No. 17-961

In the Supreme Court of the United States

THEODORE H. FRANK AND MELISSA ANN HOLYOAK,
Petitioners,

v.

PALOMA GAOS, ON BEHALF OF HERSELF AND ALL OTHERS SIMILIARLY SITUTATED, *ET AL.*,
Respondents.

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

BRIEF OF THE ATTORNEYS GENERAL OF ARIZONA, ALABAMA, ALASKA, ARKANSAS, COLORADO, IDAHO, INDIANA, LOUISIANA, MISSISSIPPI, NEVADA, NORTH DAKOTA, OKLAHOMA, RHODE ISLAND, SOUTH CAROLINA, TEXAS, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici are their respective states' chief law enforcement or chief legal officers and hold authority to file briefs on behalf of their offices.

Amici's interest arises from two responsibilities. *First*, as chief law enforcement or legal officers, amici have an overarching responsibility to protect their States' consumers. *Second*, amici have a responsibility to protect consumer class members under CAFA, which prescribes a role for state Attorneys General in the class action settlement approval process. *See* 28 U.S.C. § 1715; *see also* S. REP. 109-14, 2005 U.S.C.C.A.N. 3, 6 (requirement "that notice of class action settlements be sent to appropriate state and federal officials," exists "so that they may voice concerns if they believe that the class action settlement is not in the best interest of their citizens."); *id.* at 34 ("notifying appropriate state and federal officials ... will provide a check against inequitable settlements"; "Notice will also deter collusion between class counsel and defendants to craft settlements that do not benefit the injured parties.").

Amici submit this brief to further these interests, speaking for consumers who will benefit from the Court hearing this case and providing badly needed guidance on the acceptable contours of *cy pres* class action settlement arrangements.

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

SUMMARY OF ARGUMENT

Certiorari is warranted because the question raised relates to a concerning example of an important, pressing issue—growing use of *cy pres* to resolve class actions—and there is a circuit split on this important issue that calls for this Court's guidance.

The Ninth Circuit's approach to *cy pres* here places consumers at risk by amplifying a circuit split and blessing a class action arrangement that allows class counsel and defendants to reach a mutually beneficial settlement to the detriment of class members, who receive none of the ~$8.5 million that changes hands. Given the nature of nationwide class action litigation, and the ability of class counsel to forum shop cases, even one circuit applying an under-protective standard to *cy pres* settlement arrangements will detrimentally affect consumers across the nation and undercut any efforts (by amici or others) to protect consumers from class action settlement abuse.

The petition presents an ideal vehicle for the Court to address the important question presented and provide its first guidance on the appropriate uses of *cy pres* settlement arrangements. The allowability of the *cy pres* arrangement here (or any *cy pres*-only arrangement) was put to the district court by the objectors and was the chief issue on appeal. Pet. App. 113. The record relating to *cy pres* is clear, the legal conclusions straightforward, and resolution of the circuit split on the question presented will control as to the validity of the settlement. The Court should take this opportunity, grant certiorari, and provide needed guidance on the analysis courts should use in weighing when (if ever) *cy pres* may be judicially approved.

ARGUMENT

I. THE QUESTION PRESENTED IS IMPORTANT AND AFFECTS CONSUMER INTERESTS IN CLASS ACTION SETTLEMENTS ACROSS THE NATION

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

Directing settlement funds to class members wherever feasible is important. Class actions are largely resolved through settlement. *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1285 (2002) ("most class action suits settle"; gathering supporting sources as to same). And since class members extinguish their claims in exchange for settlement funds, those "settlement funds are the property of the class[.]" *In re BankAmerica Corp. Sec. Litig.,* 775 F.3d 1060, 1064 (8th Cir. 2015); *see also Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) ("[S]ettlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members."); American Law Institute, Principles of the Law of Aggregate Litigation § 3.07, cmt. b (2010) ("funds generated through the aggregate prosecution of divisible claims are presumptively the property of the class members").

Yet in dividing settlement funds, the interests of class members and other participants can diverge. Class counsel has an incentive to obtain a large fee, causing potential conflicts with the class. *See, e.g., In re HP Inkjet Printer Litigation*, 716 F.3d 1173, 1178

(9th Cir. 2013) ("interests of class members and class counsel nearly always diverge"); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 175 (3d Cir. 2013) ("'class actions are rife with potential conflicts of interest between class counsel and class members'"). And defendants rarely help. "[A] defendant who has settled a class action lawsuit is ultimately indifferent to how a single lump-sum payment is apportioned between the plaintiff's attorney and the class." William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 TUL. L. REV. 813, 820 (2003). The fee and class award "represent a package deal," *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996), with a defendant "'interested only in the bottom line: how much the settlement will cost him.'" *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 712 (7th Cir. 2015); *see also In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 820 (3d Cir. 1995) ("Allocation ... is of little or no interest to the defense.").

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

Defendants (especially companies like Google) may prefer *cy pres*. *See, e.g., Lane*, 696 F.3d at 834 (defendant "may prefer a *cy pres* award" "for the public relations benefit"); *see also Google and Facebook's New Tactic in the Tech Wars*, Fortune (July 30, 2012) (noting existing donations to many *cy pres* recipients, and support on cases and issues those recipients often give to donating corporations).

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

B. *Cy Pres*-Only Arrangements Are The Most Concerning Type Of *Cy Pres* Deal

While *cy pres* inherently threatens class members' interests, *cy pres*-only arrangements, like the one here, are the most concerning because the class receives no payment, even as millions (here, $8.5 million) change hands in the settlement and class members' claims are extinguished. Pet App. 134-35.

A settlement cannot be in the class's best interest or fair, adequate, and reasonable under Rule 23 where, as here, it generates millions of distributable settlement dollars (and releases millions of claims) yet the class languishes with no direct compensation. *Cf. In re Baby Prods*., 708 F.3d at 174 (requiring direct benefit to class and appropriate balance between class and *cy pres*

payments). This type of arrangement is precisely why courts are tasked with policing the "inherent tensions among class representation, defendant's interests in minimizing the cost of the total settlement package, and class counsel's interest in fees[.]" *Staton v. Boeing Co.*, 327 F.3d 938, 972 n.22 (9th Cir. 2003).

And we know that when courts push parties to direct proposed *cy pres* to class members, consumer-positive outcomes often follow. For example, in *Fraley v. Facebook, Inc.*, the court rejected a *cy pres*-only settlement, leading counsel to craft a claims-made settlement for the nearly 150 million member class that distributed ~$20 million amongst claiming class members, resulting in $15 per claimant. 966 F. Supp. 2d 939, 943 (N.D. Cal. 2013). In another example, on remand from the Seventh Circuit in *Pearson v. NBTY*, the parties renegotiated the original *cy pres* arrangement to give class members ~$4 million more in cash. No.11-07972, Dkt. 213-1 ¶¶7-8 (N.D. Ill. May 14, 2015). And these are just two examples of the improved consumer outcomes that can follow when courts reject dubious *cy pres* arrangements. *See, e.g., McDonough v. Toys "R" Us, Inc.*, 80 F. Supp. 3d 626, 660 (E.D. Pa. 2015) (after rejection of *cy pres* proposal, counsel arranged direct distribution of ~$14.5 million to class members, causing "exponential increase" in class recovery).

II. THE COURT'S GUIDANCE IS NEEDED GIVEN THE PROLIFERATION OF *CY PRES* SETTLEMENTS AND LOWER COURTS' DIVERGENT APPROACHES ON CORE *CY PRES* QUESTIONS

A. The Court Has Never Spoken On The Appropriate Use Of *Cy Pres* Class Action Settlements, Yet These Arrangements Represent An Ever More Common Resolution To Class Litigation

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

Yet as Chief Justice Roberts has noted, even as *cy pres* is a "growing feature of class action settlements," the Court has not yet addressed the use of *cy pres* in the class action context. *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting the denial of certiorari). As the Chief Justice well noted, there are important, foundational *cy pres* settlement questions that could use the Court's guidance, "including when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on." *Id*.

B. In The Absence Of The Court's Guidance, Lower Courts Have Applied Divergent Tests, Standards, And Assumptions In Weighing *Cy Pres* Settlements

There is divergence in the Court of Appeals on the most foundational *cy pres* question—how to measure when *cy pres* can be allowably used. Of the circuits that have set down guidance on the allowable uses of *cy pres* settlement arrangements, there has been general agreement on the need to look at the potential feasibility of distribution directly to class members. *See, e.g.*, *Klier*, 658 F.3d at 475 (*cy pres* to a third party "is permissible" when no longer "feasible" to distribute); *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014) (*cy pres* can be utilized when not able to "feasibly" award money); *In re BankAmerica*, 775 F.3d 1060 (citing *Klier* and using a "feasible" standard). But the circuits have

diverged in their handling of this analysis and the tests and requirements they apply to *cy pres* settlement arrangements.

The Third Circuit has taken perhaps the most consumer-friendly approach to *cy pres*, introducing as a specific consideration "the degree of direct benefit provided to the class." *In re Baby Prods.*, 708 F.3d at 174. The Third Circuit has emphasized that this "direct benefit" analysis should be "practical and not abstract"—with the district court "'affirmatively seek[ing] out'" information required to make the determination—and may warrant "urg[ing] the parties to implement a settlement structure that attempts to maintain an appropriate balance between payments to the class and *cy pres* awards." *Id.* Indeed, the Third Circuit has made plain that while *cy pres* can allowably direct "excess settlement funds to a third party," "direct distributions to the class are preferred over *cy pres*," and "*cy pres* awards should generally represent a small percentage of total settlement funds." *Id*. at 172-174.

While no other circuit has adopted a "direct benefit" test matching the Third Circuit, the Fifth, Seventh, and Eighth Circuits have all adopted their own pro-consumer versions of the "feasibility" standard that makes *cy pres* a true last resort, when distribution is seemingly *impossible* (not just difficult). According to the Seventh Circuit, if compensation could be feasibly given to the class, by providing broader notice or by other such means, *cy pres* is impermissible. *Pearson*, 772 F.3d at 784 *(*reversing $1.3 million in *cy pres* because "[a] *cy pres* award is supposed to be limited to money that can't feasibly be awarded to the intended beneficiaries."). And in the Fifth Circuit *cy pres* is

permitted only when it is no longer feasible to distribute to at least some part of the class. *Klier*, 658 F.3d at 471 (funds remained after distributions to three subclasses and court reversed and remanded, stating that instead of *cy pres* for remainder, funds should be "distributed to the subclass" with most injuries). Likewise, in the Eighth Circuit, if further distributions to the class are feasible, they should be done. *In re BankAmerica*, 775 F.3d at 1062 ($2.4 million remained in settlement fund after two distributions, yet court refused to distribute to *cy pres* since "a further distribution to the classes [was still] feasible").

The Ninth Circuit's infeasibility standard, as reflected in this case, differs from these more exacting standards and blesses free use of *cy pres*-only distributions whenever there is a large class. The Ninth Circuit has eschewed the probing, practical analysis applied in the other circuits to the distributability question, and instead required only that a case feature so many class members that *pro rata* distribution would be economically infeasible (*e.g.*, a *pro rata* distribution here would be ~4 cents), or, at a minimum, "burdensome" and "costly." Pet. App. 8. Put simply, rather than focusing on the possibility of direct distribution to class members, the Ninth Circuit allows courts to turn to *cy pres* based on the mere determination that "the proof of individual claims would be burdensome or distribution of damages costly." *Id.* This represents a split from other circuits that look past burden or expense to ensure that *cy pres* is used only where it is truly not possible to direct money to class members; most notably, the Eighth Circuit has specifically instructed district courts to *not* base *cy pres* analysis on whether "distributions would

be so 'costly and difficult,'" and look instead to "whether 'the amounts involved are too small to make individual distributions economically viable.'" *In re BankAmerica*, 775 F.3d at 1065.

C. A Circuit Split On This Issue, And Lack Of A Uniform Approach To Weighing *Cy Pres* Settlement Arrangements, Is Particularly Harmful To Consumers

If left unchecked, the conflicting approaches taken by the circuits toward this issue will likely result in significant harm to consumers nationwide. Class actions are often national in scope. Therefore, there is significant risk that class counsel will forum shop cases into circuits—such as the Ninth Circuit—that take less rigorous approaches to the review of proposed *cy pres* settlement arrangements. This will undermine the protections usually afforded by our system of divided appellate jurisdiction—by choosing a forum favorable to their own interests (rather than their class clients' interest) class counsel will be able to obtain favorable review of *cy pres* arrangements that present inherent conflicts, even as they lock in class members from across the nation, including those residing in circuits with substantially more robust protections for class members.

As advocates on behalf of their consumers (and likely future class members), especially in the class action settlement context, amici respectfully urge the Court to grant certiorari and begin providing definitive guidance on the allowable uses of *cy pres* settlement arrangements as well as the analysis courts should use in weighing when (if ever) such arrangements should be judicially approved.

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

Because of the centrality of the disputed *cy pr*es questions in this case, this is an ideal vehicle for the Court to offer guidance on the full contours of *cy pres* settlement analysis. The settlement in this case proposes to award class counsel $2.125 million in fees and no direct compensation to class members, with the ~$5.3 million that is for the class instead going to various third parties. Dkt. 85. The trial court approved this arrangement over the fulsome objection of the petitioners, who challenged the validity of such a *cy pres*-only settlement, as well as the selection of the particular *cy pres* recipients. *See* Pet. App. 117-131.

The overarching question of whether a *cy pres*-only settlement arrangement was allowable was then a central issue on appeal, as objectors argued that this *cy pres*-only settlement did not meet the standards of fairness or reasonableness under Rule 23(e)(2) since class members received nothing while millions were awarded to *cy pres* recipients and attorneys. Pet. App. 115-17. And Objectors further argued that a standard claims process was a feasible way of compensating class members without resorting to *cy pres*. Pet. App. 120-23. But the Ninth Circuit rejected these arguments, stating that *cy pres* awards like the one presented here are fair and adequate and a court may approve a *cy pres*-only settlement as long as it is free from collusion. Pet. App. 9-10.

Put simply, throughout the litigation over the validity of the proposed settlement in this case, the

fairness of a *cy pres*-only settlement arrangement and the appropriate standard by which a court is to analyze *cy pres* settlement proposals have been the central aspects of the proceedings and the court opinions. Therefore, the full spectrum of *cy pres* questions are open for this Court to address "including when, if ever, such relief should be considered; how to assess its fairness as a general matter; ... how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on." *Marek*, 134 S. Ct. at 9 (Roberts, C.J., respecting denial of certiorari).

CONCLUSION

The petition for certiorari should be granted.

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