as a class action which would provide plaintiffs' attorneys with lucrative incentives, then that decision of the legal marketplace may be the best reflection of a public consciousness that the time of the lawyers and of the court should best be spent elsewhere.") (cleaned up). It is a tautology that the unnamed class members derive zero benefit "from the defendant's giving the [settlement fund] money to someone else." *Mirfasihi*, 356 F.3d at 784.

There are several supposed justifications for *cy pres*-only class action settlements, but none of them are persuasive. One commonly invoked justification is that a defendant should not be able to get off "scot-free because of the infeasibility of distributing the proceeds of the settlement" to the unnamed class members. *Id.*; *accord Pearson*, 772 F.3d at 784 (observing that a "*cy pres* award is supposed to be limited to money that can't feasibly be awarded to the intended beneficiaries"). Sometimes that infeasibility arises from the fact that administrative costs exceed the value of individual claims; in other instances the class's enormous size precludes distributions to each and every class member.

Yet this case shows why that justification must fail. The class in this case was extremely large; it consisted of approximately 129 million people. Assuming only for the sake of argument that the class actually suffered some harm as a result of Google's use of referral headers, then class counsel bargained away the rights of 129 million people in exchange for $0 to the class, $5.3 million to a handful of organizations that the vast majority of the class had almost certainly never heard of (much less supported), and $2.125 million to class counsel.

Moreover, class counsel in this case were able to point to the $8.5 million settlement fund as evidence that they were entitled to a substantial award of attorneys' fees. This is not an unusual outcome, either. *See SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009) ("To the extent attorney's fee awards are determined using percentage of recovery method, the recovery and, therefore, the attorney's fee award is exaggerated by cy pres distributions that do not truly benefit the plaintiff class."); *accord Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (observing in a class action settlement involving a *cy pres* award that "serious issues [exist] about the alleged dollar value of the product *cy pres* award, an important number used to measure the appropriateness of attorneys' fees" and opining that the "settlement is a paper tiger"). That result, however, makes the case for abolishing *cy pres*-only class action settlements. *See In re Dry Max Pampers Litig.*, 724 F.3d at 720 ("To be clear: The fairness of the settlement must be evaluated primarily based on how it *compensates class members*—not on whether it provides relief to other people. . . .") (cleaned up).

II. The Class Device Is Not Superior if the Unnamed Plaintiffs Will Receive No Direct Benefit Under a Proposed Settlement.

A class should not be certified and a class action settlement should not be approved if class counsel and the defendant have agreed on the front end that the unnamed class members cannot (or will not) be directly compensated at all. Jay Tidmarsh, *Cy Pres and the Optimal Class Action*, 82 Geo. Wash. L. Rev. 767, 797 (2013) ("Deterrence of wrongful behavior is an important goal, but not so important as to justify extinguishing a victim's claim in favor of compensating a third party.").

Put another way, a class action settlement should not be approved if the direct benefit to the absent class members is nil. *See Lane v. Facebook, Inc.*, 709 F.3d 791, 793 (9th Cir. 2013) (M. Smith, J., dissental) (explaining that the approval of a *cy pres* settlement that was not reasonably certain to benefit the class "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"); *accord* Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. Cal. L. Rev. 97, 141-42 (2014) (advocating a "no fee approach, which would deny class counsel any fee on the portion of the fund distributed cy pres") (cleaned up).

Tying the recovery of attorneys' fees to the actual and direct benefit (if any) received by the class would help to ensure that class actions will not be brought by class counsel simply to obtain massive fee awards.

To reiterate, Rule 23 "is not a free-standing device to do justice." *In re Thornburg Mortg., Inc. Secs. Litig.*, 885 F. Supp. 2d 1097, 1112 (D.N.M. 2012) (cleaned up). And the "Federal Rules of Civil Procedure cannot work as substantive law." *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011).

The Ninth Circuit's approval of the *cy pres*-only settlement in this case incentivizes more class action lawsuits that would effectively transform a procedural device (i.e., Rule 23) into substantive law. Without a bright-line rule requiring some actual and direct benefit to the unnamed class members, the Rule 23 procedural tail wags the substantive law dog. Martin H. Redish *et al.*, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 648 (2010) ("Redish I"); Tidmarsh at 773-74 (contending that "cy pres often fails to ensure the creation of optimally structured class actions and may indeed exacerbate the problem by creating incentives to create suboptimal class actions").

Starting with what was ostensibly at stake here, the named plaintiffs alleged that Google had violated the Stored Communications Act by communicating Google users' search terms to the websites visited by those users. *See In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 740 (9th Cir. 2017) (recounting the procedural history of the case). The Stored Communications Act establishes a damages floor of $1,000. *See* 18 U.S.C. § 2707(c) ("[B]ut in no case shall a person entitled to recover receive less than the sum

of $1,000."). And in cases involving willful or intentional violations, the Stored Communications Act makes punitive damages available. *Id.* Thus, each class member's claim was in theory worth at least $1,000 and possibly more. That is a relatively high-value individual claim in the context of a consumer class action.

Nowhere in the Stored Communications Act's provisions governing civil actions does there exist any language that permits damages to be awarded to some non-party to a successful class action lawsuit brought under the statute, not even to the public fisc. *See generally* 18 U.S.C. § 2707. In this respect, the Stored Communications Act is like most other substantive laws. *See* Marvin H. Redish, *Class Action and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71, 75 (explaining that substantive laws typically "enforce their behavioral proscriptions by establishing claims for damages for private victims of the proscribed behavior") ("Redish II"); *see also Klier*, 658 F.3d at 481 (Jones, J., concurring) ("Yet in no instance of which we are aware does the underlying substantive law sought to be enforced in a federal class action direct a violator to pay damages to an uninjured charity." (citing Redish I at 623)).

A federal court should be deeply skeptical of a proposed class action settlement that purports to release the claims of roughly 129 million people in exchange for $0 to the class, $5.3 million to various organizations, and $2.125 million to class counsel, particularly

when the unnamed plaintiffs' claims have a theoretical floor value of $1000 apiece.

If the underlying problem is that the Stored Communication Act's damages provisions somehow offer inadequate compensation to aggrieved plaintiffs, then that problem is one for Congress to address. *See* Redish I at 640 ("If existing substantive remedies are deemed inadequate as a means of enforcing the law's behavioral prohibitions, the task of altering the remedial framework is one for the authority that created the substantive law in the first place."). The analysis and the solution are the same if the underlying problem involves the statute's less-than-optimal level of deterrence of wrongdoers or the less-than-vigorous enforcement of the statute by private plaintiffs.

Class counsel in this case received a $2.125 million fee award while every plaintiff except the named plaintiffs got zilch. The vast majority of the remainder of $8.5 million settlement fund was routed to non-party organizations. Rule 23 "is meant to provide a vehicle to compensate class members and to resolve disputes." *In re Thornburg Mortg., Inc. Secs. Litig.*, 885 F. Supp. 2d at 1105. From the perspective of the unnamed plaintiffs, the procedural device meant to enhance efficiency and to promote recovery failed to do its job. The natural inference is that the class action device should not have been used at all because it was not a superior method for fairly adjudicating the unnamed plaintiffs' claims. *See id.* at 1107 ("Parties do not initiate class actions so that class action damages can be distributed to third parties not involved in the litigation and without standing to sue

for the damages they receive through the mechanics of court intervention.").

And it is not enough to say that the *cy pres* awards in this case were a necessary evil. Notably, the use of the *cy pres* doctrine cannot (and should not) alter parties' substantive rights. *Molski v. Gleich*, 318 F.3d 937, 955 (9th Cir. 2003) (so stating), *overruled on other grounds by Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010). The bulk of the $8.5 million settlement fund in this case went to organizations that were non-parties. Neither the Stored Communications Act nor most other substantive laws contemplate such a result when private plaintiffs bring lawsuits under those laws. *See Klier*, 658 F.3d at 481 (Jones, J., concurring) (suggesting that *cy pres* distributions in the class action context "present an Article III problem" and "likely violate Article III's standing requirements"); *accord Spokeo, Inc. v. Robins*, 578 U.S. ___, 136 S. Ct. 1540, 1547 (2016) (explaining that the standing doctrine "developed in our case law to ensure that federal courts do not exceed their authority as it has traditionally been understood"). Rule 23, as a purely procedural device, should not permit (much less compel, as it apparently did in this case) a different result.

It is likewise insufficient to argue that the *cy pres*-only settlement in this case was permissible under the class-action-suit-as-private-attorney-general theory. Although this suit—like virtually every other class action lawsuit—was doubtless the brainchild of entrepreneurial plaintiffs' lawyers, this action and class action lawsuits in general are supposed to be

"private compensatory damage suits." Redish II at 81. When Congress intends to create a bounty-hunter-like enforcement scheme, it knows how to do so. *See id.* at 81-83 (discussing the history of *qui tam* actions); *see also* Redish I at 649 (explaining that in an ordinary *qui tam* action an "uninjured party is incentivized to bring suit by receiving a portion of the damages for its successful prosecution"). The *qui tam* model cannot be shoehorned into Rule 23 or the substantive law that Rule 23 is supposed to serve, nor should it be. *See* Redish II at 93 ("The problem is that the substantive law that the class action purports to enforce invariably fails to authorize private attorney general actions of the bounty hunter variety.").

Further, the presence of injunctive relief in this case does not make the class device a superior method of adjudication. Injunctive relief, by definition, does not provide any direct compensation to the unnamed plaintiffs. And it is entirely speculative whether class members will derive any benefit from the injunction because they may not continue to use the product or service. Worse, class members do not receive any benefit beyond what is available to society at large. By giving up their claims to be no better off than any member of society at large, the class device has failed the class members. Injunctive relief is often just another mechanism by which plaintiffs' lawyers and go-along corporate defendants create the illusion of relief in the context of proposed settlements. Judicial passivity toward injunctive relief incentivizes the filing of more low-to-no-merit class actions that exist only for plaintiffs' lawyers to obtain a fee award.

What the Ninth Circuit failed to appreciate is that its approval of the *cy pres*-only settlement in this case creates perverse incentives for more cases and proposed settlements substantially like this one. Plaintiffs' lawyers, like all rational human beings, respond to incentives. *See Mirfasihi*, 356 F.3d at 785 ("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?"); *cf. Johnson v. Daley*, 339 F.3d 582, 595 (7th Cir. 2003) (en banc) (Easterbrook, J.) (observing that the enactment of the Prison Litigation Reform Act "shows that [prisoners] *do* respond to incentives" as they relate to behavior in litigation). Specifically, the Ninth Circuit has signaled that within its district courts class counsel may satisfy their "self-interest in securing a healthy fee . . . by a cy pres distribution that denie[s] the class sufficient direct benefit." Wasserman at 134.

An empirical analysis of *cy pres* awards in federal class action suits between 1974 and 2008 shows that federal courts' approval of *cy pres* awards increased significantly beginning in 2001, which is around the time that coupon settlements began to attract negative attention. *See* Redish I at 652-61 (discussing the data). Between 1991 and 2000, federal courts approved *cy pres* awards in twenty-one class action settlements. *Id.* at 653. That number more than tripled (for a total of sixty-five) between 2001 and 2008. *Id.* Most of the *cy pres* awards over that same time period occurred in the context of settlement (as opposed to litigation) class actions. *Id.* at 661.

If the Ninth Circuit's decision survives review, then plaintiffs' lawyers will be incentivized to search for patsies to serve as named plaintiffs and to file putative class actions involving tens (or hundreds) of millions of unnamed plaintiffs who have suffered one or more alleged injuries (whether statutory or common law) relating to their online activities. A diffuse community of unnamed plaintiffs helps plaintiffs' lawyers in this regard because if the class is so massive that it appears from the get-go to be infeasible to compensate each and every class member, then class counsel will have a superficially appealing argument that a *cy pres*-only settlement is appropriate under the circumstances.

And a defendant faced with a class containing tens or hundreds of millions of plaintiffs will likely think that creating a settlement fund of (for example) $10 million is a reasonable-enough price to pay for global peace. Then class counsel—just as they did in this case—can point to the settlement fund and ask the district court to award millions of dollars' worth of attorneys' fees notwithstanding the fact that the tens or hundreds of millions of unnamed plaintiffs did not receive a penny. The result is that the merits (whatever they might be) of the class members' claims have been entirely subordinated to the Rule 23 procedural device, which is in fact operating impermissibly as a substantive remedial scheme. Finally, and most troublingly, Rule 23(b)(3)'s superiority requirement is effectively written out of Rule 23 under such circumstances.

CONCLUSION

The Court should reverse the judgment of the Ninth Circuit and hold that proposed class action settlements in which the unnamed plaintiffs will receive no direct benefit fail Rule 23(b)(3)'s superiority requirement.

Respectfully submitted,

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