

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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THEODORE H. FRANK, ET AL., )  
 )  
 Petitioners, )  
 )  
 v. ) No. 17-961  
 )  
 PALOMA GAOS, INDIVIDUALLY AND ON )  
 )  
 BEHALF OF ALL OTHERS SIMILARLY )  
 )  
 SITUATED, ET AL., )  
 )  
 Respondents. )  
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Pages: 1 through 73

Place: Washington, D.C.

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SITUATED, ET AL., )  
Respondents. )

Washington, D.C.

Wednesday, October 31, 2018

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

APPEARANCES:  
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JEFFREY B. WALL, Principal Deputy Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, in support of neither party.

1 APPEARANCES: (Continued)

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3 Respondent Google LLC.

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

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

2 (10:04 a.m.)

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

7 Mr. Frank.

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

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

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

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

25 JUSTICE GINSBURG: Why is it an abuse?

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

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

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

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

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

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

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

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

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

10 MR. FRANK: Right, right.

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

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

22 JUSTICE SOTOMAYOR: Everybody else  
23 would receive not even an indirect benefit?

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

1 JUSTICE SOTOMAYOR: They always have  
2 that opportunity.

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

6 JUSTICE SOTOMAYOR: They could opt  
7 out.

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

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

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

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



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

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

7 MR. FRANK: I --

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

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

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

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

24 JUSTICE GINSBURG: And then the  
25 99 percent.

1           MR. FRANK: Absolutely. In the  
2 typical settlement, it's a pro rata  
3 distribution. You have a fund of a few million  
4 dollars. That's tens of millions of class  
5 members have the opportunity to make a claim.  
6 A very small percentage make the claim. And  
7 the fund is distributed pro rata to them.

8           That's what happens in Fraley, where  
9 the number of class members making claims was  
10 so small they still had money left over even  
11 after giving every claiming class member \$15,  
12 even though we were talking \$9 million for 150  
13 million class members. That's 6 cents per  
14 class member.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 MR. FRANK: Well --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 JUSTICE KAGAN: Mr. Frank --

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 MR. FRANK: I agree.

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

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

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

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

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

13 MR. FRANK: Again --

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

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

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

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

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

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

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

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

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

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

24 MR. FRANK: That's correct.

25 CHIEF JUSTICE ROBERTS: Okay. So it

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

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

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

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

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

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

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

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

3 JUSTICE SOTOMAYOR: I -- I --

4 JUSTICE ALITO: Is there --

5 JUSTICE SOTOMAYOR: -- I -- I

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

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

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

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



1 hundred million dollar settlements --

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 General Wall.

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

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

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

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

1 abuse of the class action device.

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

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

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

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

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

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

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

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

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

3 JUSTICE ALITO: Yeah, but why remand?

4 MR. WALL: Well, because I think --  
5 and Justice Gorsuch was getting at this a  
6 little bit -- it isn't clear -- the -- the  
7 common law tort that everybody keeps pointing  
8 to required public disclosure of private facts  
9 about you.

10 Here, we know that somebody searched  
11 Mr. Italiano's name, but from the fact that  
12 somebody searches my name, it doesn't mean it  
13 was me. So they've developed this  
14 re-identification theory saying, oh, well, the  
15 websites you click through to will glean other  
16 information about you off of the Internet and  
17 they'll be able then to reverse-engineer and  
18 figure out that you were the one that did the  
19 search.

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

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

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

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

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

1 Italiano, and then, quote, "the name of his  
2 then soon-to-be ex-wife." End quote.

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

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

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

23 JUSTICE BREYER: But that is --

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

1 MR. WALL: I'm sorry?

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

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

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

9 MR. WALL: I think on a --

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

13 MR. WALL: Justice Kavanaugh, I'm not  
14 so sure. At the common law, it was at least  
15 uncertain as of the Second Restatement in the  
16 19 --

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

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

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

25 MR. WALL: Well, on a --



1 JUSTICE KAVANAUGH: Just -- just go to  
2 plain common sense.

3 MR. WALL: Oh, on a --

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

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

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

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

17 JUSTICE KAGAN: And -- and what --

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

25 JUSTICE KAVANAUGH: But isn't that a

1 merits question?

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

8 JUSTICE GORSUCH: General Wall --

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

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

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

25 MR. WALL: We have not taken a

1 position on that here, Justice Gorsuch.

2 JUSTICE GORSUCH: So what -- what --  
3 what -- what do you recommend the Court do  
4 about that? The government's got nothing to  
5 offer us.

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

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

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

23 And just to say one word about the  
24 merits, I do think if the Court reaches the  
25 merits, the government's primary submission is

1 the lower courts have just not been very  
2 rigorous.

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

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

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

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

23 I mean, a number of the things that  
24 they've done in the amended rule, I think, are  
25 designed to tighten up the inquiry. They're

1 consistent with what we're saying here.

2 But they didn't directly tackle the  
3 question. They, in effect, deferred to the  
4 courts. And so what we would say is, for  
5 essentially the -- the reasons that Petitioners  
6 give, there are these three important  
7 limitations that the Court should articulate  
8 and they should have real teeth.

9 I think the way that Respondents talk  
10 about them, as applied here, they don't have  
11 real teeth because there wasn't a real analysis  
12 of feasibility here. There wasn't a real  
13 analysis of redressability. And \$950,000 in  
14 fees were bumped up to \$2.1 million through a  
15 2.2 multiplier that's essentially sort of  
16 plucked out of the air.

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

23 And all three of those seem like  
24 serious problems. And I think that it's  
25 important that, if the Court reached the

1 merits, that it tighten them up so that we  
2 don't have cy pres that's completely untethered  
3 from the injury to the class and the relief  
4 that's actually being delivered.

5 If there are no further questions,  
6 thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 Mr. Pincus.

10 ORAL ARGUMENT OF ANDREW J. PINCUS

11 ON BEHALF OF RESPONDENT GOOGLE

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

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

19 And as Justice Sotomayor indicated and  
20 Judge -- Professor Rubenstein's amicus brief  
21 submits, these are very, very rare settlements.

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

1           Maybe I'll just say --

2           CHIEF JUSTICE ROBERTS: Is there --

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

6           CHIEF JUSTICE ROBERTS: Well, go ahead  
7 and speak to the standing.

8           (Laughter.)

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

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

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

1           And the complaint in paragraphs 88 and  
2           95 doesn't allege -- for re-identification to  
3           happen, a website operator has to get more than  
4           one search, because the whole idea is you put  
5           the searches together to figure out who's  
6           making them.

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

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

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

19          So what do you admit that you  
20          disclose?

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



1           The question here is the referrer  
2 header, which is that the search terms -- when  
3 you -- when you conduct a search, you get a  
4 list of websites. When you click on one of  
5 those sites, that site gets your search.

6           That's the issue here.

7           JUSTICE SOTOMAYOR: Well --

8           JUSTICE ALITO: And that's not a harm,  
9 that isn't a harm --

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

11          JUSTICE ALITO: -- to disclose that?

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

18          JUSTICE KAGAN: And could you --

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

22          MR. PINCUS: Well, yes, but not that  
23 Justice Alito --

24          CHIEF JUSTICE ROBERTS: Well, that's  
25 kind of revelatory of private information.

1 MR. PINCUS: But -- but not that  
2 Justice Alito searched for men's shoes.

3 JUSTICE ALITO: But my idea was --

4 JUSTICE SOTOMAYOR: I'm not -- I'm not  
5 sure how not.

6 MR. PINCUS: Excuse me?

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

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

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

21 JUSTICE SOTOMAYOR: Oh, I see what you  
22 mean.

23 MR. PINCUS: -- the placement of  
24 cookies in your browser and other -- other ways  
25 that -- that you may be served ads based on

1 your searches. That's not the claim in this  
2 case. The claim in this case --

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

6 MR. PINCUS: Well, I -- I -- I think  
7 the question is --

8 (Laughter.)

9 MR. PINCUS: I think -- I think it is  
10 because I --

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

14 (Laughter.)

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

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

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

1           Here, the plaintiff class was everyone  
2 who used Google in a -- in a very long period,  
3 129 million people, basically everyone on the  
4 Internet in America.

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

11           JUSTICE KAGAN: Especially when you  
12 use a --

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

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

23           JUSTICE KAGAN: May I go back, Mr.  
24 Pincus? You -- you talked about the  
25 re-identification theory, and I'm not quite

1     sure I understand it. So could you tell me the  
2     technology that I need to know to understand it  
3     and what plaintiffs would have to show to prove  
4     their own theory of harm?

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

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

18            In other words, the -- the mere  
19    revelation of facts at -- at common law in 1950  
20    -- in the 1960s was not enough, let alone in  
21    1787.

22            JUSTICE KAVANAUGH: But that's a  
23    merits question. That -- I mean, that goes to  
24    the merits of the tort.

25            MR. PINCUS: I don't think so, Your

1 Honor. I think -- I think that's a question --

2 JUSTICE KAVANAUGH: We're just talking  
3 about harm, and you don't have a mini-trial on  
4 whether the harm, sufficient for standing, is  
5 proved.

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

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

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

1 because of what Congress may have elevated  
2 makes it a harm that's actionable?

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

9 And so the -- I think there's a very  
10 significant question about whether that Act  
11 could be said by -- that in that Act, Congress  
12 could have been said to elevate that harm. But  
13 --

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

24 But where they get nothing, under  
25 those circumstances, while we wouldn't say

1 never, what's happening in reality is the  
2 lawyers are getting paid and they're making  
3 sometimes quite a lot of money for really  
4 transferring money from the defendant to people  
5 who have nothing to do with it. And under  
6 those circumstances, scrutinize very carefully  
7 to see that the four standards are met.

8 MR. PINCUS: I think there should be  
9 careful scrutiny.

10 JUSTICE BREYER: Yeah, but, I mean --

11 MR. PINCUS: I think --

12 JUSTICE BRYER: -- you heard -- I was  
13 trying to make up a --

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

23 In this kind of case, where the  
24 question at the outset is, is it worth the  
25 candle to try and identify the claimants



1 because you have a very large class and a very  
2 small settlement, there should be close  
3 scrutiny and a three-part test. One is  
4 feasibility. Is the amount that the class  
5 members are likely to receive after  
6 administrative costs, taking into account what  
7 the claiming rate may be, so small that the  
8 benefit of that payment to a class member is  
9 outweighed by the indirect benefit from the  
10 third-party's activity?

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

18 Second, the district court should look  
19 at the link between the harm -- the claimed  
20 injury and the recipients. We don't agree with  
21 General Wall that there's a redressability  
22 issue here. This is a settlement. Settlements  
23 between individual parties are not limited to  
24 things that would be awardable under the  
25 statute. But, for the test to be satisfied, we

1 think the funds have to be used for a purpose  
2 that will benefit the class members and address  
3 injuries similar to those that are subject to  
4 the lawsuit.

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

14 CHIEF JUSTICE ROBERTS: On -- on that  
15 --

16 JUSTICE KAVANAUGH: Why not a --

17 MR. PINCUS: -- that that organization  
18 will control the money and decide how it's  
19 going to be used.

20 CHIEF JUSTICE ROBERTS: On that point,  
21 would you agree that the district court should  
22 never be the one suggesting possible recipients  
23 of the funds of a settlement he has to approve?

24 MR. PINCUS: I -- I totally agree,  
25 Your Honor. I think a settlement is an

1 agreement between the parties. The district  
2 court's role here is to apply Rule 23(e) and  
3 tell the parties that because one of these  
4 three tests is not met, we would submit, that  
5 the settlement is not approved. And then if  
6 they -- if that -- then it's up to the parties  
7 to go back and come up with different  
8 recipients or a different process that -- that  
9 meets the test.

10 JUSTICE KAVANAUGH: Why is it --

11 CHIEF JUSTICE ROBERTS: Why do you --

12 JUSTICE KAVANAUGH: Go ahead.

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

22 MR. PINCUS: Well, I --

23 CHIEF JUSTICE ROBERTS: You just want  
24 money because of what happened to you.

25 MR. PINCUS: And -- and I think that's

1 why I think the critical first inquiry is, is  
2 the -- is the -- in the real world, is the --  
3 is the cost of distributing the money going to  
4 mean that people get essentially little or  
5 nothing or -- or essentially nothing so that  
6 this indirect benefit is better?

7 JUSTICE KAVANAUGH: Isn't it --

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

10 CHIEF JUSTICE ROBERTS: I think  
11 Justice Kavanaugh had a question.

12 MR. PINCUS: I'm sorry.

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

19 MR. PINCUS: We agree with the  
20 government that a lottery system would be very  
21 strange. If a class member takes the time to  
22 file a claim, it just seems it would be a very  
23 --

24 JUSTICE KAVANAUGH: This is strange  
25 too.

1 MR. PINCUS: Well, I think this --  
2 this --

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

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

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 MR. PINCUS: Thank you, Your Honor.

19 CHIEF JUSTICE ROBERTS: Mr. Lamken.

20 ORAL ARGUMENT OF JEFFREY A. LAMKEN  
21 ON BEHALF OF RESPONDENTS PALOMA GAOS, ET AL.

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

24 This case undoubtedly implicates  
25 interesting policy and empirical questions, but

1 those are the types of questions that the  
2 Administrative Office, the Judicial Conference,  
3 the Advisory Committee, Congress can  
4 investigate and answer.

5 JUSTICE ALITO: Well, where did the cy  
6 pres doctrine come from? Was that created by  
7 Congress?

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

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

21 And the question in this case is, is  
22 there anything in Rule 23(e) that says that  
23 classes, that class representatives, where it's  
24 fair, reasonable, and adequate, cannot do  
25 exactly what the Beastie Boys or any other

1 private party can?

2 And Rule 23(e) doesn't answer that  
3 question by saying never. It answers that  
4 question by providing a standard of fairness,  
5 reasonableness, and adequacy.

6 JUSTICE KAVANAUGH: The question's  
7 what reasonableness means.

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

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

24 And that --

25 JUSTICE ALITO: In whose opinion do

1 they serve the interests of the individual  
2 class members? In the opinion of the  
3 individual class members?

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

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

20 JUSTICE KAVANAUGH: But there is the  
21 appearance, as the district court said in the  
22 hearing, the appearance of favoritism and alma  
23 maters of -- of counsel.

24 MR. LAMKEN: Your Honor, I think, in  
25 this case, the district court acknowledged that



1     there was the potential of conflict, but he did  
2     what a district court should do. He took  
3     evidence. He heard counsel -- from counsel  
4     live in court, including the statement: I got  
5     my degree from Harvard and that's simply the  
6     end of it.

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

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

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

25            CHIEF JUSTICE ROBERTS: I bet there

1 are other organizations active in the area that  
2 Google had not contributed to in the past.

3 MR. LAMKEN: And -- and many were  
4 included here. But one of the critical things  
5 is, while Google was involved -- and this is at  
6 page 40 of the Joint Appendix -- it was  
7 involved in identifying potential recipients,  
8 it -- counsel for class, the class, not Google,  
9 vetted the actual proposals. Class counsel,  
10 not Google, determined which recipients.

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

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

1           And the district court heard from  
2           counsel and said: Look, it's not just an  
3           accounting core change. And the Court  
4           responded: I appreciate that. And that's at  
5           Joint Appendix 135.

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

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

15          One of them is dedicating its money  
16          to, among other things, auditing, from outside  
17          the Google ecosphere, Google's compliance with  
18          privacy policies.

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

24          JUSTICE KAVANAUGH: The appearance  
25          problem here, which has happened in many cases,

1 is symptomatic of a broader question, which is  
2 why is it not always reasonable, more  
3 reasonable in this situation, which is a  
4 difficult one, to try to get the money to  
5 injured parties, either through pro rata  
6 distribution or some kind of lottery system.

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

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

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

25 JUSTICE KAVANAUGH: How about a

1 lottery versus this?

2 MR. LAMKEN: So the lottery doesn't  
3 really help much for two reasons. First, you  
4 have to go and identify the class members in  
5 order to determine who do you give your lottery  
6 tickets to. So you now have to go out and find  
7 the names of the 129 million people, or however  
8 many you're going to submit, and ask. You have  
9 to process and determine, are these valid  
10 requests for lottery tickets, or is this person  
11 not a Google user? So you have to verify.

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

17 MR. LAMKEN: Well, I think --

18 JUSTICE KAVANAUGH: I mean, that's the  
19 --

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

21 JUSTICE KAVANAUGH: -- that's, to use  
22 your analogy, the --

23 MR. LAMKEN: It's a little passing  
24 strange to start -- to use all the money,  
25 virtually all the money, to actually set up

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

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

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

20           MR. LAMKEN: And that --

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

1 concerned about that.

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

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

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

23 JUSTICE ALITO: I mean, if you step  
24 back --

25 MR. LAMKEN: Now if someone's opposed

1 --

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

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

17 So how can -- how can such a system be  
18 regarded as a sensible system?

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

24 But, with respect to fees, it's well  
25 established that a court can reduce attorneys'



1 fees if it believes that the cy pres  
2 distribution is less valuable to the class than  
3 its cash equivalent.

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

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

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

25 There are specific proposals here with

1 a very close nexus. The injury here is that  
2 search terms are given out -- and I'm going to  
3 come back to standing in a moment if I have  
4 enough time -- but that search terms of  
5 individuals are given out to third parties  
6 without their consent.

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

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

23 JUSTICE KAVANAUGH: You started -- you  
24 started with what for me is a very good point,  
25 which is why is this for us and not for

1 Congress and the committee. But, on the other  
2 hand, the retort to that is that the committee  
3 thinks it's for us.

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

10 MR. LAMKEN: Well, Your Honor, I think  
11 --

12 JUSTICE KAVANAUGH: -- the court's  
13 going to do it?

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

19 We have to apply the rule --

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

25 MR. LAMKEN: As in Rule 23(h), where

1 it's a reasonable fee, courts typically fill  
2 reasonableness with factors and considerations.  
3 They typically don't substitute a different  
4 test, such as to say cy pres is never fair,  
5 reasonable, and adequate. And it certainly --

6 JUSTICE KAGAN: Mr. Lamken -- I'm  
7 sorry, please.

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

11 JUSTICE KAGAN: Could I ask you to  
12 address standing, please?

13 MR. LAMKEN: Yes. Okay. So turning  
14 to standing very quickly. Look, neither court  
15 below addressed the Stored Communications Act  
16 or the other four causes of action under the  
17 standard of Spokeo. Very few courts have.  
18 There's a dearth of authority on it.

19 So this isn't a situation where the  
20 Court should be going out on its own and  
21 addressing the issue without the benefit of the  
22 viewpoints of other jurists, without the  
23 benefit of the refinement that occurs when the  
24 case comes up from the lower courts.

25 They simply didn't apply that

1 standard. So the Court has two options in our  
2 view. One is to remand. The alternative is to  
3 dismiss as improvidently granted.

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

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

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

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

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

1 author's permission.

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

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

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

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

23 But -- and Congress did make the  
24 judgment in this case that, even without  
25 individual actual harm, that the presumed harm

1 is a submission because it gave as damages not  
2 just actual harm, it gave as damages the  
3 wrongdoer's profits. There's entitlement  
4 to recover the wrongdoer's profits, which,  
5 again, is consistent with the common law.

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

13 Thank you very much.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

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

18 REBUTTAL ARGUMENT OF THEODORE H. FRANK

19 ON BEHALF OF THE PETITIONERS

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

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

1           It did not look at the potential  
2           conflicts between Google and the recipients  
3           because, in Lane versus Facebook, the Ninth  
4           Circuit approved a settlement where Facebook  
5           gave to a charity created by Facebook.

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

14          So returning to the question that a  
15          number of Justices raised, why not leave this  
16          to Congress? And I return to the example of  
17          State Oil versus Khan, where the Court was  
18          interpreting restraint of trade under the  
19          Sherman Act. And not only was it interpreting  
20          that, but it already had a three-decade-old  
21          precedent, Albrecht, that it was being asked to  
22          reverse.

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



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

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

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

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

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

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

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

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

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