2018 WL 4293386 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Theodore H. FRANK and Melissa Ann Holyak, Petitioners,

v.

Paloma GAOS, individually and on behalf of all others similarly situated, et al., Respondents.

No. 17-961.
September 5, 2018.

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

Brief of Professor William B. Rubenstein as Amicus Curiae in Support of Respondents

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***1** INTEREST OF *AMICUS CURIAE* [1]

Amicus is the Bruce Bromley Professor of Law at Harvard Law School and, for the past decade, the sole author of *Newberg on Class Actions,* the leading treatise on class action law in the United States. In 2014, *amicus* re-wrote the chapter of the *Newberg* treatise concerning damages in class actions (Chapter 12). The new 180-page chapter encompasses an 81-page treatment of *cy pres* issues in class action lawsuits. This is one of the most comprehensive scholarly treatments of the topic and is often cited by the lower federal courts in adjudicating *cy pres* issues. *See, e.g., In re Google Referrer Header Privacy Litig.,* 869

F.3d 737, 741 (9th Cir. 2017); *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.,* 867 F.3d 434, 445 n.13 (3d Cir. 2017); *Fraley v. Batman,* 638 F. App'x 594, 599 (9th Cir.), *cert. denied sub nom. K.D. v. Facebook, Inc.,* 137 S. Ct. 68 (2016) (Bea, J., dissenting); *Poertner v. Gillette Co.,* 618 F. App'x 624, 628 (11th Cir. 2015); *In re Nexium Antitrust Litig., Ill* F.3d 9, 20 n.16 (1st Cir. 2015); *Hughes v. Kore of Indiana Enter., Inc.,* 731 F.3d 672, 675 (7th Cir. 2013).

Amicus respectfully submits this brief to provide this Court with (1) empirical information concerning ***2** the frequency with which the issues in this case arise; (2) clarification of the two questions presented in the petition for *certiorari;* and (3) a scholarly perspective on *cy pres* that differs from that of other leading commentators, including the American Law Institute.

Amicus submits this brief in his individual capacity as a scholar and not on behalf of The Presidents and Fellows of Harvard College. Petitioners allege that a conflict of interest exists in this case because one of the class's counsel is a graduate of Harvard Law School and some of the *cy pres* funds are directed to a program at Harvard University (the Berkman Klein Center for Internet & Society). Pet. Br. at 54-56. *Amicus* has no relationship to the lawyer at issue in the case nor to the Berkman Klein Center and does not stand to benefit in any way from the proposed allocation of monies to Harvard's Berkman Klein Center. *Amicus* also takes no position on this issue in this brief.

SUMMARY OF ARGUMENT

Amicus makes three points in this brief.

1. Class action law employs trust law's *cy pres* concept in two distinct fashions and this case involves only one such use. In nearly every class action case involving monetary damages, there will be residual funds not claimed by the class members. *Cy pres* - sending these funds to a charity that is consistent with the class's claims - is one of four common methods of dealing with such funds. I refer to this as "residual *cy* ***3** *pres.*" In a very small band of cases, where the size of the class so far outstrips the depth of the common fund that distribution of damages is infeasible, courts have approved sending the full fund to charities via the *cy pres* doctrine. I refer to this as "full *cy pres.*" *See also* William B. Rubenstein, 4 *Newberg on Class Actions* § 12:26 (5th ed. 2014) (*Newberg*) (utilizing phrase "100% *cy pres*").

The two parts of the single question presented in this case both concern full *cy pres* cases, not residual *cy pres,* as they reference cases in which "no direct relief" is offered to class members. *See* Pet. Br. at (i) ("Whether, or in what circumstances, a class-action settlement that provides a *cy pres* award of class action proceeds but no direct relief to class members comports with the requirement that a settlement binding class members must be 'fair, reasonable, and adequate' and supports class certification.") (emphasis added).

Part I of this brief: (1) presents empirical evidence showing that full *cy pres* cases are extraordinarily rare - federal courts approve about one such settlement a year - and explains why class action lawyers lack any incentive to promulgate such settlements artificially; (2) demonstrates that the issues presented here are very narrow because full *cy pres* is conceptually so distinct from residual *cy pres* that rules concerning one may not easily apply to the other; and (3) explains that if the Court addresses issues arising from residual *cy pres* in this case, a host of complex procedural and constitutional concerns would be implicated, such as the fact that the state of California ***4** (whose law governs the case) has a specific state statute regulating the distribution of residual *cy pres* awards.

These factors combine to argue in favor of a very narrow opinion addressing a rarely-occurring phenomenon, if not outright dismissal of the petition as having been improvidently granted.

2. Monetary damages in Rule 23(b)(3) class actions are individualized in nature. A class action court's goal is to distribute each class member's recovery to her. When that mark cannot be hit, courts have, *inter alia,* sent class members' monies to charitable organizations via the *cy pres* doctrine. Petitioners contest such distributions because they send a class member's money to a legal stranger and they propose instead that some absent class members' money be sent to other class members.

Petitioners' approach is no less a *cy pres* approach - it too takes some class members' property and gives it to legal strangers - it simply substitutes as the recipient another class member instead of a charitable organization. Petitioners attempt to evade the weight of this conclusion by arguing that the settlement fund is the "class's money," but they are wrong: there is no such thing as a "class's money" in a (b)(3) class action, only individual class member recoveries.

Part II of this brief unmasks this defect in the Petitioners' approach and then argues that *cy pres* is preferable to Petitioners' favored redistribution schemes for four reasons: (1) intra-class redistribution ***5** generates remarkable windfall profits for some class members at the expense of other class members; (2) intra-plaintiff redistribution would not happen in nonaggregate litigation; (3) intra-class redistribution produces no benefit for the majority of class members, whereas *cy pres* awards aim to promote the class's underlying common interest; (4) intra-class redistribution violates class counsel's Rule 23(g) duty to represent the entire class, as it places class counsel in the position of favoring some class members over others. For these reasons, the District Court did not abuse its discretion in concluding that the full *cy pres* distribution of these class members' recoveries was fair, reasonable, and adequate as those terms are used in Rule 23(e)(2).

3. It is fair to ask whether a class should be certified when the monetary relief cannot be directly distributed to class members, but that is not a question that Rule 23 in fact asks. The only prong of class certification at issue here is Rule 23(b)(3)'s superiority prong. Part III of this brief explains that this prong asks whether a class suit is superior to "other available methods for fairly and efficiently adjudicating the controversy," Fed. R. Civ. P. 23(b)(3), not whether a class suit is superior to forgoing adjudication altogether. Nothing in the doctrine of class certification forecloses certification because some of the class's relief will be indirect, rather than direct. If these very rare types of class suits argue for another form of dispute resolution than litigation, such a change is best left to Congress.

***6 ARGUMENT**

I. The Court Should Dismiss The Writ As Improvidently Granted Or Render A Narrow Decision Because The Questions Presented - And Facts Of The Case - Involve Only Rarely-Arising Full *Cy Pres* Settlements And Are Therefore Exceptionally Limited In Nature

Courts have employed the trust doctrine of *cy pres* in two distinct ways in class action law. *First,* in nearly every class action case involving monetary funds, there are likely to be leftover or unclaimed funds. *Cy pres* - sending the leftover funds to charitable organizations undertaking work consistent with the class's claims - is one of four common methods of addressing the unclaimed funds problem. *Second,* in a very small band of cases - likely fewer than 20, ever - the class's size so far outstrips the class's relief that courts may deem distribution of the settlement fund to class members to be infeasible. In these exceedingly rare circumstances, courts have approved distribution of the full fund to *cy pres* recipients.

This case involves the second type of *cy pres:* a full, 100% *cy pres* distribution. The petition for *certiorari* presented two questions solely about full *cy pres* distributions - whether such settlements are fair and whether classes can be certified in such cases - as the petition limited itself to a settlement that "provides no direct relief to class members."

***7** Because this case is limited to questions about full *cy pres* cases, a review of the distinctions between the two types of *cy pres* helps clarify the very limited nature of the questions presented.

A. Residual *cy pres*

Almost every class action lawsuit involving a monetary fund is likely to generate residual, or unclaimed, funds. This is so because in a common fund case, class members typically, though not invariably, must step forward to claim the class's proceeds, usually through a claiming program. 4 *Newberg* §§ 12:15-12:25. Given that most class actions are for small amounts of money, class members do not have an enormous incentive to file a claim, a fact that is exacerbated if the claim forms are onerous.

Although there is a dearth of reliable empirical data on claiming rates in class action lawsuits, *id.* at § 12:18, it is fair to assume that rates are below 100% - often well below - leaving unclaimed monies in the common fund. Courts must then decide how to distribute those unclaimed funds.

Four common methods exist: (1) unclaimed funds may revert to the defendant, *id.* at § 12:29; (2) unclaimed funds may be distributed *pro rata* to those class members who did file claims, *id.* at § 12:30; (3) unclaimed funds may escheat to the government, *id.* at § 12:31, or be directed by a specific state statute to be used for certain particular purposes, *id.* at § 12:35; or (4) unclaimed funds may, according to the *cy pres* doctrine, be directed to charities whose goals are ***8** consistent with the underlying causes of action. *Id.* at § 12:32.

There are costs and benefits to each approach, but generally speaking courts are hesitant to approve reversionary funds and the recent trend appears to be toward encouraging redistribution *pro rata,* particularly since the American Law Institute embraced this approach nearly a decade ago. American Law Institute, *Principles of the Law of Aggregate Litigation* § 3.07, cmt. b (2010) ("ALI, *Principles*") (concluding that "in most circumstances distributions to class members better approximate the goals of the substantive laws than distributions to third parties that were not directly injured by the defendant's conduct").

B. Full *cy pres*

While a court's goal in distributing class action damages is to get as much of the money to the class members in as simple a manner as possible, there are instances when that goal is unattainable. One such circumstance is when the class members are so numerous and the individual claims are so small that an individualized distribution to each harmed class member is, as a practical matter, infeasible. In such circumstances, the monies recovered from the defendant may be directed to one or more charities via a *cy pres* - or "next best" - award. 4 *Newberg* § 12:26.

I refer to these cases as involving "full *cy pres*" because all of the monetary recovery is directed to charities. To be clear, however, the monetary payments in ***9** full *cy pres* cases rarely constitute the class's full relief. In most full *cy pres* cases, monetary disgorgement is complemented by some form of injunctive-like relief for the class. Here, for example, the District Court found that:

> Under the terms of the parties' agreement, and contrary to what the objectors argue, future users of Google's website will receive something from the injunctive relief: the capability to better understand Google's disclosure practices before conducting a search on its website, and the ability to make a better informed choice based on that information.

Pet. App. 49-50.

Full *cy pres* distributions serve several purposes. *First,* they ensure that the defendant is disgorged of a sum certain, even if that money does not compensate class members directly. This disgorgement furthers the deterrence goals of the class suit. ALI, *Principles* § 3.07, cmt. b (noting that without *cy pres,* defendants could retain the funds otherwise distributed to charities, and that such an outcome "would undermine the deterrence function of class actions and the underlying substantive-law basis of the recovery by rewarding the alleged wrongdoer simply because distribution to the class would not be viable"). *Second,* full *cy pres* distributions provide indirect compensation to the plaintiff class by funding activities that are in the class's interest. Indeed, large multimillion dollar contributions to charities related to the plaintiffs' causes of action do more good for the plaintiffs than would a minuscule ***10** sum of money distributed directly to them. *Third,* the resolution of the class suit brings finality and repose to the defendant and relieves the judicial system of the possibility of myriad individual (or further class) suits.

Notwithstanding these points, a few critics argue, as do Petitioners here, that full *cy pres* settlements violate various constitutional or statutory provisions; that class certification should simply be denied in situations where all of the class's money would be distributed to *cy pres* organizations; that since the class action remedies belong to the class, they cannot be sent to non-class members; or that the possibilities of collusion between class and defense counsel are heightened in these circumstances.

Despite the controversy, courts in at least six circuits have approved such full *cy pres* outcomes, *see* 4 *Newberg* § 12:26 (listing cases from five circuits); *see also In re Google Inc. Cookie Placement Consumer Privacy Litig.,* No. CV 12-MD-2358 (SLR), 2017 WL 446121, at *4 (D. Del. Feb. 2, 2017), on appeal, and no court has ever rendered the ruling Petitioners seek here: that full *cy pres* settlements are *per se* unreasonable. Nonetheless, full *cy pres* distributions remain exceptional outliers. Damages recovered in a class suit are presumptively the property of the individual class members. Therefore:

> [F]ull *cy pres* is appropriate only if a court finds that individual distributions are not viable because it is difficult or impossible to identify the persons to whom damages should be assigned or distributed and thus proceeds ***11** cannot be economically distributed to the class members. Courts have rejected full *cy pres* settlements that do not meet these standards, without actually rejecting the concept of full *cy pres* itself.

4 *Newberg* § 12:26 (internal quotation marks and citations omitted).

C. Why the distinction matters

The facts of this case, and the questions presented in the *cert.* petition, concern full *cy pres* settlements, not residual *cy pres* awards. A clear understanding of this fact brings home three critical points: full *cy pres* settlements are exceedingly rare; the issues preserved for appeal and presented in the petition for *certiorari* are therefore remarkably narrow; and significant procedural and constitutional concerns would arise were the Court to use this narrow full *cy pres* case as an occasion to generate broad residual *cy pres* principles.

1. Full *cy pres* cases are remarkably rare

The questions presented by the *cert.* petition - whether class certification and settlement approval are appropriate in full *cy pres* cases - rarely ever arise. Generally speaking, the federal courts terminate about one full *cy pres* case a year. To put that in perspective, if any more perspective is necessary: the federal courts terminate about 275,000 cases per year, *see* U.S. District Courts - Judicial Business 2017, available at ***12** http://www.uscourts.gov/statistics-reports/ us-district-courts-judicial-business-2017, roughly 350 of which are class actions. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards,* 7 J. Empirical L. Studies 811, 817-818 (2010). Following an extensive review of several thousand class action cases, my research assistants and I have been able to identify a total of 18 cases in which federal courts have *ever* approved full cy *pres* settlements, or about 1/year for the past two decades. These data are charted in Table 1 below. (A list of these cases, and the methodology used to identify them, appears as an Appendix.) It is possible that our research did not capture 100% of the approved full *cy pres* cases - and the decision whether or not to include a few other cases on the list is open to interpretation - but I am confident that the research accurately represents the general magnitude of full *cy pres* settlement approvals.

***13 TABLE 1**

Number of Full *Cy Pres* Settlements Finally Approved by Federal Courts (By Year of Final Approval)

2017	1

2016	1
2015	1
2014	1
2013	2
2012	1
2011	1
2010	2
2009	1
2008	3
2007	1
2006	1
1997	1
1995	1

These data support four conclusions.

First, these data undermine the argument that this form of class action settlement is either rampant or expanding. Rather, they show that the questions presented in the *cert.* petition impact a minute portion of American litigation and that the category they impact has shown no sign of expanding in any meaningful way.

Second, these data support the conclusion that the lower federal courts have shown care in scrutinizing full *cy pres* matters. As noted in the Appendix's list, in three of these 18 cases, the federal courts initially ***14** rejected the full *cy pres* proposal, with final approval being granted only after the parties addressed particular problems. In a handful of other cases, courts have rejected particular full *cy pres* settlements outright. *See, e.g., Koby v. ARS Nat'l Servs., Inc.,* 846 F.3d 1071 (9th Cir. 2017); *Fraley v. Facebook, Inc.,* 966 F. Supp. 2d 939, 943-44 (N.D. Cal. 2013) (describing rejection of prior full *cy pres* settlement in approving later settlement encompassing monetary relief for class), *aff'd sub nom. Fraley v. Batman,* 638 F. App'x 594 (9th Cir. 2016), *cert. denied sub nom. K.D. v. Facebook, Inc.,* 137 S. Ct. 68 (2016); *Zimmerman v. Zwicker & Assocs., P.C.,* No. CIV. 09-3905 RMB JS, 2011 WL 65912 (D.N.J. Jan. 10, 2011).

Third, these data support the conclusion that full *cy pres* cases arise almost exclusively in two distinct doctrinal areas, each with its own complex legal setting, rendering problematic any sweeping generalizations or legal rules. Eleven of the 18 full *cy pres* cases arose under the Fair Debt Collection Practices Act, 15 U.S.C. 1692 *et seq.* (FDCPA). In enacting that statute, Congress capped damages in class action lawsuits at the lesser of $500,000 or 1% of the defendant's net worth. 15 U.S.C. 1692k(a)(1)(B). Because of the small net worth of some debt collectors, that cap is occasionally so low that distribution of recoveries to even medium-sized classes is infeasible. (Nonetheless, these full *cy pres* settlements remain the exception, not the rule, among FDCPA settlements.) Five of the 18 full *cy pres* cases involved privacy-related allegations - typically arising under another federal statute, the Stored ***15** Communications Act, 18 U.S.C. 2701 *et seq.* - against large internet-based companies like

Google, Facebook, Netflix, and AOL. As in this case, the enormous size of the plaintiff class rendered distribution of modest damage amounts infeasible. The final few full *cy pres* cases also involved massive classes, but in consumer protection cases.

Fourth, the data refute Petitioners' contentions that class counsel are incentivized to displace true compensatory damage settlements with full *cy pres* settlements. Pet. Br. at 57. These few full *cy pres* cases are not ones that conventionally would have resulted in compensatory damages but were perverted into full *cy pres* settlements. Moreover, class counsel have no incentive to propose artificial full *cy pres* settlements. They recover no extra fees for sending money to *cy pres* recipients. If a monetary distribution is feasible, the court overseeing the class action will inquire as to why it is not proposed, and if class counsel do not have a good explanation, the court will reject the settlement; class counsel will then have to re-negotiate a new settlement. *See, e.g., Fraley,* 966 F. Supp. 2d at 943-44. This whole process will cost class counsel time and money, cause them reputational harm, and could lead to a diminution in their fees. *See, e.g., In re Baby Prod. Antitrust Litig.,* 708 F.3d 163, 178 (3d Cir. 2013) ("Where a district court has reason to believe that counsel has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class, we therefore think it appropriate for the court to decrease the fee award.").

***16** Full *cy pres* cases are, in sum, (1) few; (2) scrutinized by skeptical federal judges; (3) confined to several very specific doctrinal situations; and (4) neither presently displacing true compensatory damage cases nor likely to do so.

2. The questions preserved for appeal by Petitioners' objection and then presented in the *cert.* petition are few and narrow

In *Marek v. Lane,* 571 U.S. 1003 (2013), this Court denied a petition for *certiorari,* with the Chief Justice writing in a concurring statement that the case "focused on the particular features of the specific *cy pres* settlement at issue [such that] [g]ranting review … might not have afforded the Court an opportunity to address more fundamental concerns surrounding the use of such remedies in class action litigation. …" *Id.* at 1006 (statement of Roberts, C.J., respecting the denial of *certiorari).* The Chief Justice went on to identify seven such issues:

> [1] when, if ever, such relief should be considered; [2] how to assess its fairness as a general matter; [3] whether new entities may be established as part of such relief; if not, [4] how existing entities should be selected; [5] what the respective roles of the judge and parties are in shaping a *cy pres* remedy; [6] how ***17** closely the goals of any enlisted organization must correspond to the interests of the class; and [7] so on.

Id. (brackets added).

The limited nature of this case is remarkably similar to the Chief Justice's conclusion about *Marek* for three reasons.

First, the underlying case involves only full *cy pres,* not residual *cy pres,* so the facts of the case limit the scope of the issues presented. While some similar issues arise in both full and residual *cy pres* cases, the reason for turning to *cy pres* is distinct in each setting and not all principles of law necessarily apply across the settings. In the former (residual fund) situation, class members have been provided notice and an opportunity to claim their recoveries but have failed to do so. Courts must then address how to proceed with what could be characterized as abandoned property. In the latter (full *cy pres* cases), the parties are proposing to foreclose class members' causes of action without providing direct monetary compensation to them because individualized distribution is infeasible.

Thus, the Chief Justice's two core questions - "when, if ever, such relief should be considered" and "how to assess its fairness as a general matter," *id.* - trigger differing concerns and call for distinct rules across the two settings, as do subsidiary questions about, for example, whether and how class members should be involved in the selection of cy *pres* recipients. ***18** (*Amicus*

has similarly struggled to comprehend a literal application of the trust analogy to each setting, *see* 4 *Newberg* § 12:32 n.7, but it seems clear that the analogy would vary depending upon whether the funds at issue are abandoned or not.) Put simply, the differences between the two types of *cy pres* are more differences of kind than degree.

Second, Petitioners objected to only a few features of the full *cy pres* settlement, Pet. App. 112-150, and they are, according to this Court's precedents, permitted to appeal only those issues actually raised in their objections. *Devlin v. Scardelletti,* 536 U.S. 1, 9 (2002) (holding that an objector "will only be allowed to appeal that aspect of the District Court's order that affects him - the District Court's decision to disregard his objections").

Third, the scope of this Court's review is then set forth in the *certiorari* questions accepted for review; as noted, these are limited to questions about full *cy pres* settlements.

Given this legal framework, very few of the Chief Justice's above-referenced inquiries are properly before the Court in this case - and those that are raise quite limited concerns, as set forth in Table 2 below.

***19 TABLE 2**

Limited Nature of *Cy Pres* Concerns Properly At Issue in This Case

1	when, if ever, such relief should be considered;	At issue here only as to full *cy pres* settlements
2	how to assess its fairness as a general matter;	At issue here only as to full *cy pres* settlements
3	whether new entities may be established as part of such relief; if not,	Not an issue in this case
4	how existing entities should be selected;	Not raised in Petitioners' objection
5	what the respective roles of the judge and parties are in shaping a *cy pres* remedy;	Not raised in Petitioners' objection
6	how closely the goals of any enlisted organization must correspond to the interests of the class;	Not raised in Petitioners' objection [2]
7	and so on	Whether the *cy pres* recipients are disqualified because of certain specific preexisting relationships with class counsel or the defendant(s)

***20** In sum, this case bears striking similarity to the *Marek* case, which this Court deemed an inappropriate vehicle for thorough consideration of *cy pres* issues, because it involves only the rarely-occurring topic of full *cy pres* and then, within that topic, only the few concerns that were properly preserved for appeal.

3. A decision setting rules for residual *cy pres* cases would raise complex procedural and constitutional concerns

If the Court were to use this case as a mechanism for generating rules concerning residual *cy pres* situations, it would trigger a series of procedural and constitutional concerns. Google's terms of service mandate application of California law to the resolution of disputes. *See* Google Terms of Service, available at https://policies.google.com/terms. Like at least a dozen other

states, 4 *Newberg* § 12:35, California has an explicit statute governing the distribution of unclaimed or abandoned funds in class action litigation. Cal. Civ. Proc. Code 384. If the Court uses this case as a vehicle for rulemaking as to residual funds, it would have to ascertain the applicability of this provision to litigation ***21** in federal court, a complex choice of law question. *Cf. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,* 559 U.S. 393 (2010). Were the statute deemed to apply to this litigation - the California residual funds statute says nothing about class certification standards and hence it would not necessarily suffer the fate that befell the New York provision at issue in *Shady Grove* - it would further support the parties' use of *cy pres.*

Petitioners' contentions herein would therefore arguably call into question the constitutionality of California's statute, a fact that triggers procedural protections for the State of California requiring notice and an opportunity to be heard on these constitutional concerns, 28 U.S.C. 2403(b), if not rendering the State a required party to the litigation. Fed. R. Civ. P. 19. All of these intricate procedural and constitutional concerns lie dormant if the Court limits itself - as do the questions presented - to consideration solely of full *cy pres* awards.

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These three factors - the rarity of full *cy pres,* the limited nature of the questions preserved for appeal and presented in the *cert.* petition, and the concerns raised if the Court strays into residual *cy pres* issues - combine to argue in favor of a very narrow opinion addressing a rarely-occurring phenomenon, if not outright dismissal of the petition as having been improvidently granted.

***22 II. This Full *Cy Pres* Settlement Meets Rule 23(e)(2)'s Requirement That It Be Fair, Reasonable, And Adequate**

Money damages in 23(b)(3) class action lawsuits are individualized in nature. *See Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 364 (2011) (rejecting certification of money damage claims under Rule 23(b)(2) because of their individualized nature and holding that (b)(3) certification is required because of "the need for plaintiffs with individual monetary claims to decide for themselves whether to tie their fates to the class representatives' or go it alone - a choice Rule 23(b)(2) does not ensure that they have"); *Boeing Co. v. Van Gemert,* 444 U.S. 472, 481-82 (1980) ("The members of the class, whether or not they assert their rights, are at least the equitable owners of their respective shares in the recovery").

Here, the claims of 129 million class members were settled for $8.5 million, meaning that the gross value of each class member's recovery was roughly 6.6 cents. Distribution of that amount, net of fees and expenses, to each individual class member is both illogical and infeasible. The settling parties therefore proposed utilizing the money for the "next best" purpose by directing each class member's individual recovery to fund work consistent with the class's underlying legal claims.

Petitioners contend that the "class's damages," Pet. Br. at 29-30, should be awarded only to the class and accordingly argue for a claiming program reliant on under-claiming and/or a lottery-like system, either ***23** of which would ensure that 100% of the settlement funds remain with class members themselves. *Id.* at 44-45. This is effectively similar to the *pro rata* redistribution approach to residual funds supported by the American Law Institute. ALI, *Principles* § 3.07, cmt. b. It has the surface appeal of distributing the "class's damages" solely within the class.

When probed, however, that appeal is elusive for one simple reason: there is no such thing as "the class's damages." A class action settlement fund is a collection of individualized monetary recoveries, not a group's fund. To re-direct one class member's recovery to another class member keeps that recovery among class members, but it is no less the direction of one person's property to a stranger than is the direction of that same property to a non-profit organization.

Once the Petitioners' redistribution scheme is properly framed as simply an alternative form of *cy pres,* it poses the question of whether Petitioners' *cy pres* scheme is a better use of each class member's individual recovery than the use proposed by the parties herein. There are four reasons that it is not.

First, the Petitioners' redistribution scheme results in a rather miraculous windfall for some class members at the expense of others. At one extreme, Petitioners propose splitting the present $8.5 million fund among 50,000 class members, Pet. Br. at 44, meaning each would receive a gross amount of $170; as the gross value of each individual's share of the settlement is 6.6 cents, this yields an award 2,576 times ***24** greater than the settlement value of the claim; even at the Petitioners' other extreme - splitting the fund among 1,000,000 class members, *id.* - each would receive $8.50 or 129 times the claim's settlement value.

Second, because Petitioners' scheme would not occur outside the class action context, the Court should be especially reluctant to embrace it within that context. Petitioners acknowledge this measuring stick, stating that, "Courts and class counsel should not have the authority to divert [settlement-fund proceeds] to third parties any more than attorneys for individual clients *do.*" *Id.* at 17. But a review of what attorneys for individual clients are able to accomplish argues against Petitioners' intra-plaintiff redistribution scheme and in support of *cy pres.* A simple example (initially involving residual funds) brings home the point. If a lawyer represented three co-plaintiffs in a lawsuit, secured awards of $50,000 for each, but one did not step forward to claim her recovery, no one would seriously suggest distributing that $50,000 to the other two co-plaintiffs. Because the monetary recovery belongs to that plaintiff, her counsel would look for her, then for her legal heirs, with fully unclaimed funds ultimately escheating to the state.

Those who argue for the redistribution of residual funds among claiming class members note that the settling class members likely did not receive the full value of their claims and/or were charged transaction costs (*i.e.,* fees and expenses) and thus conclude that even with the redistribution, the class members are barely made whole. 4 *Newberg* § 12:30 n.5 (citing cases). But ***25** the three-plaintiff situation shows that this justification is not terribly convincing: even if plaintiffs #1 and #2, who did step forward to claim their recovery, received less than 100% of the value of their claims and were taxed attorney's fees and expenses, it would nonetheless remain remarkably peculiar, if not flatly illegal, for counsel to hand plaintiff #3's unclaimed recovery to them. Intra-plaintiff redistribution *of a residual* recovery is simply not an option in the normal non-class case.

Intra-plaintiff redistribution of the *full* recovery would also be peculiar, if not perverse, in the non-class context. If a lawyer represented several plaintiffs in a private lawsuit involving important but largely immeasurable harm, and the defendant proposed, as a settlement, making a charitable contribution to groups of the plaintiffs' choosing, the lawyer would surely have an obligation to take that settlement offer to the client and the client would have every right to accept it. Indeed, this is a familiar occurrence. *See, e.g., Beastie Boys v. Monster Energy Co.,* 983 F. Supp. 2d 369, 373 (S.D.N.Y. 2014) (describing copyright infringement settlement whereby alleged infringer "agreed to make annual payments of 1% of its gross revenue, until the total payments reached $1 million, to a charitable organization chosen by the [copyright holder] and approved by [the alleged infringer] which supports 'science, technology, engineering and/or mathematics education for girls' "). What would be far odder would be for the defendant to propose, and for the plaintiffs to accept, that a small amount of money be distributed ***26** to one of the co-plaintiffs following a lottery. Unlike the charitable settlement, intra-plaintiff redistribution schemes are not a familiar form of dispute resolution in a non-class setting.

Thus, consideration of a non-class action variant of the present situation demonstrates that the Petitioners' proposed redistribution schemes are more problematic and less acceptable than the settling parties' *cy pres* approach.

Third, and most obviously, *cy pres* distributions aim to provide an indirect benefit to class members by supporting organizations undertaking work consistent with their causes of action; intra-class redistribution provides no benefit whatsoever for those class members other than the few receiving the other class members' money as their windfall. The Petitioners' attempt to refute this point by citing a 2004 decision in which Judge Posner stated that, "There is no direct benefit to the class from the defendant's giving the money to someone else." Pet. Br. at 33 (quoting *Mirfasihi v. Fleet Mortg. Corp.,* 356 F.3d 781, 784 (7th Cir. 2004)). However, nine years later, writing for another Seventh Circuit panel, Judge Posner (and the Seventh Circuit) effectively repudiated this statement in holding:

> Payment of $10,000 to a charity whose mission coincided with, or at least overlapped, the interest of the class (such as a foundation concerned with consumer protection) would amplify the effect of the modest damages

> in protecting consumers. A foundation that receives $10.000 can use the money to do ***27** something to minimize violations of the Electronic Funds Transfer Act; as a practical matter, class members each given $3.57 cannot.

Hughes v. Kore of Indiana Enter., Inc., 731 F.3d 672, 676 (7th Cir. 2013) (emphasis added). Petitioners do not cite to this later development, nor to the numerous courts that, in supporting *cy pres* distributions, have so found. 4 *Newberg* § 12:32 n.12 (listing examples).

Fourth, because *cy pres* aims to benefit the absent class members while redistribution schemes do not, class counsel's ethical duties under Rule 23 arguably compel them to seek such an approach. Rule 23(g), which sets forth those duties, mandates that class counsel "must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(4). The Advisory Committee Notes emphasize that:

> Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. The class representatives do not have an unfettered right to "fire" class counsel. In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel must determine whether seeking the court's approval of a settlement would be in the best interests of the class as a whole.

Fed. R. Civ. P. 23 advisory committee note (2003) (emphasis added). *See also id.* (stating that the Rule ***28** "articulates the obligation of class counsel to represent the interests of the class, as opposed to the potentially conflicting interests of individual class members"). Given class counsel's obligation to represent the interests of the entire class, a decision to direct un-distributable funds to organizations undertaking work consistent with the interests of the entire class is completely defensible, whereas a decision to confer windfall recoveries on some class members at the expense of others is not.

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Because *cy pres,* unlike Petitioners' proposal, (1) does not result in windfalls; (2) would be the approach used in an individual litigation setting; (3) aims to benefit the entire class; and (4) is compelled by class counsel's duties, it is a reasonable solution to the problem presented in rarely-occurring full *cy pres* situations such as this one. *See also* U.S. Br. at 27 n.2 ("Petitioners do not explain why a truly random distribution of settlement funds would be 'reasonable' under Federal Rule of Civil Procedure 23(e)(2) or why it would necessarily result in greater relief to the class as a whole than a properly tailored *cy pres* award.").

III. Rule 23 Does Not Prohibit Class Certification In Full *Cy Pres* Cases

Though one of the two questions presented is whether Rule 23 permits class certification in a full *cy pres* case, Petitioners devote just two pages of their 57page brief to the question, Pet. Br. at 52-54, and make ***29** only one argument therein: that this class suit does not meet Rule 23(b)(3)'s superiority requirement "because every single class member is worse off than if they opted out and reserved their claims to litigate individually." *Id.* at 53. Petitioners are correct that only the superiority prong of Rule 23 is arguably at issue: this is the only certification prong that the Petitioners raised in their class action objection, Pet. App. 131-134, and hence the only available ground for appeal. *Devlin,* 536 U.S. at 9. But they are wrong in their understanding of that requirement.

Rule 23(b)(3) asks a specific question: whether a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). It requires a court to compare a class action to, for example, individual actions. 2 *Newberg* § 4:85. Notably, Petitioners fail to undertake that task: they simply argue, incorrectly, that class members are better off opting out and *reserving* their claims. But they do not consider the question of whether class members could individually *litigate* their claims more "fairly and efficiently" than in a class suit.

They likely do not undertake that analysis because the outcome supports class certification. Full *cy pres* cases tend to arise in statutory damage situations, as discussed above, and thus raise the question of whether class litigation is superior to individual litigation in statutory damage cases. Litigants have raised two distinct concerns, each of which is now well-settled.

***30** *First,* some defendants had argued that the multiplication of statutory damages by the number of class members could generate a judgment value so out of proportion to (often technical) statutory violations that class certification should be denied. *Id.* at § 4:84. This Court laid that argument to rest in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,* 559 U.S. 393 (2010). In that case, New York State had enacted a statute that essentially barred class certification in cases seeking statutory damages. This Court held that Rule 23, and not the New York limitation rule, governed class certification in federal court. If Rule 23 itself barred class actions for statutory damages, there would have been no clash between Rule 23 and the New York statute at issue in *Shady Grove* and the federal court could have simply applied the New York provision. Moreover, the Court explicitly held that Rule 23 applies across the board but for the exceptions that *Congress* creates. *Id.* at 400.

Second, a few courts have held that a plaintiff is worse off in a statutory damage class action than in individual litigation when a Congressional cap on class action damages means that her class recovery could be lower than her potential recovery in individual litigation. 2 *Newberg* § 4:83; *see also* 7 *Newberg* § 21:6 n.34 (FDCPA cases); *id.* at § 21:3 n.34 (TILA cases). The problem, of course, is that it is highly unlikely that any class member would individually litigate a case for $1,000 in statutory damages. Even if the relevant statute authorized a fee for a prevailing attorney, the cost of litigating against Google or a similar corporate ***31** defendant is so high, and the single individual's statutory recovery so low, that counsel are unlikely to invest in such a suit. *See Am. Exp. Co. v. Italian Colors Rest.,* 570 U.S. 228, 245 (2013) (Kagan, J., dissenting) (discussing costs of individual arbitration in antitrust suit and concluding that, "No rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands."). This is particularly true given the risk that the defendant may simply pick off the plaintiff by offering a $2,000 settlement on the eve of the $1,000 trial, after plaintiff's counsel have invested their time and money to reach that point.

Because denying class certification in statutory damage cases therefore inures only to the benefit of the wrongdoer, the Seventh Circuit rejected this line of argument more than 20 years ago, writing:

> [A] de minimis recovery (in monetary terms) should not automatically bar a class action. The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor. True, the FDCPA allows for individual recoveries of up to $1000. But this assumes that the plaintiff will be aware of her rights, willing to subject herself to all the burdens of suing and able to find an attorney willing to take her ***32** case. These are considerations that cannot be dismissed lightly in assessing whether a class action or a series of individual lawsuits would be more appropriate for pursuing the FDCPA's objectives.

Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997). Many courts have followed suit. *See* 7 *Newberg* § 21:6 n.36 (listing FDCPA cases on point); *see also id.* at § 21:3 n.35 (identifying two TILA cases on point); 2 *Newberg* § 4:87 n.ll (identifying five Fair Credit Reporting Act (FCRA) cases on point).

Together these two points suggest that class action litigation is superior to individual litigation as a means of "fairly" litigating the controversy.

Third, a class action is also, of course, far more efficient: Rule 23 here affords relief (albeit some indirect) to a class of 129 million Google users in one proceeding. No one seriously proposes, nor expects, 129 million individual proceedings, but there will either be so many that they will flood the courts or so few that the class action is shown to be the sole - and hence superior - means of relief.

Petitioners barely pursue the argument that class actions fail the superiority test in full *cy pres* (typically statutory damage) cases and the scant argument they make is unconvincing. Absent a class suit, a wrongdoer will simply face no liability whatsoever.

*33 CONCLUSION

For the foregoing reasons, if the writ is not dismissed as improvidently granted, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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*1A APPENDIX

List of Full *Cy Pres* Settlements Finally Approved By Federal Courts (By Year of Final Approval)

1. *In re Google Inc. Cookie Placement Consumer Privacy Litig.,* No. CV 12-MD-2358 (SLR), 2017 WL 446121 (D. Del. Feb. 2, 2017), on appeal (internet privacy)
2. *Graff v. United Collection Bureau, Inc.,* Civ. Action No. 2:12-cv-02402 (E.D.N.Y. Apr. 26, 2016) (following remand from *Graff v. United Collection Bureau, Inc.,* 132 F. Supp. 3d 470, 485 (E.D.N.Y. 2016)) (FDCPA)

3. *Gonzalez v. Dynamic Recovery Sols., LLC,* No. 14-CIV-20933, 2015 WL 738329 (S.D. Fla. Feb. 23, 2015) (FDCPA)

4. *Klewinowski v. MFP, Inc.,* No. 8:13-CV-1204-T-33TBM, 2014 WL 1418263 (M.D. Fla. Apr. 11, 2014) (FDCPA)

5. *Fairchild v. AOL, LLC,* Civ. Action No. 09-03568 CAS (CD. Cal. Dec. 12, 2013) (following remand from *Nachshin v. AOL, LLC,* 663 F.3d 1034 (9th Cir. 2011)) (internet privacy)

6. *In re Netflix Privacy Litig.,* No. 5:11-CV-00379 EJD, 2013 WL 1120801 (N.D. Cal. Mar. 18, 2013) (internet privacy)

7. *In re Bluetooth Headset Prod. Liab. Litig.,* No. 07-ML-1822 DSF EX, 2012 WL 6869641 (CD. Cal. July 31, 2012) (following remand from *In re Bluetooth Headset Prod. Liab. Litig.,* 654 F.3d 935 (9th Cir. 2011)) (consumer protection)

***2a** 8. *In re Google Buzz Privacy Litig.,* No. C 10-00672 JW, 2011WL 7460099 (N.D. Cal. June 2, 2011) (internet privacy) [1]

9. *Catala v. Resurgent Capital Servs. L.P.,* No. CIV.08CV2401 NLS, 2010 WL 2524158 (S.D. Cal. June 22, 2010) (FDCPA)
10. *Lane v. Facebook, Inc.,* No. C 08-3845 RS, 2010 WL 9013059 (N.D. Cal. Mar. 17, 2010), *aff'd,* 696 F.3d 811 (9th Cir. 2012) (internet privacy)

11. *Gravina v. Client Services, Inc.,* No. 08-3634 (E.D.N.Y. Aug. 25, 2009) (FDCPA)

12. *Huffman v. Zwicker & Assocs., P.C.,* No. 1:07CV01369-LJO-SMS, 2008 WL 11385386 (E.D. Cal. Sept. 3, 2008) (FDCPA)

13. *Voris v. Resurgent Capital Services, L.P.,* No. 06-2253 (S.D. Cal. June 17, 2008) (FDCPA)

14. *Francisco v. Numismatic Guar. Corp. of Am.,* No. 06-61677-CIV, 2008 WL 649124 (S.D. Fla. Jan. 31, 2008) (deceptive trade practices)

15. *Davern v. Arrow Financial Services, LLC,* No. 06-6655 (E.D.N.Y. Sept. 7, 2007) (FDCPA)

16. *Reade-Alvarez v. Eltman, Eltman, & Cooper, PC,* No. CV-04-2195 CPS, 2006 WL 3681138 (E.D.N.Y. Dec. 11, 2006) (FDCPA)

17. *Drennan v. Van Ru Credit Corp.,* No. 96 C 5789, 1997 WL 305298 (N.D. Ill. June 2, 1997) (FDCPA)

18. *Gammon v. GC Servs. Ltd. P'ship,* 162 F.R.D. 313 (N.D. Ill 1995) (FDCPA)

***3a Methodology**

My research assistants and I generated these data in four ways:

1. We ran a series of broad searches on Westlaw (such as <"class action" & "*cy pres*">) and then followed up on those with more targeted searches utilizing specific terms such as <FDCPA & "*cy pres.*">. These searches generated hundreds of results that we then read through to find full *cy pres* settlements.

2. We searched for full *cy pres* cases in a database of more than 1,000 class action lawsuits that I maintain. My prior research assistants originally generated this database from information contained in the journal, *Class Action Attorney Fee Digest* ("CAAFD"). CAAFD was published monthly from January 2007 to September 2011, for a total of 57 issues. In those 57 issues, it reported on 1,187 unique court-approved state and federal class actions. For each case, a CAAFD case abstract describes the awarding court and judge, the subject matter of the dispute, the settlement/ judgment benefits, the attorney fee and expense awards (both as requested by plaintiff's counsel and as approved by the court), the case filing and attorney fee award dates, any named plaintiff awards, and miscellaneous data on case and settlement/judgment administration. My current research assistants

identified full *cy pres* cases in this database and then verified the information by reviewing each case's original documents on PACER.

***4a** 3. We reviewed briefs filed by the Petitioners in this case and read through all of the *cy pres* cases cited therein.

4. We reviewed the primary scholarly literature on *cy pres* in class actions and tracked down any cases cited within these articles. *See, e.g.,* 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 (2010) (finding only 10 cases among 120 from 1974-2008 that distributed more than 75% of class recovery to *cy pres* recipients).

Footnotes

1 Pursuant to Supreme Court Rule 39(6), *amicus* certifies that no counsel for a party authored this brief in whole or in part, and that no party, no party's counsel, and no person or entity, other than *amicus,* has made a monetary contribution to its preparation or submission.

All of the parties in this case have consented to the filing of this brief.

2 In the District Court, one of the two Petitioners (Frank) objected to the AARP "receiving money as a proxy for the class" because, according to his declaration, the group "takes numerous political positions that I believe contravene good public policy." Declaration of Theodore H. Frank, *In re: Google Referrer Header Privacy Litigation,* No. 5:10-cv-04809-EJD, ECF No. 70-2 at 2 (August 8, 2014). He does not pursue that factual "nexus" argument in this Court, however, instead now framing his objection as a legal one of compelled speech, Pet. Br. at 12, buttressed with citations to the First Amendment. *Id.* at 17, 36. Because Petitioners never raised First Amendment issues in their objection - those two words never appear, *see* Pet. App. 112-150 - they cannot raise them on appeal. *Devlin,* 536 U.S. at 9.

1 *Amicus* was one of 15 lawyers with designated class counsel roles in this case. *Id.* at 2.