No. 13-136

IN THE

# Supreme Court of the United States

MEGAN MAREK,

*Petitioner,*

v.

SEAN LANE, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL.,

*Respondents.*

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

## REPLY BRIEF FOR PETITIONER


THEODORE H. FRANK
ADAM EZRA SCHULMAN
CENTER FOR CLASS ACTION FAIRNESS
1718 M ST., N.W., NO. 236
Washington, D.C. 20036

JOHN W. DAVIS
LAW OFFICE OF JOHN W. DAVIS
501 W. Broadway, Ste. 800
San Diego, CA 92101

STEVEN F. HELFAND
HELFAND LAW OFFICES
582 Market St., Ste. 1400
San Francisco, CA 94104

DAVID B. RIVKIN, JR.
*Counsel of Record*
ANDREW M. GROSSMAN
BAKERHOSTETLER LLP
1050 Connecticut Ave., N.W., Ste. 1100
Washington, D.C. 20036
(202) 861-1731
drivkin@bakerlaw.com

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

CASES

STATUTES AND RULES



OTHER AUTHORITIES

## REPLY BRIEF FOR PETITIONER

The Ninth Circuit specifically rejected the contention that the district court was required to estimate and account for the value of plaintiff class members' claims before approving a settlement that directed all proceeds to a new foundation controlled by the lead defendant and class counsel and awarded class members nothing. It held that the district court had no obligation to scrutinize the settlement's "individual components," including the *cy pres* award of all proceeds, only to see that this award was not entirely "unrelated to the class's interests." Pet. App. 9, 15. That decision conflicts with the "next best" standard adopted by every other circuit to consider whether a *cy pres* award, in place of direct monetary compensation to plaintiffs, satisfies Rule 23(e)(2)'s requirement that a binding settlement be "fair, reasonable, and adequate."

That decision was not, as Facebook claims, somehow "fact-bound." Even a cursory review of the cases proves that "[o]ther appeals courts have been more skeptical of creative class-action settlements" involving *cy pres* awards and similar contrivances than the Ninth Circuit was here. Adam Liptak, When Lawyers Cut Their Clients Out of the Deal, N.Y. Times, Aug. 12, 2013 (contrasting decision below with *In re Dry Max Pampers Litigation*, -- F.3d --, No. 11-4156, 2013 WL 3957060, at *6 (6th Cir. Aug. 2, 2013), which faulted the district court for failing to scrutinize "the value of this settlement to unnamed class

members"). The Second, Third, Fifth, Seventh, and Eighth Circuits have all held that the risk of collusion between class counsel and the defendant posed by the use of *cy pres* awards requires the district court to estimate and account for the value of absent class members' claims *before awarding their money to someone else* and to carefully scrutinize whether proposed *cy pres* awards best advance class members' interests. The Ninth Circuit's rejection of these bare-minimum requirements cannot be squared with those cases or with any common-sense understanding of what it means for a settlement to be "fair, reasonable, and adequate."

This Court's review is necessary because that decision has nationwide implications. Even if the other circuits properly scrutinize *cy pres* awards, any nationwide class action may be brought within the Ninth Circuit to take advantage of this precedent and strike a quick settlement to the mutual benefit of defendants and class counsel, at the expense of class members. And even if the Ninth Circuit has paid lip service to scrutinizing *cy pres* awards elsewhere, its authorization of a new grant-making foundation controlled by defendant and class counsel defeats any meaningful judicial review of the settlement's benefit to class members. Facebook does not answer these points, and the Lane Respondents' bare assertion that class counsel are impervious to financial incentives contradicts the sweep of human experience, *see* The Federalist No. 51 (James Madison) ("If men were angels . . ."), and, more specifical-

ly, the views of practically all judges and commentators to consider the matter. Indeed, this case could be Exhibit A for the perverse results caused by the abuse of *cy pres* awards: class counsel collect millions in fees for a case settled right out of the gate, while the injured class members get nothing.

This case is therefore the perfect vehicle to ensure that such abuses do not recur by establishing a nationwide standard for the use of *cy pres* awards in class action settlements. Facebook's claim that any part of the question presented is not properly before this Court is meritless. As the Ninth Circuit made clear, the Petitioner challenged both the *cy pres* award, as providing insufficient benefit to the class, and the district court's failure to estimate and account for the value of the claims traded away for that award—the two moving pieces of any *cy pres* settlement. This Court absolutely may address the circumstances under which a district court may approve a *cy pres* remedy that provides no direct relief to class members, whether or not, in answering that question, it ultimately concludes that there are none.

## I. The Ninth Circuit's Decision Conflicts with Decisions of the Second, Third, Fifth, Seventh, and Eighth Circuits

A. As shown in the Petition, the decision below breaks with the consistent standard applied by the other circuits that *cy pres* relief is available only when, taking into account the value of class members' claims, awarding funds to a third party best advances class members' interests. Facebook's at-

tempt to distinguish these cases factually is unpersuasive because it minimizes or ignores the substantive standards that the courts themselves enunciated and applied.

For example, the Third Circuit could not have stated more clearly that the key determination in evaluating a *cy pres* award is "whether the settlement provides sufficient direct benefit to the class," something that the district court must "affirmatively" determine for itself by considering the value of class members' claims. *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 174, 176 (quotation marks omitted) (3d Cir. 2013). If "[t]he Third Circuit was troubled that the district court, when it approved the settlement, did so based upon flawed information about the rate and level of claims," Facebook BIO at 20, that stands in sharp contrast to the standard applied by the Ninth Circuit, which was *untroubled* that the district court lacked any such information when it approved a settlement providing class members with zero compensation. Indeed, the Ninth Circuit specifically rejected "the proposition that the district court was required to find a specific monetary value corresponding to each of the plaintiff class's statutory claims and compare the value of those claims to the proffered settlement award." Pet. App. 18-19. It certainly did not believe, as did the Third Circuit, that the district court had an obligation to "affirmatively seek out such information" and then use it to determine "whether the settlement was fair to the entire class." 708 F.3d at 174-75 (quotation marks omitted).

Facebook's claim that these two decisions are somehow consistent depends on the assumption that the Third Circuit simply did not mean what it said.[1]

The same is true of Facebook's discussion of *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 785-86 (7th Cir. 2004), which rejected a *cy pres* award absent a finding that class members "had . . . no claim large enough to justify a distribution to them" and remanded for the district court to make an "estimate of the value of the legal claims of the . . . class." In fact, the court vacated settlement approval a second time, remanding with instructions for the district court to estimate the value of each of the class's state law claims. 450 F.3d 745, 749, 751 (7th Cir. 2006). That was not, *contra* Facebook, "essentially what the district court did here," Facebook BIO at 22, or what the Ninth Circuit held it was required to have done. There was no need, said the Ninth Circuit, for the district court to address "the potential recovery for each of the plaintiffs' causes of action." Pet. App. 19. It was enough that "[a] $9.5 million class recovery would be substantial under most circumstances," no matter that "some of the class members in this case would have successful claims for $2,500 in statutory damages." Pet. App. 21. Again, the only way these cases can be reconciled

[1] And the Third Circuit said the same thing before in *In re Pet Food Products Liability Litigation*, 629 F.3d 333, 354-55 (3d Cir. 2010), which Facebook declines to address.

is to ignore the standard that the Seventh Circuit actually said it was applying.[2]

Facebook makes no attempt to distinguish the reasoning of the Fifth and Second Circuits in *Klier v. Elf Autochem North America, Inc.*, 658 F.3d 468 (5th Cir. 2011), and *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007). *See* Facebook BIO at 22-23. *Klier* rejected a *cy pres* award of excess funds to one subclass where members of another had not been fully compensated for their injuries. *Cy pres* relief, it explained, is available "only if it is not possible to put [settlement] funds to their very best use: benefitting the class members directly." 658 F.3d at 475. Similarly, *Masters* rejected a *cy pres* award unsupported by any finding that "each class member's recovery would be so small as to make an individual distribution economically impracticable." 473 F.3d at 436. The Ninth Circuit held that no such finding was required. Pet. App. 21-22. These conflicting decisions cannot be distinguished away on any relevant basis.

Finally, Facebook and Respondent McCall point to other Ninth Circuit cases that supposedly protect class members' interests in *cy pres* settlements. Facebook BIO at 17; McCall Br. at 2-3, 4-5. But prece-

---

[2] The Seventh Circuit's ultimate approval of a settlement that awarded some class members nothing is far less "significant[]" that Facebook maintains. Facebook BIO at 22. That approval was premised on the legal conclusion that the state statutes under which they sued "do not permit the award of such damages in a class action." 551 F.3d 682, 685 (7th Cir. 2008).

dents that do not preclude approval of abusive settlements like this one are of dubious value. Any inconsistency in the Ninth Circuit's case law—indeed, McCall argues that this case was wrongly decided under the Ninth Circuit's own precedents, McCall Br. at 1—only highlights the lower courts' confusion over when *cy pres* relief is available. *See, e.g.*, *In re Thornburg Mortg., Inc. Secs. Litig.*, 885 F. Supp. 2d 1097, 1105-12 (D.N.M. 2012) (holding *cy pres* settlements are never permissible and noting absence of controlling authority). This Court must establish what it means for a *cy pres* settlement to be "fair, reasonable, and adequate" under Rule 23(e)(2).

B. The decision below disclaimed any rigorous "next best" inquiry into a *cy pres* award, breaking with decisions of the Second, Seventh, and Eighth Circuits.

The Second Circuit requires that any *cy pres* award actually "assist the class," out of concern that a relaxed standard would "induce[] plaintiffs to pursue doubtful class claims for astronomical amounts and thereby generate . . . leverage and pressure on defendants to settle." *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179, 185 (2d Cir. 1987) (second alteration in original) (quotation marks omitted). It therefore rejected a *cy pres* award administered by an independent foundation, because there was no way to guarantee that it would "allocate limited funds to benefit the class as a whole." *Id.* Here, by contrast, there is no ready congruence between class members—Facebook users injured by its Beacon

program—and the beneficiaries of the *cy pres* award, identified by the Lane Respondents as Internet "users, regulators and enterprises." Lane BIO at 2. Moreover, the Ninth Circuit explained that any scrutiny by the district court of *cy pres* recipients would have been "an intrusion into the private parties' negotiations" and therefore "improper and disruptive." Pet. App. 14. Facebook's assertion that "[t]he Ninth Circuit applied the same standards here," Facebook BIO at 24, is false. Indeed, if the Ninth Circuit's "intrusion into the private parties' negotiations" standard is let stand, settling parties could evade the "next best" inquiry in every instance by laundering a *cy pres* award through a newly-created entity.

Nor can the Ninth Circuit's decision be reconciled with those of the Seventh and Eighth Circuits. Those courts, following the ALI Principles, require that a *cy pres* award approximate class members' interests. *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 683 (8th Cir. 2002); *Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989). What brings class members together in this case is that Facebook and other companies sought to advance their own business interests through a marketing campaign that flagrantly disregarded class members' statutory privacy rights. But no one maintains that the foundation established and funded by this settlement will advance class members' interests by working to curb such practices. *See* Facebook BIO at 23-24; Lane BIO at 6-7. Indeed, the Ninth Circuit assumed that "Facebook retained and will

use its say in how cy pres funds will be distributed so as to ensure that the funds will not be used in a way that harms Facebook." Pet. App. 16. Understandably, Facebook does not respond to this point.

C. Finally, there is nothing "highly fact-specific" about the question of whether a district court must supervise distribution of *cy pres* funds. *See* Facebook BIO at 24. The First and Second Circuits have held that supervision is required to ensure that any distribution actually "comports with the interests of the class." *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 39 (1st Cir. 2012); *see also Agent Orange*, 818 F.2d at 185. The Ninth Circuit, by contrast, affirmed creation of a new foundation to distribute class members' funds to third parties as Facebook and class counsel see fit, without judicial supervision. Pet. App. 16-17. On this point, the circuits plainly differ.

## II. The Question Presented Is Important and Frequently Recurring

This Court's review is important because the decision below creates enormous incentives to file nationwide class actions within the footprint of the Ninth Circuit and thereby ensure that lucrative settlements will not be subject to the same careful scrutiny applied by other circuits. This concern is not hypothetical. In the one year since the decision below issued, it has been cited in dozens of cases, orders, and briefs, typically in support of class-action settlement approval. That trend is only likely to increase, given the rapid growth in the use of *cy pres*

awards in recent years. *See* Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres* Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis, 62 Fla. L. Rev. 617, 653 (2010).

The reason for that rapid growth is that the unchecked use of *cy pres* facilitates the filing, certification, and settlement of class actions that would otherwise be infeasible to litigate due to unmanageability or questionable merit. *Id*. at 639-40; *Agent Orange*, 818 F.2d at 184-85. To this point, Respondents have no real response. Facebook argues only that *cy pres* relief is appropriate "when it furthers the appropriate interests and includes the requisite safeguards," Facebook BIO at 27, but resists any real scrutiny of those things.

The Lane Respondents simply assert that *cy pres* "does not disincentivize direct monetary recovery." Lane BIO at 10. But the conflict of interest inherent in *cy pres* is obvious: class counsel can guarantee a large fee award for itself at the very outset of litigation by agreeing to a settlement that is less onerous to the defendant than direct compensation. *See, e.g.*, Redish at 650-52 (describing how *cy pres* relief "disincentiviz[es] class attorneys from vigorously pursuing individualized compensation for absent class members"); John H. Beisner, Jessica Davidson Miller & Jordan M. Schwartz, *Cy Pres*: A Not So Charitable Contribution to Class Action Practice 12-14 (2010) (discussing conflicts of interest created by *cy pres*); *Mirfasihi*, 356 F.3d at 785 ("Would it be too cynical

to speculate that what may be going on here is that class counsel wanted a settlement that would give them a generous fee and Fleet wanted a settlement that would extinguish 1.4 million claims against it at no cost to itself?"); *In re Pet Food Prod. Liab. Litig.*, 629 F.3d 333, 359 (3d Cir. 2010) (Weis, J., concurring and dissenting); *Baby Prods.*, 708 F.3d at 178 (*cy pres* "creates a potential conflict of interest between absent class members and their counsel").

The decision below only accentuates the inherent 'pathologies' of the opt-out class action mechanism. It will result in more settlements, like this one, where class counsel sell out their putative clients in exchange for a substantial fee award. Whether this Court places meaningful limits on *cy pres* awards or bars them altogether, its guidance is required to prevent further abuses.

## III. This Case Presents the Ideal Vehicle To Establish a Nationwide Standard for the Use of *Cy Pres* Awards

This case presents an ideal opportunity for the Court to provide that guidance. The Ninth Circuit's decision represents a clear break with other circuits' more careful scrutiny of *cy pres* awards, and the Petition squarely presents the question of under what circumstances a district court may, consistent with the requirements of Rule 23(e)(2), approve a settlement that contains a *cy pres* award.

Facebook's contention that Petitioner Megan Marek forfeited any aspect of her challenge is belied by

the Ninth Circuit's opinion, which recognizes that she contested both the settlement agreement's provision for a *cy pres* remedy and the district court's failure to estimate and account for the value of class members' claims. Pet. App. 13. The nature of Marek's objections was driven by the structure of the settlement, which created a $9.5 million fund (minus fees, of course) for injuries suffered by a settlement class of over 3.6 million individuals. Pet. App. 12-13. While Marek acknowledged that a *cy pres* award may be appropriate based on "the size of the class when balanced against the overall size of the fund," Facebook BIO at 28, she challenged this *cy pres* award as failing to best advance class members' interests and also challenged the size of the fund. She certainly did not concede that, if those challenges were to succeed, a *cy pres* remedy would remain appropriate on remand.

Accordingly, Marek preserved every aspect of the question presented. And even if she did not argue below that settlement proceeds, presumptively the property of class members, may never be re-directed to a third party, that question is fairly encompassed by the breadth of her challenge. *See Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2296 n.9 (2012) (addressing antecedent question of whether an opt-out regime is permitted for payment of union agency fees where petitioner challenged the circumstances under which a state may deduct such fees from employees' wages under an opt-out regime).

## CONCLUSION

The Court should grant the petition.

Respectfully submitted,

THEODORE H. FRANK
ADAM EZRA SCHULMAN
CENTER FOR CLASS ACTION FAIRNESS
1718 M ST., N.W., NO. 236
Washington, D.C. 20036

JOHN W. DAVIS
LAW OFFICE OF JOHN W. DAVIS
501 W. Broadway, Ste. 800
San Diego, CA 92101

STEVEN F. HELFAND
HELFAND LAW OFFICES
582 Market St., Ste. 1400
San Francisco, CA 94104

DAVID B. RIVKIN, JR.
*Counsel of Record*
ANDREW M. GROSSMAN
BAKERHOSTETLER LLP
1050 Connecticut Ave., N.W., Ste. 1100
Washington, D.C. 20036
(202) 861-1731
drivkin@bakerlaw.com

SEPTEMBER 2013