

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

THEODORE H. FRANK, ET AL.,)
)
 Petitioners,)
)
 v.) No. 17-961
)
 PALOMA GAOS, INDIVIDUALLY AND ON)
)
 BEHALF OF ALL OTHERS SIMILARLY)
)
 SITUATED, ET AL.,)
)
 Respondents.)

Pages: 1 through 73

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Date: October 31, 2018

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BEHALF OF ALL OTHERS SIMILARLY)
SITUATED, ET AL.,)
Respondents.)

Washington, D.C.

Wednesday, October 31, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

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4 JEFFREY A. LAMKEN, ESQ., Washington, D.C.; on behalf
5 of Respondents Paloma Gaos, et al.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 17-961,
5 Frank versus Gaos, Individually And On Behalf
6 Of All Others Similarly Situated.

7 Mr. Frank.

8 ORAL ARGUMENT OF THEODORE H. FRANK
9 ON BEHALF OF THE PETITIONERS

10 MR. FRANK: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 Amchem instructs that courts should
13 interpret Rule 23 with the interests of absent
14 class members in close view. The best way to
15 interpret Rule 23's text requiring settlements
16 be fair and reasonable is to align class
17 counsel's interests with those of the absent
18 class members.

19 In Deposit Guaranty v. Roper at page
20 339, this Court called it an abuse when class
21 members were not the primary beneficiaries of a
22 class action. How can it be fair and
23 reasonable for a court to endorse such an
24 abuse?

25 JUSTICE GINSBURG: Why is it an abuse?

1 Because, practically, the class members would
2 get nothing, nothing at all, and, here, at
3 least they get an indirect benefit.

4 MR. FRANK: Well, the indirect benefit
5 is even less than nothing. The -- it was
6 feasible to distribute money to class members.
7 And, instead, class counsel chose to agree to a
8 settlement that directed that money elsewhere.

9 JUSTICE GINSBURG: How much would it
10 have come to for each class member?

11 MR. FRANK: Each claiming class member
12 probably could have gotten between 5 and 10
13 dollars with typical claims rates if -- for
14 example, in the Fraley versus Facebook
15 settlement, the court rejected an all cy pres
16 settlement --

17 JUSTICE SOTOMAYOR: Sorry. There's an
18 amicus brief that talked -- who laid out pretty
19 thoroughly the costs associated with, first,
20 identifying the class; second, preparing the
21 mailing; third, executing the mailing; and then
22 processing the claims that came up with a
23 figure of 67 cents.

24 Now, putting aside that there may be a
25 question about whether the trial court

1 adequately determined feasibility, but assuming
2 it did, why would it have been an abuse of
3 discretion for the court to believe that
4 processing 67 cents didn't make sense because
5 the cost would outweigh what they would pay?

6 MR. FRANK: Well, the district court
7 applied the wrong legal standard, but --

8 JUSTICE SOTOMAYOR: No, no. I know
9 your standard for feasibility --

10 MR. FRANK: Right, right.

11 JUSTICE SOTOMAYOR: -- is can we give
12 10 percent of the class something even if
13 nobody else gets anything, meaning what you
14 would like to do is select 10 percent of the
15 class and pay them alone and do nothing for
16 everybody else.

17 MR. FRANK: Well, no. We would like
18 to give everybody in the class the opportunity
19 to make a claim. And in practice, a very small
20 minority of the class would not be indifferent
21 to the opportunity, and typically --

22 JUSTICE SOTOMAYOR: Everybody else
23 would receive not even a direct benefit?

24 MR. FRANK: No, they would receive the
25 opportunity to make a claim.

1 JUSTICE SOTOMAYOR: They always have
2 that opportunity.

3 MR. FRANK: They don't have that
4 opportunity here as a class member. Class
5 members were deprived of that opportunity.

6 JUSTICE SOTOMAYOR: They could opt
7 out.

8 MR. FRANK: They could opt out in
9 Amchem also, but that didn't make the
10 settlement fair.

11 JUSTICE SOTOMAYOR: But I go back to
12 my point, which is are you disputing the
13 finding of fact that under the normal
14 application of feasibility, whether cost
15 outweighs the payment or cost far exceeds
16 whatever could be given out, is that -- are you
17 disputing that?

18 MR. FRANK: The court never made that
19 finding. The court applied the Ninth Circuit's
20 de minimis test under Lane versus Facebook,
21 which required it to divide by the entire
22 denominator the entire class.

23 In reality, settlements settle all the
24 time for well under a dollar per class member
25 and then successfully distribute that money to

1 the class because most class members are just
2 simply indifferent to the opportunity for these
3 small sums.

4 JUSTICE GINSBURG: And then is it all
5 right to have some kind of a cy pres doctrine
6 operate?

7 MR. FRANK: I --

8 JUSTICE GINSBURG: Because if --
9 would -- with -- for all the class members who
10 don't make any claim?

11 MR. FRANK: I -- I -- I -- I -- I
12 don't understand the question, Justice. I -- I
13 apologize.

14 JUSTICE GINSBURG: Suppose the class
15 members are notified and only 10 percent of
16 them make a claim. What happens to the rest of
17 the amount that was agreed upon as a
18 settlement?

19 MR. FRANK: First of all, in practice,
20 I just want to let the Court know that
21 10 percent is an extraordinarily high claim
22 rate. The claims rate is typically below
23 1 percent. But --

24 JUSTICE GINSBURG: And then the
25 99 percent.

1 MR. FRANK: Absolutely. In the
2 typical settlement, it's a pro rata
3 distribution. You have a fund of a few million
4 dollars. That's tens of millions of class
5 members have the opportunity to make a claim.
6 A very small percentage make the claim. And
7 the fund is distributed pro rata to them.
8 That's what happens in Fraley, where the number
9 of class members making claims was so small
10 they still had money left over even after
11 giving every claiming class member \$15, even
12 though we were talking \$9 million for 150
13 million class members. That's 6 cents per
14 class member.

15 CHIEF JUSTICE ROBERTS: What -- what
16 do they do? Do they wait until -- a reasonable
17 period and figure out most of the claims are in
18 and then divide it up or --

19 MR. FRANK: The settlement procedures
20 will establish 90 days or 60 days or 120 days
21 to make a claim. The claims come in either
22 electronically or through paper, depending on
23 how the claims process is set up.

24 And sometimes there's an audit for --
25 to make sure there aren't fraudulent claims.

1 That's what happened in Carrier IQ, where,
2 again, even though we were talking pennies per
3 class member, it only cost them \$600,000 to
4 distribute a few million dollars to 30 million
5 class members and still audit the claims and
6 reject 30 percent of the claims. So --

7 JUSTICE SOTOMAYOR: I'm sorry, I --
8 I'm talking -- this is a full cy pres award,
9 meaning there's no direct benefit to the class.
10 What about the residual cy pres? I thought in
11 many instances, if a fund is created and the
12 claimants are all paid off, there's some money
13 left over, the residual cy pres, and that's
14 given indirectly often.

15 MR. FRANK: Circuits differ on that.
16 The Seventh rejects that proposal because they
17 recognize that the settling parties have the
18 ability to adjust the claims rate by --
19 depending on how difficult they make the claims
20 process.

21 So, in a Seventh Circuit case, there
22 is a \$1.1 million residual and 12 million class
23 members, though that was 8 cents per class
24 member, the court rejected the idea that that
25 was a benefit to the class and said you've made

1 the claims process too hard and required them
2 to redo the settlement on remand. Millions
3 more dollars went to the class because they
4 changed the -- the claims process and made it
5 easier for class members to make claims.

6 So, if you have a residual and you
7 incentivize the attorneys to prefer the
8 residual to the actual claims, what will happen
9 is you'll have a very difficult claims process.
10 There is a Third Circuit case, a \$35 million
11 fund, and -- but you had to fill out a
12 five-page claim form to claim your \$5. And so
13 very few class members did that. They were
14 only going to distribute \$3 million with over
15 15 million to cy pres.

16 And the Third Circuit rejected that,
17 that the district court failed to prioritize
18 direct benefit to the class. And it just --

19 JUSTICE SOTOMAYOR: Assuming all of
20 that, let's assume a very efficient claim
21 process, let's assume a -- a careful
22 feasibility study by the district court.

23 Are you still -- you're still taking
24 the position that if there's a residual for any
25 reason that's legitimate, there's been an easy

1 claims process, there's been a simple
2 distribution, whatever, you're still saying
3 that an indirect benefit, a partial cy pres, is
4 not okay?

5 MR. FRANK: I'm saying that you can't
6 reward class counsel for it. You have to
7 incentivize them to prioritize the direct
8 benefit to the class.

9 JUSTICE SOTOMAYOR: So your position
10 is that cy pres is okay, but we should write
11 legislation in our opinion saying that we can't
12 pay class counsel for that.

13 Have you read the Third Circuit
14 opinion that talks about this and says there's
15 a lot to balance in this issue, and are the
16 courts the appropriate one or is Congress the
17 appropriate one?

18 MR. FRANK: Well --

19 JUSTICE SOTOMAYOR: Or is the
20 individual district court's discretion
21 appropriate until the Congress looks at this
22 and decides?

23 MR. FRANK: I think Rule 23(e) means
24 something. And this Court has previously
25 called disproportionate benefits an abuse. And

1 it's -- it's very clear that Rule 23 -- not --
2 not -- it's not the case that everything goes
3 under Rule 23(e), so long as a district court
4 rubber stamps it.

5 JUSTICE ALITO: In a case such as
6 this, is any effort made -- and would it even
7 be possible -- to determine whether every
8 absent class member or even most of the absent
9 class members regard the beneficiaries of the
10 cy pres award as entities to which they would
11 like to make a contribution?

12 MR. FRANK: It's very possible to
13 establish a claims process where somebody
14 checks a box and said, instead of sending me a
15 check for \$6, send it to the American Cancer
16 Society.

17 Nobody does that, or at least we -- we
18 haven't seen settlements that do that. And the
19 reality is, if class members want to send their
20 money to charity, they can do it without the
21 intermediary of class counsel.

22 JUSTICE ALITO: So who decides who
23 these beneficiaries are going to be?

24 MR. FRANK: It varies from settlement
25 to settlement. In this case, class counsel and

1 Google negotiated and agreed to a set of six
2 beneficiaries. That process was opaque, and we
3 don't understand which beneficiaries didn't
4 make the cut and why they didn't make the cut,
5 but they -- they chose these particular
6 beneficiaries.

7 JUSTICE ALITO: So the parties and the
8 lawyers get together and they choose
9 beneficiaries that they personally would like
10 to subsidize? That's how it works?

11 MR. FRANK: That's usually how it
12 works. We've had -- I've seen settlements
13 where the judge says I don't like these
14 beneficiaries, pick these beneficiaries.

15 CHIEF JUSTICE ROBERTS: Where the
16 judge has designated the beneficiaries?

17 MR. FRANK: There are settlements
18 structured where the judge designates the
19 beneficiaries.

20 And in another Google settlement that
21 we discuss in our opening brief, the parties
22 designated a beneficiary and -- and the court
23 re-designated the beneficiary.

24 JUSTICE KAGAN: Mr. Frank --

25 JUSTICE GORSUCH: We -- I'm sorry.

1 JUSTICE KAGAN: Sorry. No, go ahead.
2 JUSTICE GORSUCH: Oh, please go ahead.
3 JUSTICE KAGAN: No.
4 CHIEF JUSTICE ROBERTS: Justice Kagan.
5 JUSTICE KAGAN: I was going to change
6 the subject.
7 (Laughter.)
8 JUSTICE GORSUCH: So was I.
9 (Laughter.)
10 JUSTICE GORSUCH: Jurisdiction?
11 JUSTICE KAGAN: Yes.
12 JUSTICE GORSUCH: Go for it.
13 (Laughter.)
14 JUSTICE KAGAN: May I ask you, Mr.
15 Frank, to -- to -- to address the standing
16 issue in this case, to -- to talk about what
17 you think the harm was and whether any court
18 has addressed your theories about the harm?
19 MR. FRANK: Are you -- are you talking
20 my harm or the harm of the plaintiffs?
21 JUSTICE KAGAN: The harm of the
22 plaintiffs.
23 MR. FRANK: The harm of the
24 plaintiffs, we discuss that at pages 25 and 26
25 of our reply brief.

1 And one of the named plaintiffs,
2 Anthony Italiano, alleges a statutory violation
3 that corresponds to the common law tort of
4 public disclosure of private facts.

5 And the lower courts are unanimous in
6 holding that that kind of statutory claim
7 satisfies Spokeo.

8 Even on remand in Spokeo, the Ninth
9 Circuit found standing, and this Court denied
10 cert the second time up.

11 So I don't think there's a real
12 standing issue, unless the Court is inclined to
13 expand Spokeo.

14 JUSTICE KAGAN: I had thought, Mr.
15 Frank, that the lower court thought that there
16 would be -- there was standing just because it
17 was a statutory claim, and that there was no
18 reason that the plaintiff had to show a
19 particularized or a concrete injury.

20 MR. FRANK: That is certainly the
21 wrong standard for the district court to have
22 applied, with later Supreme Court jurisprudence
23 indicating that, but we can determine from the
24 face of the complaint that Anthony Italiano
25 made an allegation of concrete injury within

1 the ambit of what Justice Thomas's concurrence
2 in Spokeo indicated was acceptable and what
3 lower courts have unanimously indicated that it
4 was -- was acceptable.

5 CHIEF JUSTICE ROBERTS: I was curious
6 where you were going to come down before you
7 filed your brief, because, obviously, if
8 there's no standing, the whole class action is
9 thrown out, right?

10 MR. FRANK: That would be correct.
11 That would be the right thing to do under
12 Arizonans for Proper English, or Official
13 English. That's exactly what the Court did.
14 The Court found that the lower courts did not
15 have jurisdiction and vacated everything.

16 JUSTICE GORSUCH: Now you say -- to
17 follow up with Justice Kagan, who anticipated
18 exactly where I wanted to go -- you say there's
19 an allegation with respect to Mr. Italiano that
20 -- that he was injured. But do we know that he
21 was injured? Is there any evidence that his
22 personal information, for example, wasn't
23 already available through the white pages and
24 otherwise published so that there is no injury
25 in fact?

1 MR. FRANK: Well, that goes to the
2 merits. If I allege that my friend here
3 punched me in the head and owes me over \$75,000
4 and we're citizens of different states, I had a
5 claim for standing even if that claim is
6 completely fictional.

7 JUSTICE GORSUCH: Well, fair enough at
8 a 12(b)(6) stage, but here we're entering a
9 final judgment, and should we at least remand
10 to -- to a lower court to make a decision as to
11 whether there is actually standing as opposed
12 to mere allegation of standing?

13 MR. FRANK: I don't think that's the
14 case. I think the -- the -- the allegation of
15 concrete injury establishes the standing, and
16 then the merits question's always different
17 than the jurisdictional question.

18 JUSTICE BREYER: What is the private
19 -- I mean, what I have here, my law clerk
20 brought it up, is that the search that Mr.
21 Italiano engaged in was his name, that's
22 certainly public, his home address, I imagine
23 that's public, name in bankruptcy, his name in
24 foreclosure proceedings, his name in short sale
25 proceedings, his name in Facebook, and his name

1 and the name of his then soon-to-be ex-wife and
2 the words "forensic accounting."

3 Now how, if that -- if those are all
4 the things that he looked up, how are the --
5 what concrete injury was there because somebody
6 might discover through Google that he made
7 those searches?

8 I mean, I -- I don't quite see how
9 this is some kind of secret or private or --
10 information. And I don't see alleged anywhere
11 how those things were hurt. So I had a hard
12 time distinguishing this from Spokeo.

13 MR. FRANK: Well, the Ninth Circuit --

14 JUSTICE BREYER: And -- and -- and the
15 statute -- and the judge, by the way, didn't
16 even try.

17 MR. FRANK: I agree.

18 JUSTICE BREYER: He just said that the
19 very fact that the statute forbids it is
20 enough, which I think is one thing Spokeo says
21 that's wrong.

22 MR. FRANK: I agree that the judge did
23 not apply the Spokeo standard. And if you
24 think the Ninth Circuit would do something
25 differently here than it would in Spokeo or has

1 a chance of doing something differently here,
2 then maybe the appropriate decision is to
3 remand and let them consider that.

4 And while the case for Mr. Italiano's
5 injury may be weak, which suggests why this
6 settled for such an infinitesimal amount of the
7 statutory damages, that does not change that
8 the allegation was made and that --

9 JUSTICE BREYER: The allegation is
10 made, but where is an allegation of some kind
11 of injury that would actually concretely and
12 particularly hurt him?

13 MR. FRANK: Again --

14 JUSTICE BREYER: By somebody looking
15 up on the -- at Google and discovering he made
16 those searches?

17 MR. FRANK: Even under the common law,
18 the public disclosure of private facts --

19 JUSTICE BREYER: And which are the
20 private facts?

21 MR. FRANK: The private facts
22 regarding the dissolution of his marriage and
23 -- and -- and things of that nature.

24 JUSTICE GORSUCH: Well, again, though,
25 I think this gets -- we're stuck in the same

1 place, I think, which is that you have to
2 assume that that information isn't otherwise
3 available.

4 At least, fine, you don't want to
5 prove it, an allegation of it, there's no
6 allegation that that information wasn't
7 otherwise available.

8 So what do we do about that? I think
9 that's the part where -- that we're struggling
10 with here.

11 MR. FRANK: If the complaint is not
12 strong enough to establish the concrete injury
13 under what a majority of the Court indicated
14 would be sufficient under Spokeo and what the
15 lower courts have repeatedly found with respect
16 to Spokeo, then the appropriate decision is to
17 have a limited remand and take it back up,
18 assuming that the Court finds jurisdiction.

19 CHIEF JUSTICE ROBERTS: Is -- putting
20 aside the question of whether it's pertinent to
21 the standing analysis, just so I understand the
22 claims, the disclosures go to any searches that
23 somebody engages in, correct?

24 MR. FRANK: That's correct.

25 CHIEF JUSTICE ROBERTS: Okay. So it

1 may be that they have the wrong named plaintiff
2 if the disclosures are not private?

3 MR. FRANK: If -- if both Gaos and
4 Italiano don't qualify, then they might have
5 the wrong named plaintiff. If one of the named
6 plaintiffs satisfies it, though, under Rumsfeld
7 versus FAIR, that would be sufficient.

8 CHIEF JUSTICE ROBERTS: But it -- but
9 it has to be one of the named plaintiffs?

10 MR. FRANK: It does have to be a named
11 plaintiff.

12 JUSTICE GINSBURG: But your argument
13 is passing standing. You're not challenging
14 that?

15 MR. FRANK: We're not challenging
16 standing. We're not challenging the court's
17 finding -- nobody is challenging the court's
18 finding under Rule 23(a) that all the class
19 members have a common injury.

20 The -- the Ninth Circuit's standard
21 creates perverse incentives for class counsel
22 to divert money away from their clients and to
23 third parties. When courts have insisted that
24 attorneys don't get paid unless their clients
25 get paid, the attorneys find a way to improve

1 the claims process and make money get to the
2 class.

3 JUSTICE SOTOMAYOR: I -- I --

4 JUSTICE ALITO: Is there --

5 JUSTICE SOTOMAYOR: -- I -- I

6 understand your fear, but, as I look at the
7 full cy pres awards, they're rare. The list
8 that I've looked at is, what, five in how many
9 years? It's not as if it's occurring
10 routinely, number one.

11 Number two, you do point to some
12 potentially abusive situations, but in all
13 those situations, it's the cases where the
14 circuit court rejected a cy pres award. It
15 seems like the system is working, not not
16 working.

17 MR. FRANK: Well, the system will
18 cease to work if the Ninth Circuit's standard
19 is affirmed by this Court. And, otherwise,
20 class counsel will direct settlements to the
21 Ninth Circuit.

22 There are two all-pres settlements
23 with just Google alone that are pending,
24 waiting for resolution of this decision. And
25 the Ninth Circuit's standard permits even

1 hundred million dollar settlements --

2 JUSTICE SOTOMAYOR: How is the Ninth
3 Circuit's standard different than all the other
4 standards? I thought the circuits had
5 basically coalesced around the ALI three-factor
6 test.

7 MR. FRANK: The Ninth Circuit rejected
8 that. It said all that's needed is that the
9 money is de minimis per class member. And
10 that's at page 8 of the Petition Appendix. And
11 we see that in our supplemental brief, where we
12 point out that in a case with 1.3 million class
13 members where every class member is
14 identifiable and 3 to 9 million dollars left
15 over, the court said that's de minimis and it's
16 okay to send all of that to a local university
17 where the defendant can name a chair after
18 itself.

19 JUSTICE SOTOMAYOR: So is this appeal
20 all about feasibility alone?

21 MR. FRANK: No. The -- it's about
22 settlement fairness under Rule 23(e).

23 I'd like to reserve the rest of my
24 time for rebuttal.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 General Wall.

3 ORAL ARGUMENT OF JEFFREY B. WALL
4 FOR THE UNITED STATES, AS AMICUS CURIAE,
5 IN SUPPORT OF NEITHER PARTY

6 MR. WALL: Mr. Chief Justice, and may
7 it please the Court:

8 Two points. First, when the district
9 court here resolved Petitioners' objections,
10 approved the settlement agreement, and entered
11 it as a binding judgment that appears at pages
12 62 to 66 of the Petition Appendix, it was
13 exercising Article III jurisdiction, which
14 means the plaintiffs had to have standing and
15 the court's ordered cy pres relief had to
16 redress plaintiffs' injuries under Laidlaw.
17 Neither of those is likely true here.

18 Second, the other limitations of
19 feasibility and fee proportionality should not
20 be paper tigers. Lower courts need to conduct
21 rigorous numerical analyses of feasibility and
22 determine fees based on actual relief to the
23 class, not, as here, based on an inflated
24 percentage or multiplier. Meaningful limits
25 are necessary to align incentives and deter

1 abuse of the class action device.

2 CHIEF JUSTICE ROBERTS: I don't -- I
3 don't understand your argument on the fee. I
4 mean, I think you either decide the cy pres
5 award provides relief or it doesn't provide
6 relief. If it doesn't provide relief, you
7 don't get a fee for it. But if it does provide
8 relief, then I don't know why the fee should be
9 cut back just because it's not money.

10 MR. WALL: Well, I still think you
11 have to look at what relief it provides to the
12 class. If the Court agrees with us that the
13 lower courts are not being very rigorous with
14 respect to redressability and feasibility, and
15 it tightens the inquiry, I still think it's
16 possible to say, Mr. Chief Justice, that
17 tailored cy pres provides some benefit to the
18 class but not benefit that should be treated
19 dollar for dollar like money in the pocket of
20 the class members.

21 But, I mean, I'd certainly agree that
22 not much of a discount would be warranted if
23 you've got really tailored cy pres. The
24 problem here is that, of the six proposals,
25 only one even argued the World Privacy Forum's

1 proposal, even arguably deals with referral
2 headers and the subject of this suit. The --
3 one of them, the AARP's proposal, deals with
4 online fraud. And this wasn't even a fraud
5 case. All the fraud claims were dismissed.
6 And the other four just deal with Internet
7 privacy in general.

8 And I think if -- if the inquiry is --
9 if cy pres is going to be so far divorced
10 despite I think -- what I think are serious
11 redressability concerns from the claimed
12 injuries, then I don't think we can treat it
13 anywhere near dollar for dollar. I think the
14 discount has to be more substantial.

15 JUSTICE ALITO: Is there any reason
16 why we should not decide the standing question?
17 It's a question of law. At the 12(b)(6) stage,
18 it's the plaintiff's obligation to allege
19 standing. If it wasn't alleged properly,
20 sufficiently, then -- then we should -- then
21 there isn't any standing.

22 Why -- why does -- why is a remand
23 necessary?

24 MR. WALL: I think the Court could
25 decide it, Justice Alito. I think it could

1 decide it or remand. We would urge the Court
2 to do either of those, rather than DIG. But --

3 JUSTICE ALITO: Yeah, but why remand?

4 MR. WALL: Well, because I think --
5 and Justice Gorsuch was getting at this a
6 little bit -- it isn't clear -- the -- the
7 common law tort that everybody keeps pointing
8 to required public disclosure of private facts
9 about you. Here, we know that somebody
10 searched Mr. Italiano's name, but from the fact
11 that somebody searches my name, it doesn't mean
12 it was me. So they've developed this
13 re-identification theory saying, oh, well, the
14 websites you click through to will glean other
15 information about you off of the Internet and
16 they'll be able then to reverse-engineer and
17 figure out that you were the one that did the
18 search.

19 That seems pretty speculative, I
20 think, for Spokeo purposes, and there isn't a
21 record on it, though I don't know that the
22 Court needs one. And then even beyond that,
23 even if you could identify that these people
24 were the ones doing the searches, if they're
25 searching information that's already public and

1 they're not pointing to any other additional
2 harm, is that harm under Spokeo, I think that
3 latter part is a legal inquiry that I agree, I
4 think the Court is as well positioned as the
5 lower court to decide.

6 JUSTICE ALITO: Well, do you think
7 that every time we get a case where there's
8 been a dismissal at the pleading stage and a
9 question of standing arises, we should remand
10 it to the lower court to see whether the
11 plaintiff might be able to come up with some
12 additional allegations, or should we decide
13 whether the plaintiff has sufficiently alleged
14 standing as the plaintiff must sufficiently
15 allege all the elements of whatever claim is
16 being pressed?

17 MR. WALL: I -- Justice Alito, I think
18 the Court could decide it. If the Court thinks
19 that, on the basis of these allegations, it's
20 got enough to decide the standing question, I
21 think it could do that here.

22 JUSTICE BREYER: We know this, on that
23 very point -- we have in the complaint, quote
24 -- there was one search that was his name,
25 Italiano, and then, quote, "the name of his

1 then soon-to-be ex-wife." End quote.

2 All right. Now was the search, the
3 words, it couldn't have been "the name" --
4 there must have been a different actual search.
5 Do we know what it was and were the words in
6 the search "soon-to-be ex-wife"? Because those
7 words would seem private. Probably. And --
8 but maybe those words weren't there. Maybe all
9 that was there was his name and his wife's
10 name, which I don't think is private. But --
11 but -- but -- so do we know?

12 MR. WALL: So, in fairness to their
13 theory, Justice Breyer, I don't think it's the
14 -- I don't think that what they're pointing the
15 harm is the disclosure of the information
16 itself. I think the harm that they're claiming
17 is the disclosure that they performed that
18 search. I am known then to have searched for
19 my name, plus the following terms.

20 And for the reasons I -- the two
21 reasons I gave to Justice Alito --

22 JUSTICE BREYER: But that is --

23 JUSTICE KAVANAUGH: Isn't that an
24 injury?

25 MR. WALL: I'm sorry?

1 JUSTICE KAVANAUGH: Isn't that an
2 injury, disclosure of what you searched?

3 MR. WALL: I don't think --

4 JUSTICE KAVANAUGH: I don't think
5 anyone would want the disclosure of everything
6 they searched for disclosed to other people.
7 That seems a harm.

8 MR. WALL: I think on a --

9 JUSTICE KAVANAUGH: It may not -- may
10 or may not be a cause of action, but it's a
11 harm.

12 MR. WALL: Justice Kavanaugh, I'm not
13 so sure. At the common law, it was at least
14 uncertain as of the Second Restatement in the
15 19 --

16 JUSTICE KAVANAUGH: But it doesn't
17 have to be exactly at common law, according to
18 the language in Spokeo. It doesn't say that.

19 MR. WALL: No, I -- it's just an
20 analogue. Look, I will agree with you that on
21 a particular --

22 JUSTICE KAVANAUGH: Just as a common
23 sense matter.

24 MR. WALL: Well, on a --

25 JUSTICE KAVANAUGH: Just -- just go to

1 plain common sense.

2 MR. WALL: Oh, on a --

3 JUSTICE KAVANAUGH: What you search
4 for, if that's disclosed to other people.

5 MR. WALL: Yes, I think on a
6 particularized basis, you could conduct
7 searches the disclosure of which would
8 embarrass or harm you. But if all he searched
9 was his own name, is that a sufficient harm for
10 Spokeo purposes? I -- I'm not sure that it is.

11 JUSTICE KAVANAUGH: If it's disclosed
12 to another person?

13 MR. WALL: Again, I'm not sure that it
14 is a sufficient harm under Spokeo. I will
15 say --

16 JUSTICE KAGAN: And -- and what --

17 MR. WALL: -- though, that the
18 predicate problem and the reason I think you
19 don't even get there is this re-identification
20 theory is itself so speculative, I don't think
21 it's at all clear that the Internet sites you
22 click through to could be used for that --

23 JUSTICE KAVANAUGH: But isn't that a
24 merits question?

25 MR. WALL: I don't think so. I think

1 it's a question of whether they've plausibly
2 alleged a harm. If the harm that they're
3 pointing to couldn't occur because nobody could
4 reverse-engineer, they don't have a sufficient
5 injury.

6 JUSTICE GINSBURG: General Wall --

7 JUSTICE KAGAN: And what is the record
8 with respect to that question, about whether
9 anybody can identify the person who did the
10 search?

11 MR. WALL: As far as we can tell,
12 there is no record because the district court
13 never reexamined this post-Spokeo and no one
14 raised it, either because they were bound not
15 to attack the settlement agreement or because
16 they wanted a ruling on the merits of cy pres.

17 JUSTICE GORSUCH: General Wall, what's
18 -- what's the government's position on Justice
19 Thomas's theory in Spokeo that standing can be
20 proven by violation of a legal right granted by
21 Congress, even if it wouldn't be otherwise
22 recognized at common law?

23 MR. WALL: We have not taken a
24 position on that here, Justice Gorsuch.

25 JUSTICE GORSUCH: So what -- what --

1 what -- what do you recommend the Court do
2 about that? The government's got nothing to
3 offer us.

4 MR. WALL: Just, we would be happy to
5 supplementally brief the standing question. We
6 flagged it for the Court, and then none of the
7 parties has really delved into it on the
8 merits. And so I think if the Court wants --

9 JUSTICE GINSBURG: Isn't that a reason
10 why we should -- we should not decide it in the
11 first instance?

12 MR. WALL: Justice Ginsburg, for the
13 reasons I gave earlier, I think the Court could
14 on this record or it could remand. As long as
15 the Court doesn't DIG, both because it would
16 leave standing, a judgment that I think the
17 Court had no jurisdiction to enter, and I think
18 it would encourage parties not to flag
19 jurisdictional issues at the cert stage as the
20 parties here should have.

21 And just to say one word about the
22 merits, I do think if the Court reaches the
23 merits, the government's primary submission is
24 the lower courts have just not been very
25 rigorous.

1 JUSTICE KAVANAUGH: Why -- why -- to
2 pick up on Justice Sotomayor's question
3 earlier -- why shouldn't that be a question for
4 the Rules Committee in Congress to address in
5 the first instance?

6 MR. WALL: Well, so, look, guidance
7 from Congress would be helpful, but in its
8 absence, I still think we have to say what the
9 fair, reasonable, and adequate standard means
10 under Rule 23.

11 The Rules Committee has essentially
12 punted to the courts by saying the courts are
13 actively looking at this issue, we're not going
14 to address it.

15 Now they did amend the rule in various
16 ways that I think support our approach by
17 saying you should consider fees at the 23(e)
18 stage, you can delay to see what the claims
19 rate is, the court should be looking at the
20 claims rate.

21 I mean, a number of the things that
22 they've done in the amended rule, I think, are
23 designed to tighten up the inquiry. They're
24 consistent with what we're saying here.

25 But they didn't directly tackle the

1 question. They, in effect, deferred to the
2 courts. And so what we would say is, for
3 essentially the -- the reasons that Petitioners
4 give, there are these three important
5 limitations that the Court should articulate
6 and they should have real teeth.

7 I think the way that Respondents talk
8 about them, as applied here, they don't have
9 real teeth because there wasn't a real analysis
10 of feasibility here. There wasn't a real
11 analysis of redressability. And \$950,000 in
12 fees were bumped up to \$2.1 million through a
13 2.2 multiplier that's essentially sort of
14 plucked out of the air.

15 It's just a reverse justification for
16 taking \$2 million in fees off of an \$8 million
17 settlement that didn't actually deliver any
18 relief to the class on its specific claim here,
19 which is that there's a referrer header that
20 turns over my information.

21 And all three of those seem like
22 serious problems. And I think that it's
23 important that, if the Court reached the
24 merits, that it tighten them up so that we
25 don't have cy pres that's completely untethered

1 from the injury to the class and the relief
2 that's actually being delivered.

3 If there are no further questions,
4 thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Mr. Pincus?

8 ORAL ARGUMENT OF ANDREW J. PINCUS
9 ON BEHALF OF RESPONDENT GOOGLE

10 MR. PINCUS: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 To the extent Petitioners are arguing
13 for a per se rule invalidating settlements,
14 where the monetary payments only go to third
15 parties, nothing in the Rules Enabling Act or
16 Rule 23 authorizes a flat prohibition.

17 And as Justice Sotomayor indicated and
18 Judge -- Professor Rubinstein's amicus brief
19 submits, these are very, very rare settlements.

20 But Rule 23(e)'s requirement that
21 settlements be fair, reasonable, and adequate
22 does impose significant constraints, which is
23 why I think these settlements are rare.

24 Maybe I'll just say --

25 CHIEF JUSTICE ROBERTS: Is there --

1 MR. PINCUS: -- something about
2 standing because someone's probably going to
3 ask about it.

4 CHIEF JUSTICE ROBERTS: Well, go ahead
5 and speak to the standing.

6 (Laughter.)

7 MR. PINCUS: We agree with the
8 government that there's a serious question
9 about whether this action was ever properly in
10 federal court and that the standing issue has
11 to be addressed before the court could
12 determine the questions presented.

13 So that means either the case should
14 be dismissed as improvidently granted, there
15 should be remand, or the Court should decide
16 the question. I think the question is
17 complicated under Spokeo.

18 Mr. Italiano was the only plaintiff
19 whose claims weren't addressed by the district
20 court. In -- in order for his claim -- for him
21 to have a sufficient allegation of injury, we
22 think it depends on this re-identification
23 theory, as General Wall indicated.

24 And the complaint in paragraphs 88 and
25 95 doesn't allege -- for re-identification to

1 happen, a website operator has to get more than
2 one search, because the whole idea is you put
3 the searches together to figure out who's
4 making them.

5 There's no allegation here that Mr.
6 Italiano for his searches clicked on the same
7 website and, therefore, there's really no way
8 that the re-identification could take place.

9 JUSTICE ALITO: What does -- what does
10 Google admit it discloses to third parties? I
11 don't know. All of us have probably done
12 searches.

13 If I do a search and search for men's
14 shoes, I will immediately get all sorts of
15 advertisements for men's shoes or whatever
16 other product I am searching for.

17 So what do you admit that you
18 disclose?

19 MR. PINCUS: Well, the issue here is
20 -- is there were -- there are -- there are lots
21 of cookies and other things that -- that
22 generate the -- the serving up of ads to your
23 particular computer.

24 The question here is the referrer
25 header, which is that the search terms, when

1 you -- when you conduct a search, you get a
2 list of websites. When you click on one of
3 those sites, that site gets your search.

4 That's the issue here.

5 JUSTICE SOTOMAYOR: Well --

6 JUSTICE ALITO: And that's not a harm,
7 that isn't a harm --

8 MR. PINCUS: I -- I don't think --

9 JUSTICE ALITO: -- to disclose that?

10 MR. PINCUS: -- I don't think that the
11 mere disclosure of a search without more, your
12 men's shoes search, is not a harm because
13 there's no disclosure that you're making the
14 search. It's a disclosure that somebody
15 searched for men's shoes.

16 JUSTICE KAGAN: And could you --

17 CHIEF JUSTICE ROBERTS: Based on --
18 based on -- based on what Justice Alito typed
19 in, right, someone searched for men's shoes?

20 MR. PINCUS: Well, yes, but not that
21 Justice Alito --

22 CHIEF JUSTICE ROBERTS: Well, that's
23 kind of revelatory of private information.

24 MR. PINCUS: But not that Justice
25 Alito searched for men's shoes.

1 JUSTICE ALITO: But my idea was --

2 JUSTICE SOTOMAYOR: I'm not -- I'm not
3 sure how not.

4 MR. PINCUS: Excuse me?

5 JUSTICE SOTOMAYOR: The -- the -- I'm
6 not sure how not. The reverse-engineering is
7 self-evident because he is receiving the men's
8 shoes advertising. So somehow something he's
9 doing is identifying his website.

10 And given that I went into a store not
11 long ago, and without giving them anything
12 except my credit card, they came back with my
13 website, I -- it seems --

14 MR. PINCUS: Well, there are -- there
15 are lots of ways that information is disclosed
16 that don't have to do with the referrer header.
17 Again, we're talking about the referrer header
18 here. There are lots of other --

19 JUSTICE SOTOMAYOR: Oh, I see what you
20 mean.

21 MR. PINCUS: -- the placement of
22 cookies in your browser and other -- other ways
23 that -- that you may be served ads based on
24 your searches. That's not the claim in this
25 case. The claim in this case --

1 CHIEF JUSTICE ROBERTS: But do you
2 think that problem is going to be meaningfully
3 redressed by giving money to AARP?

4 MR. PINCUS: Well, I -- I -- I think
5 the question is --

6 (Laughter.)

7 MR. PINCUS: I think -- I think it is
8 because I --

9 CHIEF JUSTICE ROBERTS: As if only --
10 as if this is only a problem for elderly
11 people?

12 (Laughter.)

13 MR. PINCUS: No, but AARP is not the
14 only recipient and elderly people are
15 particularly --

16 CHIEF JUSTICE ROBERTS: Well, you're
17 changing the subject, Mr. Pincus. AARP is one
18 of the recipients.

19 MR. PINCUS: It is. And I think one
20 of the questions that a district court has to
21 ask is the fit between the recipients and the
22 harm alleged in the complaint and the plaintiff
23 class.

24 Here, the plaintiff class was everyone
25 who used Google in a -- in a very long period,

1 129 million people, basically everyone on the
2 Internet in America.

3 It is a fact that elderly people are
4 less knowledgeable about privacy and their
5 vulnerability on the Internet than other
6 people. And so having part of the award be
7 designated to -- for that group we think meets
8 that fit test.

9 JUSTICE KAGAN: Especially when you
10 use a --

11 CHIEF JUSTICE ROBERTS: Including a
12 group that engages in -- engages in political
13 activity, having nothing to do with the
14 inability of elderly people to conduct
15 searches?

16 MR. PINCUS: Well, this grant had
17 nothing to do with political activity. AARP,
18 like the other recipients, had to submit a
19 proposal, and the money was specifically for
20 that proposal.

21 JUSTICE KAGAN: May I go back, Mr.
22 Pincus? You -- you talked about the
23 re-identification theory, and I'm not quite
24 sure I understand it. So could you tell me the
25 technology that I need to know to understand it

1 and what plaintiffs would have to show to prove
2 their own theory of harm?

3 MR. PINCUS: Well, I think this is one
4 of the reasons why more information, either
5 re-briefing here or a remand is necessary, but
6 what would have to be alleged would be that
7 enough referrer headers went to a single
8 website operator that that website operator
9 could combine them and say: A-ha, I can now
10 figure out that this is the person who made the
11 search and tie the search terms to that person.

12 I'm not sure that would be enough.
13 The restatement section, 652(h), seems to
14 indicate that actual imminent damages are
15 required for privacy violations.

16 In other words, the -- the mere
17 revelation of facts at -- at common law in 1950
18 -- in the 1960s was not enough, let alone in
19 1787.

20 JUSTICE KAVANAUGH: But that's a
21 merits question. I mean, that goes to the
22 merits of the tort.

23 MR. PINCUS: I don't think so, Your
24 Honor. I think -- I think that's a question --

25 JUSTICE KAVANAUGH: We're just talking

1 about harm, and you don't have a mini-trial on
2 whether the harm, sufficient for standing, is
3 proved.

4 MR. PINCUS: I think that -- that
5 standing -- there are two ways that standing
6 can be contested by a defendant. One is based
7 on the allegations of the complaint, whether
8 they're sufficient. And the second is whether
9 the allegations of the complaint are, in fact,
10 backed up by real facts.

11 Both of those are preliminary
12 inquiries at the standing stage. In this case,
13 Google filed a motion to dismiss Mr. Italiano's
14 claim when the -- when the final consolidated
15 complaint was filed. The district court didn't
16 act on that motion.

17 But I think the question whether --
18 the Spokeo question, whether there's concrete
19 harm, has two components. One is, is it -- is
20 it the kind of harm that's generally
21 recognized? And then, if it's not, the
22 question is, is it an intangible harm that
23 because of its recognition at the common law or
24 because of what Congress may have elevated
25 makes it a harm that's actionable?

1 And I think, under the Stored
2 Communications Act, there's a real question.
3 It's an Act that both requires that a plaintiff
4 be aggrieved and it's an Act two circuits have
5 said requires proof of actual damages to
6 recover.

7 And so the -- I think there's a very
8 significant question about whether that Act
9 could be said by -- that in that Act, Congress
10 could have been said to elevate that harm. But
11 --

12 JUSTICE BREYER: Would the following
13 make sense if we get to the merits? Professor
14 Rubenstein's brief -- I'm referring to that,
15 interesting. Could we say something like this:
16 Where the actual plaintiffs receive something
17 significant so there were -- then quite often
18 there is money left over, a little bit, some or
19 sometimes more. But where -- and in those
20 circumstances, you apply the ALI four-step
21 thing and just do it and be sure it's done.

22 But where they get nothing, under
23 those circumstances, while we wouldn't say
24 never, what's happening in reality is the
25 lawyers are getting paid and they're making

1 sometimes quite a lot of money for really
2 transferring money from the defendant to people
3 who have nothing to do with it. And under
4 those circumstances, scrutinize very carefully
5 to see that the four standards are met.

6 MR. PINCUS: I think there should be
7 careful scrutiny.

8 JUSTICE BREYER: Yeah, but, I mean,
9 you heard -- I was trying to make up a --

10 MR. PINCUS: Yes. I think -- I think
11 in -- there's a great difference between most
12 of the cases that Mr. Frank relies on, which
13 are cases where claimants have been identified
14 and there is nonetheless a separate
15 multimillion-dollar cy pres payment. That's a
16 very different case because you don't have the
17 question of the costs of identifying the
18 plaintiffs.

19 In this kind of case, where the
20 question at the outset is, is it worth the
21 candle to try and identify the claimants
22 because you have a very large class and a very
23 small settlement, there should be close
24 scrutiny and a three-part test. One is
25 feasibility. Is the amount that the class

1 members are likely to receive after
2 administrative costs, taking into account what
3 the claiming rate may be, so small that the
4 benefit of that payment to a class member is
5 outweighed by the indirect benefit from the
6 third-party's activity?

7 I think that's a -- a tough test. The
8 district court needs discretion because there
9 are two unknowns: What will the administrative
10 costs actually be of distributing the money?
11 And, two, how many class members will claim?
12 But that's the question the district court
13 should ask.

14 Second, the district court should look
15 at the link between the harm -- the claimed
16 injury and the recipients. We don't agree with
17 General Wall that there's a redressability
18 issue here. This is a settlement. Settlements
19 between individual parties are not limited to
20 things that would be awardable under the
21 statute. But, for the test to be satisfied, we
22 think the funds have to be used for a purpose
23 that will benefit the class members and address
24 injuries similar to those that are subject to
25 the lawsuit.

1 And the third test is no conflicts of
2 interest. The -- the lower courts here
3 actually addressed that test. We don't think
4 the fact -- the happenstance that the defendant
5 may have given contributions in the past to the
6 organization should rule them out, but the
7 court should make sure that this isn't a
8 displacement of money that the defendant would
9 otherwise give and --

10 CHIEF JUSTICE ROBERTS: On -- on that
11 --

12 JUSTICE KAVANAUGH: Why not on --

13 MR. PINCUS: -- that that organization
14 will control the money and decide how it's to
15 be used.

16 CHIEF JUSTICE ROBERTS: On that point,
17 would you agree that the district court should
18 never be the one suggesting possible recipients
19 of the funds of a settlement he has to approve?

20 MR. PINCUS: I -- I totally agree,
21 Your Honor. I think a settlement is an
22 agreement between the parties. The district
23 court's role here is to apply Rule 23(e) and
24 tell the parties that because one of these
25 three tests is not met, we would submit, that

1 the settlement is not approved. And then if
2 they -- if that -- then it's up to the parties
3 to go back and come up with different
4 recipients or a different process that -- that
5 meets the test.

6 JUSTICE KAVANAUGH: Why is it --

7 CHIEF JUSTICE ROBERTS: Why do you --

8 JUSTICE KAVANAUGH: Go ahead.

9 CHIEF JUSTICE ROBERTS: Why do you --
10 why do you assume that simply because someone
11 wants money in the settlement or is entitled
12 to, that he's also opposed to what gave rise to
13 the -- the wrong? I mean, you may be in an
14 auto accident with someone who's speeding.
15 That doesn't mean you automatically think that
16 highway safety is affected and the speed limit
17 should be changed.

18 MR. PINCUS: Well, I --

19 CHIEF JUSTICE ROBERTS: You just want
20 money because of what happened to you.

21 MR. PINCUS: And -- and I think that's
22 why I think the critical first inquiry is, is
23 the -- is the -- in the real world, is the --
24 is the cost of distributing the money going to
25 mean that people get essentially little or

1 nothing or -- or essentially nothing so that
2 this indirect benefit is better?

3 JUSTICE KAVANAUGH: Isn't it --

4 MR. PINCUS: I don't think -- I think
5 --

6 CHIEF JUSTICE ROBERTS: I think
7 Justice Kavanaugh had a question.

8 MR. PINCUS: I'm sorry.

9 JUSTICE KAVANAUGH: Isn't it always
10 better to at least have a lottery system, then,
11 that one of the plaintiffs, one of the injured
12 parties gets it, rather than someone who's not
13 injured? Why isn't that always more
14 reasonable?

15 MR. PINCUS: We agree with the
16 government that a lottery system would be very
17 strange. If a class member takes the time to
18 file a claim, it just seems it would be a very
19 --

20 JUSTICE KAVANAUGH: This is strange
21 too.

22 MR. PINCUS: Well, I think this --
23 this --

24 JUSTICE KAVANAUGH: I mean, it's a
25 question of what's more strange, I think.

1 MR. PINCUS: Well, if I may answer the
2 question, I think this is actually -- and this
3 is partially an answer to the Chief Justice's
4 question. The -- the actual application of a
5 cy pres-like doctrine here is that the class
6 representatives and their lawyers are
7 essentially fiduciaries to the class. And
8 they're looking at this and saying, does it
9 make sense at the end of the day to have this
10 indirect benefit rather than a direct benefit
11 that is essentially going to be a dollar?

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 MR. PINCUS: Thank you, Your Honor.

15 CHIEF JUSTICE ROBERTS: Mr. Lamken.

16 ORAL ARGUMENT OF JEFFREY A. LAMKEN
17 ON BEHALF OF RESPONDENTS PALOMA GAOS, ET AL.

18 MR. LAMKEN: Thank you, Mr. Chief
19 Justice, and may it please the Court:

20 This case undoubtedly implicates
21 interesting policy and empirical questions, but
22 those are the types of questions that the
23 Administrative Office, the Judicial Conference,
24 the Advisory Committee, Congress can
25 investigate and answer.

1 JUSTICE ALITO: Well, where did the cy
2 pres doctrine come from? Was that created by
3 Congress?

4 MR. LAMKEN: No, Your Honor. The cy
5 pres doctrine comes out of -- and it's inaptly
6 named -- from the notion that what -- someone
7 who gets a reward, someone who gets an award,
8 can repurpose it to a different thing, to a
9 different purpose, if the current -- if the
10 existing purpose isn't used -- feasible.

11 So, for example, we cite the Beastie
12 Boys examples. Private parties regularly will
13 get an award or a settlement, but they can
14 actually, instead of having that settlement
15 come to them, go to a third-party for their
16 benefit.

17 And the question in this case is, is
18 there anything in Rule 23(e) that says that
19 classes, that class representatives, where it's
20 fair, reasonable, and adequate, cannot do
21 exactly what the Beastie Boys or any other
22 private party can?

23 And Rule 23(e) doesn't answer that
24 question by saying never. It answers that
25 question by providing a standard of fairness,

1 reasonableness, and adequacy.

2 JUSTICE KAVANAUGH: The question is
3 what reasonableness means.

4 MR. LAMKEN: I think that's right.
5 And the question is -- and the answer to that,
6 I think, is when the alternative, when you have
7 a possibility of getting millions of dollars of
8 indirect relief, it is better, it is fair,
9 reasonable, and adequate, to get that when the
10 alternative is likely nothing or the nominal
11 equivalent of nothing.

12 And that's the fundamental decision
13 that ALI made. If it's infeasible, if it's not
14 possible to give this money out to people
15 without it becoming practically zero or there's
16 a grave risk of that happening, then you can
17 take the money and give it to institutions for
18 particular uses that serve the interests of the
19 individual class members.

20 And that --

21 JUSTICE ALITO: In whose opinion do
22 they serve the interests of the individual
23 class members? In the opinion of the
24 individual class members?

25 MR. LAMKEN: Well, the decision is

1 initially made by the class representatives and
2 the lawyers, and it's subject to judicial
3 review by the court. And that -- in this case,
4 rather than simply giving money to -- and,
5 frankly, this is an issue that's not before the
6 Court because Petitioner didn't challenge the
7 requisite nexus between the recipients and the
8 interests of the class members.

9 But turning to it anyway, in this
10 case, specific proposals were provided, and
11 those proposals are actually quite closely
12 linked to not just the injury that occurred
13 here, that underlies both the cause of action
14 and the actual complaint, but also the specific
15 class.

16 JUSTICE KAVANAUGH: But there is the
17 appearance, as the district court said in the
18 hearing, the appearance of favoritism and alma
19 maters of -- of counsel.

20 MR. LAMKEN: Your Honor, I think, in
21 this case, the district court acknowledged that
22 there was the potential of conflict, but he did
23 what a district court should do. He took
24 evidence. He heard counsel -- from counsel
25 live in court, including the statement: I got

1 my degree from Harvard and that's simply the
2 end of it.

3 He reviewed detailed proposals which
4 carefully calibrated the -- the money to the
5 specific harms, the impact of search terms and
6 disclosures and third-party data flows. And
7 the district court found "no indication" that
8 counsel's allegiance to alma maters factored
9 into selection.

10 CHIEF JUSTICE ROBERTS: Well, don't
11 you think it's just a little bit fishy that the
12 money goes to a charity or a 501(c)(3)
13 organization that Google had contributed to in
14 the past?

15 MR. LAMKEN: So, Your Honor, remember,
16 because we're in the high-tech area and we're
17 in an emerging area, there's only so many
18 organizations that are going to have track
19 records of this. And so it's not at all
20 surprising --

21 CHIEF JUSTICE ROBERTS: I bet there
22 are other organizations active in the area that
23 Google had not contributed to in the past.

24 MR. LAMKEN: And -- and many were
25 included here. But one of the critical things

1 is, while Google was involved -- and this is at
2 page 40 of the Joint Appendix -- it was
3 involved in identifying potential recipients,
4 it -- counsel for class, the class, not Google,
5 vetted the actual proposals. Class counsel,
6 not Google, determined which recipients.

7 CHIEF JUSTICE ROBERTS: Well, I know,
8 but the allegation -- you know, I mean, the
9 allegation is that counsel for the class and
10 the defendant are working together because no
11 money is going to anybody else, it's just going
12 to counsel for the -- for the class, and that
13 Google for its part as part of the deal -- I'm
14 not suggesting that's what's going on -- but
15 the allegation, it says part of the deal, they
16 get to give money to their favorite charity.

17 MR. LAMKEN: And the district court
18 looked at it and understood that Google's role
19 ended at selecting potential recipients. It
20 had no role in deciding who got how much money
21 either.

22 And the district court heard from
23 counsel and said: Look, it's not just an
24 accounting core change. And the Court
25 responded: I appreciate that. And that's at

1 Joint Appendix 135.

2 Google's own counsel explained to the
3 Court that if you look at the detail of these
4 programs and the lack of Google's involvement
5 in the development of the programs, it rebuts
6 that. That's Joint Appendix 155.

7 If you look at the actual recipients,
8 these are not necessarily flattering recipients
9 for Google. There's two that referred Google
10 to the FTC, resulting in a \$17 million fine.

11 One of them is dedicating its money
12 to, among other things, auditing, from outside
13 the Google ecosphere, Google's compliance with
14 privacy policies.

15 And each of them, which is where I was
16 going just a moment ago, is specifically
17 directed to not just privacy on the Internet
18 but what happens when you do searches, for
19 example, the Brooklyn center.

20 JUSTICE KAVANAUGH: The appearance
21 problem here, which has happened in many cases,
22 is symptomatic of a broader question, which is
23 why is it not always reasonable, more
24 reasonable in this situation, which is a
25 difficult one, to try to get the money to

1 injured parties, either through pro rata
2 distribution or some kind of lottery system.

3 Imperfect or strange as that may be,
4 it seems to me potentially less strange or why
5 isn't it less strange than giving it to people
6 who weren't injured at all, who have
7 affiliations with the counsel, and who in many
8 cases don't need the money?

9 MR. LAMKEN: Your Honor, in terms of
10 what the standard is, yes, absolutely, the
11 priority is to give the individual class
12 members money. That's the number one priority.
13 And only when it proves infeasible to do that
14 can you go to a cy pres result.

15 And in this case -- and I turn the
16 Court to Pet App 47a -- the district court
17 actually found, he looked and said, the costs
18 to do claims processing, costs to do claims
19 forms, costs to do distribution, and said it's
20 clearly infeasible when you look at those
21 factors.

22 JUSTICE KAVANAUGH: How about a
23 lottery versus this?

24 MR. LAMKEN: So the lottery doesn't
25 really help much for two reasons. First, you

1 have to go and identify the class members in
2 order to determine who do you give your lottery
3 tickets to. So you now have to go out and find
4 the names of the 129 million people, or however
5 many you're going to submit, and ask.

6 You have to process and determine, are
7 these valid requests for lottery tickets, or is
8 this person not a Google user? So you have to
9 verify.

10 JUSTICE KAVANAUGH: But at least it's
11 someone who -- who, quote, to use your analogy,
12 paid for the lottery ticket as opposed to
13 giving the billion dollar award to someone who
14 didn't buy the lottery ticket.

15 MR. LAMKEN: Well, I think --

16 JUSTICE KAVANAUGH: I mean, that's the
17 --

18 MR. LAMKEN: -- it is a little --

19 JUSTICE KAVANAUGH: -- that's, to use
20 your analogy, the --

21 MR. LAMKEN: It's a little passing
22 strange to start -- to use all the money,
23 virtually all the money, to actually set up
24 this lottery process to accept all these
25 claims, administer that process, and then

1 exclude the vast majority of the class and say:
2 And we're going to take some people who were
3 injured and entitled to money, and we're not
4 going to give them their money, we're going to
5 give that money to somebody else because they
6 won the lottery.

7 It's just a little unseemly, in
8 addition to being grossly inefficient, because
9 the only thing it reduces -- it doesn't reduce
10 claims administration cost in terms of
11 accepting claims. It doesn't reduce claims
12 administration cost in terms of vetting the
13 claims. The only thing it reduces is the end
14 mailing cost. That's the only thing it does.

15 JUSTICE KAVANAUGH: It -- it reduces,
16 to pick up on the Chief Justice's comments, the
17 appearance of favoritism and collusion --

18 MR. LAMKEN: And that --

19 JUSTICE KAVANAUGH: -- which is rife
20 in these cases. At least that's been the
21 allegation. There have been lots of courts
22 that have said that. And the district court
23 here, as you know in the transcript, was very
24 concerned about that.

25 MR. LAMKEN: Well, he wasn't concerned

1 about the collusion because he specifically
2 found that it did not enter into the decision.
3 And if the district court had -- the standard
4 everyone agrees is, if there's even doubt, if
5 there's substantial doubt about whether the
6 recipients were selected on the merits, that
7 doubt is called against the settlement. It's
8 called in favor of trying something different.

9 But, in this case, the court of
10 appeals and the district court both applied
11 that -- that ALI standard and both determined
12 that, after looking at all the evidence, after
13 looking at the detailed proposals, after
14 hearing from counsel, after doing all that,
15 there wasn't that substantial doubt.

16 And I think we can rely on our
17 district courts to make those determinations,
18 to be careful, and to not get engaged in the
19 type of process that brings the judiciary into
20 disrepute.

21 JUSTICE ALITO: I mean, if you step
22 back --

23 MR. LAMKEN: Now if someone's opposed
24 --

25 JUSTICE ALITO: -- if you step back

1 from what happened in this case and cases like
2 this, how can you say that it makes any sense?
3 The purpose of asking for compensation, it's
4 not injunctive relief that would benefit a --
5 benefit a broad class, but the purpose --
6 benefit the public -- it's compensation for the
7 -- for the class members.

8 And at the end of the day, what
9 happens? The attorneys get money, and a lot of
10 it. The class members get no money whatsoever.
11 And money is given to organizations that they
12 may or may not like and that may or may not
13 ever do anything that is of even indirect
14 benefit to them.

15 So how can -- how can such a system be
16 regarded as a sensible system?

17 MR. LAMKEN: So two parts to that.
18 The first is with respect to fees, and we don't
19 believe -- because that's Rule 24(h), a
20 reasonable fee adder. We don't think that's
21 before the Court either.

22 But with respect to fees, it's well
23 established that a court can reduce attorneys'
24 fees if it believes that the cy pres
25 distribution is less valuable to the class than

1 its cash equivalent.

2 It just happened in this case the
3 district court heard objectors' arguments and
4 said that he did not agree that the fees and
5 incentive awards are inconsistent with the
6 value of the class benefit, specific finding on
7 Pet App 60.

8 Moreover, class counsel's request is
9 not disproportionate to the class benefit. So
10 this is a situation where district courts on
11 the ground can value what is the cy pres
12 benefit and then make a determination: Is the
13 fee a disproportionate result? And they can
14 reduce it. And, in fact, they have in the past
15 in a number of cases reduced fees because it's
16 a cy pres distribution.

17 The second part, Justice Alito, is
18 that somehow this distribution doesn't benefit
19 the class. But this isn't a case where you
20 simply take money and give it to charity that
21 happens to be in a space that's similar to or
22 occupied by the underlying injuries.

23 There are specific proposals here with
24 a very close nexus. The injury here is that
25 search terms are given out -- and I'm going to

1 come back to standing in a moment if I have
2 enough time -- but that search terms of
3 individuals are given out to third parties
4 without their consent.

5 And the Stored Communications Act is
6 very clear, it's not illegal to give out that
7 information if there is consent. And both the
8 prospective relief, the modifications to
9 Google's FAQs, and all these organizations are
10 working towards making sure that the public is
11 properly notified that this is the consequence
12 of entering potentially extremely personal
13 information, what your worries, your concerns
14 are, into that search box will do.

15 So it is not at all even remotely the
16 case that this is not benefitting the class.
17 This is targeted precisely to the type of
18 injury and precisely the type of problem,
19 privacy invasion, that that class is subjected
20 to.

21 JUSTICE KAVANAUGH: You started -- you
22 started with what for me is a very good point,
23 which is why is this for us and not for
24 Congress and the committee. But, on the other
25 hand, the retort to that is that the committee

1 thinks it's for us.

2 And -- and -- and maybe Congress does,
3 too, because reasonable gives common law-like
4 power to the courts to figure out and to put
5 limits on these things. So how can we rely on
6 Congress and the committee if they're thinking
7 that --

8 MR. LAMKEN: Well, Your Honor, I think
9 --

10 JUSTICE KAVANAUGH: -- the court's
11 going to do it?

12 MR. LAMKEN: -- what the court has
13 before it is the text of the rule, and the one
14 thing the Court can't do is substitute some
15 categorical rule that it thinks more efficient
16 or better than the rule itself.

17 We have to apply what --

18 JUSTICE KAVANAUGH: But isn't that
19 what courts do all the time with the word
20 reasonable, is over time apply -- learn from
21 experience and then draw sometimes bright-line
22 rules?

23 MR. LAMKEN: As in Rule 23(h), where
24 it's a reasonable fee, courts typically fill
25 reasonableness with factors and considerations.

1 They typically don't substitute a different
2 test, such as to say cy pres is never fair,
3 reasonable, and adequate. And it certainly --

4 JUSTICE KAGAN: Mr. Lamken -- I'm
5 sorry, please.

6 MR. LAMKEN: No, and it certainly
7 should be fair, reasonable, and adequate when
8 the alternative is nothing.

9 JUSTICE KAGAN: Could I ask you to
10 address standing, please?

11 MR. LAMKEN: Yes. Okay. So turning
12 to standing very quickly. Look, neither court
13 below addressed the Stored Communications Act
14 or the other four causes of action under the
15 standard of Spokeo.

16 Very few courts have. There's a
17 dearth of authority on it. So this isn't a
18 situation where the Court should be going out
19 on its own and addressing the issue without the
20 benefit of the viewpoints of other jurists,
21 without the benefit of the refinement that
22 occurs when the case comes up from the lower
23 courts.

24 They simply didn't apply that
25 standard. So the Court has two options in our

1 view. One is to remand. The alternative is to
2 dismiss as improvidently granted.

3 If the Court were inclined to think it
4 might grant again, I think that remand would be
5 the right answer, but this Court is so -- this
6 case is so rife with vehicle problems that I
7 think the proper answer under those
8 circumstances is to dismiss as improvidently
9 granted, but that aside, that is in the Court's
10 discretion.

11 Turning to the merits, if the Court
12 were to be the first to address this issue --

13 CHIEF JUSTICE ROBERTS: You can take
14 an extra minute on standing.

15 MR. LAMKEN: Okay. If the Court were
16 to be the first to address the Stored
17 Communications Act under Spokeo, since the
18 framing, the rule has been the disclosure of
19 another's communication without their consent
20 is actionable.

21 And the Court can look to Justice
22 Story's opinion in Folsom versus Marsh for
23 that. Even the recipient of a letter was not
24 permitted to disclose that letter without the
25 author's permission.

1 This -- in Bartnicki versus Vopper,
2 that issue was thoroughly briefed by the United
3 States, among others, and the Court in Doe
4 versus Chao recognized that, for privacy harms,
5 they're often actionable without specific harm,
6 that the damage is presumed.

7 Congress is entitled to make that same
8 judgment in --

9 JUSTICE KAGAN: The -- the alleged
10 injury here, am I correct, is that a
11 third-party will know that a particular person
12 did this search. It's not what -- it's not
13 simply the nature of the search. Is that
14 correct?

15 MR. LAMKEN: I think that when it's
16 associated with you, that -- that is an injury.
17 But merely disclosing your letter, even if it
18 was an anonymous letter, to a third-party, I
19 think that would have been actionable at common
20 law. That would have been actionable before
21 the framing.

22 But -- and Congress did make the
23 judgment in this case that, even without
24 individual actual harm, that the presumed harm
25 is a submission because it gave as damages not

1 just actual harm, it gave as damages the wrong
2 doer's profits. There is entitlement
3 to recover the wrong doer's profits, which,
4 again, is consistent with the common law.

5 But this is an extraordinarily complex
6 issue. You have to go deep into history that,
7 in the pageant pages we had, we didn't. I
8 think under the circumstances, the right answer
9 for the Court, given that this is a
10 jurisdictional question, is to dismiss or -- is
11 to remand or dismiss as improvidently granted.

12 Thank you very much.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Frank, you have three minutes
16 remaining.

17 REBUTTAL ARGUMENT OF THEODORE H. FRANK

18 ON BEHALF OF THE PETITIONERS

19 MR. FRANK: Thank you, Mr. Chief
20 Justice. And may it please the Court:

21 My friend is alleging that the
22 district court made factual findings that it
23 simply did not reach because it believed its
24 hands were tied by the Ninth Circuit precedent.

25 It did not look at the potential

1 conflicts between Google and the recipients,
2 because in Lane versus Facebook, the Ninth
3 Circuit approved a settlement where Facebook
4 gave to a charity created by Facebook.

5 It did not look at the difficulty of
6 distributing to some class members, because the
7 Ninth Circuit has a de minimis standard. And
8 as we discuss at page 22 of our reply brief,
9 what the district court found was that it would
10 be too hard to distribute to over 100 million
11 class members. We don't contest that, but
12 that's not the standard under any other court.

13 So returning to the question that a
14 number of Justices raised, why not leave this
15 to Congress? And I return to the example of
16 State Oil versus Khan where the Court was
17 interpreting restraint of trade under the
18 Sherman Act.

19 And not only was it interpreting that,
20 but it already had a three-decade-old
21 precedent, Albrecht, that it was being asked to
22 reverse.

23 And Congress had specifically
24 considered the rule in Albrecht over the --
25 those three decades and it never acted on it.

1 Yet in 522 U.S. 3, *State Oil versus Khan*, the
2 Court unanimously reversed *Albrecht* and came to
3 the economically-sound conclusion about the way
4 to interpret restraint of trade.

5 And we have courts here that are
6 already importing a proportionality requirement
7 into the reasonableness and fairness inquiries,
8 and at no point do my friends indicate that
9 *Pearson versus NBTY*, the Seventh Circuit
10 decision, is wrong or why it's wrong or why it
11 is not the superior rule here.

12 And as we document in our opening
13 brief, when courts demand that counsel is
14 faithful to their fiduciary obligations,
15 counsel responds to those incentives.

16 The Ninth Circuit's rule creates
17 incentives for class counsel to argue that it's
18 too hard to get money to the class, and, in
19 fact, the de minimis rule would take many
20 settlements that are settling now for less than
21 \$1 per class member, for less than \$2 per class
22 member, that distribute tens of millions, even
23 over \$100 million to class members, it's now
24 appropriate under the Ninth Circuit's rule to
25 take all of that money and give it to the

1 defendant's favorite charity or the plaintiff's
2 favorite charity.

3 If there are no further questions, I'd
4 ask the Court to vacate and reverse.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel. The case is submitted.

7 (Whereupon, at 11:06 a.m., the case
8 was submitted.)

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