SUPREME COURT
OF THE UNITED STATES

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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11 Washington, D.C.

12 Wednesday, October 31, 2018

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14 The above-entitled matter came on for

15 oral argument before the Supreme Court of the

16 United States at 10:04 a.m.

17

18 APPEARANCES:

19 THEODORE H. FRANK, ESQ., Washington, D.C.; on behalf

20 of the Petitioners.

21 JEFFREY B. WALL, Principal Deputy Solicitor General,

22 Department of Justice, Washington, D.C.; for

23 the United States, as amicus curiae, in support of

24 neither party.

25

1 APPEARANCES: (Continued)
2 ANDREW J. PINCUS, ESQ., Washington, D.C.; on behalf of
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 five 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: I -- first of all, in
20 practice, I just want to let the Court know
21 that 10 percent is an extraordinarily high
22 claim rate. The claims rate is typically below
23 one 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 six 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, and --
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 eight 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 five
13 dollars. And so very few class members did
14 that. They were only going to distribute $3
15 million with over 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 six dollars, send it to the American
16 Cancer 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 -- we -- I'm

1 sorry.

2 JUSTICE KAGAN: Sorry. No, go ahead.

3 JUSTICE GORSUCH: Oh, please go ahead.

4 JUSTICE KAGAN: No.

5 CHIEF JUSTICE ROBERTS: Justice Kagan.

6 JUSTICE KAGAN: I was going to change

7 the subject.

8 (Laughter.)

9 JUSTICE GORSUCH: So was I.

10 (Laughter.)

11 JUSTICE GORSUCH: Jurisdiction?

12 JUSTICE KAGAN: Yes.

13 JUSTICE GORSUCH: Go for it.

14 (Laughter.)

15 JUSTICE KAGAN: May I ask you, Mr.

16 Frank, to -- to -- to address the standing

17 issue in this case, to -- to talk about what

18 you think the harm was and whether any court

19 has addressed your theories about the harm?

20 MR. FRANK: Are you -- are you talking

21 my harm or the harm of the plaintiffs?

22 JUSTICE KAGAN: The harm of the

23 plaintiffs.

24 MR. FRANK: The harm of the

25 plaintiffs, we discuss that at pages 25 and 26

1 of our reply brief.
2 And one of the named plaintiffs,
3 Anthony Italiano, alleges a statutory violation
4 that corresponds to the common law tort of
5 public disclosure of private facts.
6 And the lower courts are unanimous in
7 holding that that kind of statutory claim
8 satisfies Spokeo.
9 Even on remand in Spokeo, the Ninth
10 Circuit found standing, and this Court denied
11 cert the second time up.
12 So I don't think there's a real
13 standing issue, unless the Court is inclined to
14 expand Spokeo.
15 JUSTICE KAGAN: I had thought, Mr.
16 Frank, that the lower court thought that there
17 would be -- there was standing just because it
18 was a statutory claim, and that there was no
19 reason that the plaintiff had to show a
20 particularized or a concrete injury.
21 MR. FRANK: That is certainly the
22 wrong standard for the district court to have
23 applied, with later Supreme Court jurisprudence
24 indicating that, but we can determine from the
25 face of the complaint that Anthony Italiano

1 made an allegation of concrete injury within
2 the ambit of what Justice Thomas's concurrence
3 in Spokeo indicated was acceptable and what
4 lower courts have unanimously indicated that it
5 was -- was acceptable.
6 CHIEF JUSTICE ROBERTS: I was curious
7 where you were going to come down before you
8 filed your brief, because, obviously, if
9 there's no standing, the whole class action's
10 thrown out, right?
11 MR. FRANK: That would be correct.
12 That would be the right thing to do under
13 Arizonans for Proper English, or Official
14 English. That's exactly what the Court did.
15 The Court found that the lower courts did not
16 have jurisdiction and vacated everything.
17 JUSTICE GORSUCH: You say -- to follow
18 up with Justice Kagan, who anticipated exactly
19 where I wanted to go -- you say there's an
20 allegation with respect to Mr. Italiano that --
21 that he was injured. But do we know that he
22 was injured? Is there any evidence that his
23 personal information, for example, wasn't
24 already available through the white pages and
25 otherwise published so that there is no injury

1 in fact?
2 MR. FRANK: Well, that goes to the
3 merits. If I allege that my friend here
4 punched me in the head and -- and owes me over
5 $75,000 and we're citizens of different states,
6 I had a claim for standing even if that claim
7 is completely fictional.
8 JUSTICE GORSUCH: Well, fair enough at
9 a 12(b)(6) stage, but, here, we're entering a
10 final judgment, and should we at least remand
11 to -- to a lower court to make a decision as to
12 whether there is actually standing as opposed
13 to a mere allegation of standing?
14 MR. FRANK: I don't think that's the
15 case. I think the -- the -- the allegation of
16 concrete injury establishes the standing, and
17 then the merits question's always different
18 than the jurisdictional question.
19 JUSTICE BREYER: What is the private
20 -- I mean, what I have here, my law clerk
21 looked it up, is that the search that Mr.
22 Italiano engaged in was his name, that's
23 certainly public, his home address, I imagine
24 that's public, name in bankruptcy, his name in
25 foreclosure proceedings, his name in short sale

1 proceedings, his name in Facebook, and his name
2 and the name of his then soon-to-be ex-wife and
3 the words "forensic accounting."
4 Now how -- go -- if that -- if those
5 are all the things that he looked up, how are
6 the -- what concrete injury was there because
7 somebody might discover through Google that he
8 made those searches?
9 I mean, I -- I don't quite see how
10 this is some kind of secret or private or --
11 information. And I don't see alleged anywhere
12 how those things were hurt. So I had a hard
13 time distinguishing this from Spokeo.
14 MR. FRANK: Well, the Ninth Circuit --
15 JUSTICE BREYER: And -- and -- and the
16 statute -- and the judge, by the way, didn't
17 even try.
18 MR. FRANK: I agree.
19 JUSTICE BREYER: He just said that the
20 very fact that the statute forbids it is
21 enough, which I think is one thing Spokeo says
22 that's wrong.
23 MR. FRANK: I agree that the judge did
24 not apply the Spokeo standard. And if you
25 think the Ninth Circuit would do something

1 differently here than it would in Spokeo or has
2 a chance of doing something differently here,
3 then maybe the appropriate decision is to
4 remand and let them consider that.
5 And while the case for Mr. Italiano's
6 injury may be weak, which suggests why this
7 settled for such an infinitesimal amount of the
8 statutory damages, that does not change that
9 the allegation was made and that --
10 JUSTICE BREYER: Yes, the allegation
11 is made, but where is an allegation of some
12 kind of injury that would actually concretely
13 and particularly hurt him?
14 MR. FRANK: Again --
15 JUSTICE BREYER: By somebody looking
16 up on the -- at Google and discovering he made
17 those searches?
18 MR. FRANK: Even under the common law,
19 the public disclosure of private facts --
20 JUSTICE BREYER: And which are the
21 private facts?
22 MR. FRANK: The private facts
23 regarding the dissolution of his marriage and
24 -- and -- and things of that nature.
25 JUSTICE GORSUCH: Well, again, though,

1 I think this gets -- we're stuck in the same
2 place, I think, which is that you have to
3 assume that that information isn't otherwise
4 available.
5 At least in a -- fine, you don't want
6 to prove it, an allegation of it, there's no
7 allegation that that information wasn't
8 otherwise available.
9 So what do we do about that? I think
10 that's the part where -- that we're struggling
11 with here.
12 MR. FRANK: If the complaint is not
13 strong enough to establish the concrete injury
14 under what a majority of the Court indicated
15 would be sufficient under Spokeo and what the
16 lower courts have repeatedly found with respect
17 to Spokeo, then the appropriate decision is to
18 have a limited remand and take it back up,
19 assuming that the Court finds jurisdiction.
20 CHIEF JUSTICE ROBERTS: Is -- putting
21 aside the question of whether it's pertinent to
22 the standing analysis, just so I understand the
23 claims, the disclosures go to any searches that
24 somebody engages in, correct?
25 MR. FRANK: That's correct.

1 CHIEF JUSTICE ROBERTS: Okay. So it
2 may be that they have the wrong named plaintiff
3 if the disclosures are not private?
4 MR. FRANK: If -- if both Gaos and
5 Italiano don't qualify, then they might have
6 the wrong named plaintiff. If one of the named
7 plaintiffs satisfies it, though, under Rumsfeld
8 versus FAIR, that would be sufficient.
9 CHIEF JUSTICE ROBERTS: But it -- but
10 it has to be one of the named plaintiffs?
11 MR. FRANK: It does have to be a named
12 plaintiff.
13 JUSTICE GINSBURG: But your argument
14 is passing standing. You're not challenging
15 that?
16 MR. FRANK: We're not challenging
17 standing. We're not challenging the court's
18 finding -- nobody is challenging the court's
19 finding under Rule 23(a) that all the class
20 members have a common injury.
21 The -- the Ninth Circuit's standard
22 creates perverse incentives for class counsel
23 to divert money away from their clients and to
24 third-parties. When courts have insisted that
25 attorneys don't get paid unless their clients

1 get paid, the attorneys find a way to improve
2 the claims process and make money get to the
3 class.
4 JUSTICE SOTOMAYOR: I -- I --
5 JUSTICE ALITO: Is there --
6 JUSTICE SOTOMAYOR: -- I -- I
7 understand your fear, but, as I look at the
8 full cy pres awards, they're rare. The list
9 that I've looked at is, what, five in how many
10 years? It's not as if it's occurring
11 routinely, number one.
12 Number two, you do point to some
13 potentially abusive situations, but in all
14 those situations, it's the cases where the
15 circuit court rejected a cy pres award. It
16 seems like the system is working, not not
17 working.
18 MR. FRANK: Well, the system will
19 cease to work if the Ninth Circuit's standard
20 is affirmed by this Court. And, otherwise,
21 class counsel will direct settlements to the
22 Ninth Circuit.
23 There are two all-pres settlements
24 with just Google alone that are pending,
25 waiting for resolution of this decision. And

1 the Ninth Circuit's standard permits even
2 hundred million dollar settlements --
3 JUSTICE SOTOMAYOR: How is the Ninth
4 Circuit's standard different than all the other
5 standards? I thought the circuits had
6 basically coalesced around the ALI three-factor
7 test.
8 MR. FRANK: The Ninth Circuit rejected
9 that. It said all that's needed is that the
10 money is de minimis per class member. And
11 that's at page 8 of the Petition Appendix. And
12 we see that in our supplemental brief, where we
13 point out that in a case with 1.3 million class
14 members where every class member is
15 identifiable and 3 to 9 million dollars left
16 over, the court said that's de minimis and it's
17 okay to send all of that to a local university
18 where the defendant can name a chair after
19 itself.
20 JUSTICE SOTOMAYOR: So is this appeal
21 all about feasibility alone?
22 MR. FRANK: No. The -- it's about
23 settlement fairness under Rule 23(e).
24 I'd like to reserve the rest of my
25 time for rebuttal.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.
3 General Wall.
4 ORAL ARGUMENT OF JEFFREY B. WALL
5 FOR THE UNITED STATES, AS AMICUS CURIAE,
6 IN SUPPORT OF NEITHER PARTY
7 MR. WALL: Mr. Chief Justice, and may
8 it please the Court:
9 Two points. First, when the district
10 court here resolved Petitioners' objections,
11 approved the settlement agreement, and entered
12 it as a binding judgment that appears at pages
13 62 to 66 of the Petition Appendix, it was
14 exercising Article III jurisdiction, which
15 means the plaintiffs had to have standing and
16 the court's ordered cy pres relief had to
17 redress plaintiffs' injuries under Laidlaw.
18 Neither of those is likely true here.
19 Second, the other limitations of
20 feasibility and fee proportionality should not
21 be paper tigers. Lower courts need to conduct
22 rigorous numerical analyses of feasibility and
23 determine fees based on actual relief to the
24 class, not, as here, based on an inflated
25 percentage or multiplier. Meaningful limits

1 are necessary to align incentives and deter
2 abuse of the class action device.
3 CHIEF JUSTICE ROBERTS: I don't -- I
4 don't understand your argument on the fee. I
5 mean, I think you either decide the cy pres
6 award provides relief or it doesn't provide
7 relief. If it doesn't provide relief, you
8 don't get a fee for it. But, if it does
9 provide relief, then I don't know why the fee
10 should be cut back just because it's not money.
11 MR. WALL: Well, I still think you
12 have to look at what relief it provides to the
13 class. If the Court agrees with us that the
14 lower courts are not being very rigorous with
15 respect to redressability and feasibility, and
16 it tightens the inquiry, I still think it's
17 possible to say, Mr. Chief Justice, that
18 tailored cy pres provides some benefit to the
19 class but not benefit that should be treated
20 dollar for dollar like money in the pocket of
21 the class members.
22 But, I mean, I'd certainly agree that
23 not much of a discount would be warranted if
24 you've got really tailored cy pres. The
25 problem here is that, of the six proposals,

1 only one even argued the World Privacy Forum's
2 proposal, even arguably deals with referral
3 headers and the subject of this suit. The --
4 one of them, the AARP's proposal, deals with
5 online fraud. And this wasn't even a fraud
6 case. All the fraud claims were dismissed.
7 And the other four just deal with Internet
8 privacy in general.
9 And I think if -- if the inquiry is --
10 if cy pres is going to be so far divorced
11 despite I think -- what I think are serious
12 redressability concerns from the claimed
13 injuries, then I don't think we can treat it
14 anywhere near dollar for dollar. I think the
15 discount has to be more substantial.
16 JUSTICE ALITO: Is there any reason
17 why we should not decide the standing question?
18 It's a question of law. At the 12(b)(6) stage,
19 it's the plaintiff's obligation to allege
20 standing. If it wasn't alleged properly,
21 sufficiently, then -- then we should -- then
22 there isn't any standing.
23 Why -- why does -- why is a remand
24 necessary?
25 MR. WALL: I think the Court could

1 decide it, Justice Alito. I think it could
2 decide it or remand. We would urge the Court
3 to do either of those, rather than DIG. But --
4 JUSTICE ALITO: Yeah, but why remand?
5 MR. WALL: Well, because I think --
6 and Justice Gorsuch was getting at this a
7 little bit -- it isn't clear -- the -- the
8 common law tort that everybody keeps pointing
9 to required public disclosure of private facts
10 about you.
11 Here, we know that somebody searched
12 Mr. Italiano's name, but from the fact that
13 somebody searches my name, it doesn't mean it
14 was me. So they've developed this
15 re-identification theory saying, oh, well, the
16 websites you click through to will glean other
17 information about you off of the Internet and
18 they'll be able then to reverse-engineer and
19 figure out that you were the one that did the
20 search.
21 That seems pretty speculative, I
22 think, for Spokeo purposes, and there isn't a
23 record on it, though I don't know that the
24 Court needs one. And then, even beyond that,
25 even if you could identify that these people

1 were the ones doing the searches, if they're
2 searching information that's already public and
3 they're not pointing to any other additional
4 harm, is that harm under Spokeo, I think that
5 latter part of it is a legal inquiry that I
6 agree, I think the Court is as well positioned
7 as the lower court to decide.
8 JUSTICE ALITO: Well, do you think
9 that every time we get a case where there's
10 been a dismissal at the pleadings stage and a
11 question of standing arises, we should remand
12 it to the lower court to see whether the
13 plaintiff might be able to come up with some
14 additional allegations, or should we decide
15 whether the plaintiff has sufficiently alleged
16 standing, as the plaintiff must sufficiently
17 allege all the elements of whatever claim is
18 being pressed?
19 MR. WALL: I -- Justice Alito, I think
20 the Court could decide it. If the Court thinks
21 that, on the basis of these allegations, it's
22 got enough to decide the standing question, I
23 think it could do that here.
24 JUSTICE BREYER: We know this, on that
25 very point -- it -- we have in the complaint,

1 quote -- there was one search that was his
2 name, Italiano, and then, "the name of his then
3 soon-to-be ex-wife."
4 All right. Now was the search, the
5 words -- it couldn't have been "the name" --
6 there must have been a different actual search.
7 Do we know what it was, and were the words in
8 the search "soon-to-be ex-wife"? Because those
9 words would seem private. Probably. And --
10 but maybe those words weren't there. Maybe all
11 that was there was his name and his wife's
12 name, which I don't think is private. But --
13 but -- but -- so do we know?
14 MR. WALL: So, in fairness to their
15 theory, Justice Breyer, I don't think it's the
16 -- I don't think that what they're pointing the
17 harm is the disclosure of the information
18 itself. I think the harm that they're claiming
19 is the disclosure that they performed that
20 search. I am known then to have searched for
21 my name, plus the following terms.
22 And for the reasons I -- the two
23 reasons I gave to Justice Alito --
24 JUSTICE BREYER: But that is --
25 JUSTICE KAVANAUGH: Isn't that an

1 injury?
2 MR. WALL: I'm sorry?
3 JUSTICE KAVANAUGH: Isn't that an
4 injury, disclosure of what you searched?
5 MR. WALL: I don't think --
6 JUSTICE KAVANAUGH: I don't think
7 anyone would want the disclosure of everything
8 they searched for disclosed to other people.
9 That seems a harm.
10 MR. WALL: I think on a --
11 JUSTICE KAVANAUGH: It may not -- may
12 or may not be a cause of action, but it's a
13 harm.
14 MR. WALL: Justice Kavanaugh, I'm not
15 so sure. At the common law, it was at least
16 uncertain as of the Second Restatement in the
17 19 --
18 JUSTICE KAVANAUGH: But it doesn't
19 have to be exactly at common law, according to
20 the language in Spokeo. It doesn't say that.
21 MR. WALL: No, I -- it's just an
22 analogue. Look, I will agree with you that on
23 a particular --
24 JUSTICE KAVANAUGH: Just as a common
25 sense matter.

1 MR. WALL: Well, on a --
2 JUSTICE KAVANAUGH: Just -- just go to
3 plain common sense.
4 MR. WALL: Oh, on a --
5 JUSTICE KAVANAUGH: What you search
6 for, if that's disclosed to other people?
7 MR. WALL: Yes, I think on a
8 particularized basis, you could conduct
9 searches the disclosure of which would
10 embarrass or harm you. But, if all he searched
11 was his own name, is that a sufficient harm for
12 Spokeo purposes? I -- I'm not sure that it is.
13 JUSTICE KAVANAUGH: If it's disclosed
14 to another person?
15 MR. WALL: Again, I'm not sure that it
16 is a sufficient harm under Spokeo. I will
17 say --
18 JUSTICE KAGAN: And -- and what --
19 MR. WALL: -- though, that the
20 predicate problem and the reason I think you
21 don't even get there is this re-identification
22 theory is itself so speculative, I don't think
23 it's at all clear that the Internet sites you
24 click through to could be used to figure out it
25 was you.

1 JUSTICE KAVANAUGH: But isn't that a
2 merits question?
3 MR. WALL: I don't think so. I think
4 it's a question of whether they've plausibly
5 alleged a harm. If the harm that they're
6 pointing to couldn't occur because nobody could
7 reverse-engineer, they don't have a sufficient
8 injury.
9 JUSTICE GORSUCH: General Wall --
10 JUSTICE KAGAN: And what is the record
11 with respect to that question, about whether
12 anybody can identify the person who did the
13 search?
14 MR. WALL: As far as we can tell,
15 there is no record because the district court
16 never reexamined this post-Spokeo and no one
17 raised it, either because they were bound not
18 to attack the settlement agreement or because
19 they wanted a ruling on the merits of cy pres.
20 JUSTICE GORSUCH: General Wall, what's
21 the -- what's the government's position on
22 Justice Thomas's theory in Spokeo that standing
23 can be proven by violation of a legal right
24 granted by Congress, even if it wouldn't be
25 otherwise recognized at common law?

1 MR. WALL: We have not taken a
2 position on that here, Justice Gorsuch.
3 JUSTICE GORSUCH: So what -- what --
4 what -- what do you recommend the Court do
5 about that? The government's got nothing to
6 offer us.
7 MR. WALL: Just, we would be happy to
8 supplementally brief the standing question. We
9 flagged it for the Court, and then none of the
10 parties has really delved into it on the
11 merits. And so I think if the Court wants --
12 JUSTICE GINSBURG: Isn't that a reason
13 why we should -- we should not decide it in the
14 first instance?
15 MR. WALL: Justice Ginsburg, for the
16 reasons I gave earlier, I think the Court could
17 on this record or it could remand. As long as
18 the Court doesn't DIG, both because it would
19 leave standing, a judgment that I think the
20 Court had no jurisdiction to enter, and I think
21 it would encourage parties not to flag
22 jurisdictional issues at the cert stage, as the
23 parties here should have.
24 And just to say one word about the
25 merits, I do think if the Court reaches the

1 merits, the government's primary submission is
2 the lower courts have just not been very
3 rigorous.
4 JUSTICE KAVANAUGH: Why -- why -- to
5 pick up on Justice Sotomayor's question
6 earlier -- why shouldn't that be a question for
7 the Rules Committee in Congress to address in
8 the first instance?
9 MR. WALL: Well, so, look, guidance
10 from Congress would be helpful, but in its
11 absence, I still think we have to say what the
12 fair, reasonable, and adequate standard means
13 under Rule 23.
14 The Rules Committee has essentially
15 punted to the courts by saying the courts are
16 actively looking at this issue, we're not going
17 to address it.
18 Now they did amend the rule in various
19 ways that I think support our approach by
20 saying you should consider fees at the 23(e)
21 stage, you can delay to see what the claims
22 rate is, the court should be looking at the
23 claims rate.
24 I mean, a number of the things that
25 they've done in the amended rule, I think, are

1 designed to tighten up the inquiry. They're
2 consistent with what we're saying here.
3 But they didn't directly tackle the
4 question. They, in effect, deferred to the
5 courts. And so what we would say is, for
6 essentially the -- the reasons that Petitioners
7 give, there are these three important
8 limitations that the Court should articulate
9 and they should have real teeth.
10 I think the way that Respondents talk
11 about them, as applied here, they don't have
12 real teeth because there wasn't a real analysis
13 of feasibility here. There wasn't a real
14 analysis of redressability. And $950,000 in
15 fees were bumped up to $2.1 million through a
16 2.2 multiplier that's essentially sort of
17 plucked out of the air.
18 It's just a reverse justification for
19 taking $2 million in fees off of an $8 million
20 settlement that didn't actually deliver any
21 relief to the class on its specific claim here,
22 which is that there's a referrer header that
23 turns over my information.
24 And all three of those seem like
25 serious problems. And I think that it's

1 important that, if the Court reached the
2 merits, that it tighten them up so that we
3 don't have cy pres that's completely untethered
4 from the injury to the class and the relief
5 that's actually being delivered.
6 If there are no further questions,
7 thank you.
8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.
10 Mr. Pincus.
11 ORAL ARGUMENT OF ANDREW J. PINCUS
12 ON BEHALF OF RESPONDENT GOOGLE
13 MR. PINCUS: Thank you, Mr. Chief
14 Justice, and may it please the Court:
15 To the extent Petitioners are arguing
16 for a per se rule invalidating settlements,
17 where the monetary payments only go to third
18 parties, nothing in the Rules Enabling Act or
19 Rule 23 authorizes a flat prohibition.
20 And as Justice Sotomayor indicated and
21 Judge -- Professor Rubenstein's amicus brief
22 submits, these are very, very rare settlements.
23 But Rule 23(e)'s requirement that
24 settlements be fair, reasonable, and adequate
25 does impose significant constraints, which is

1 why I think these settlements are rare.
2 Maybe I'll just say --
3 CHIEF JUSTICE ROBERTS: Is there --
4 MR. PINCUS: -- something about
5 standing because someone's probably going to
6 ask about it.
7 CHIEF JUSTICE ROBERTS: Well, go ahead
8 and speak to the standing.
9 (Laughter.)
10 MR. PINCUS: We agree with the
11 government that there's a serious question
12 about whether this action was ever properly in
13 federal court and that the standing issue has
14 to be addressed before the court could
15 determine the questions presented.
16 So that means either the case should
17 be dismissed as improvidently granted, there
18 should be remand, or the Court should decide
19 the question. I think the question is
20 complicated under Spokeo.
21 Mr. Italiano was the only plaintiff
22 whose claims weren't addressed by the district
23 court. In -- in order for his claim -- for him
24 to have a sufficient allegation of injury, we
25 think it depends on this re-identification

1 theory, as General Wall indicated.
2 And the complaint in paragraphs 88 and
3 95 doesn't allege -- for re-identification to
4 happen, a website operator has to get more than
5 one search, because the whole idea is you put
6 the searches together to figure out who's
7 making them.
8 There's no allegation here that Mr.
9 Italiano for his searches clicked on the same
10 website, and, therefore, there's really no way
11 that the re-identification could take place.
12 JUSTICE ALITO: What does -- what does
13 Google admit it discloses to third-parties? I
14 don't know. All of us have probably done
15 searches.
16 If I do a search and search for men's
17 shoes, I will immediately get all sorts of
18 advertisements for men's shoes or whatever
19 other product I am searching for.
20 So what do you admit that you
21 disclose?
22 MR. PINCUS: Well, the issue here is
23 -- is there were -- there are -- there are lots
24 of cookies and other things that -- that
25 generate the -- the serving up of ads to your

1 particular computer.

2 The question here is the referrer

3 header, which is that the search terms -- when

4 you -- when you conduct a search, you get a

5 list of websites. When you click on one of

6 those sites, that site gets your search.

7 That's the issue here.

8 JUSTICE KAGAN: And could --

9 JUSTICE ALITO: And that's not a harm,

10 that isn't a harm --

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

12 JUSTICE ALITO: -- to disclose that?

13 MR. PINCUS: -- I don't think that the

14 mere disclosure of a search without more, your

15 men's shoes search, is not a harm because

16 there's no disclosure that you're making the

17 search. There's a disclosure that somebody

18 searched for men's shoes.

19 JUSTICE KAGAN: And could you --

20 CHIEF JUSTICE ROBERTS: Based on --

21 based on -- based on what Justice Alito typed

22 in, right, someone searched for men's shoes?

23 MR. PINCUS: Well, yes, but not that

24 Justice Alito --

25 CHIEF JUSTICE ROBERTS: Well, that's

1 kind of revelatory of private information.
2 MR. PINCUS: But -- but not that
3 Justice Alito searched for men's shoes.
4 JUSTICE ALITO: But my IP address was
5 --
6 JUSTICE SOTOMAYOR: I'm not -- I'm not
7 sure how not.
8 MR. PINCUS: Excuse me?
9 JUSTICE SOTOMAYOR: The -- the -- I'm
10 not sure how not. The reverse-engineering is
11 self-evident because he is receiving the men's
12 shoes advertising. So somehow something he's
13 doing is identifying his website.
14 And given that I went into a store not
15 long ago, and without giving them anything
16 except my credit card, they came back with my
17 website, I -- it seems --
18 MR. PINCUS: Well, there are -- there
19 are lots of ways that information is disclosed
20 that don't have to do with the referrer header.
21 Again, we're talking about the referrer header
22 here. There are lots of other --
23 CHIEF JUSTICE ROBERTS: But you've --
24 JUSTICE SOTOMAYOR: Oh, I see what you
25 mean.

1 MR. PINCUS: -- the placement of
2 cookies in your browser and other -- other ways
3 that -- that you may be served ads based on
4 your searches --
5 CHIEF JUSTICE ROBERTS: And --
6 MR. PINCUS: That's not the claim in
7 this case. The claim in this case --
8 CHIEF JUSTICE ROBERTS: But do you
9 think that problem is going to be meaningfully
10 redressed by giving money to AARP?
11 MR. PINCUS: Well, I -- I -- I think
12 the question is --
13 (Laughter.)
14 MR. PINCUS: I think -- I think it is
15 because I --
16 CHIEF JUSTICE ROBERTS: As if only --
17 as if this is only a problem for elderly
18 people?
19 (Laughter.)
20 MR. PINCUS: No, but AARP is not the
21 only recipient and elderly people are
22 particularly --
23 CHIEF JUSTICE ROBERTS: No, well,
24 you're changing the subject, Mr. Pincus. AARP
25 is one of the recipients.

1 MR. PINCUS: It is. And I think one
2 of the questions that a district court has to
3 ask is the fit between the recipients and the
4 harm alleged in the complaint and the plaintiff
5 class.
6 Here, the plaintiff class was everyone
7 who used Google in a -- in a very long period,
8 129 million people, basically everyone on the
9 Internet in America.
10 It is a fact that elderly people are
11 less knowledgeable about privacy and their
12 vulnerability on the Internet than other
13 people. And so having part of the award be
14 designated to -- for that group we think meets
15 that fit test.
16 JUSTICE KAGAN: Especially when you
17 use a --
18 CHIEF JUSTICE ROBERTS: Including a
19 group that engages in -- engages in political
20 activity, having nothing to do with the
21 inability of elderly people to conduct
22 searches?
23 MR. PINCUS: Well, this grant had
24 nothing to do with political activity. That
25 AARP, like the other recipients, had to submit

1 a proposal, and the money was specifically for
2 that proposal.
3 JUSTICE KAGAN: May I go back, Mr.
4 Pincus? You -- you talked about the
5 re-identification theory, and I'm not quite
6 sure I understand it. So could you tell me the
7 technology that I need to know to understand it
8 and what plaintiffs would have to show to prove
9 their own theory of harm?
10 MR. PINCUS: Well, I think this is one
11 of the reasons why more information, either
12 re-briefing here or a remand is necessary, but
13 what would have to be alleged would be that
14 enough referrer headers went to a single
15 website operator that that website operator
16 could combine them and say: A-ha, I can now
17 figure out that this is the person who made the
18 search and tie the search terms to that person.
19 I'm not sure that would be enough.
20 The restatement section, 652(h), seems to
21 indicate that actual imminent damages are
22 required for privacy violations.
23 In other words, the -- the mere
24 revelation of facts at -- at common law in 1950
25 -- in the 1960s was not enough, let alone in

1 1787.

2 JUSTICE KAVANAUGH: But that's a

3 merits question. That -- I mean, that goes to

4 the merits of the tort.

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

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

7 JUSTICE KAVANAUGH: We're just talking

8 about harm, and you don't have a mini-trial on

9 whether the harm, sufficient for standing, is

10 proved.

11 MR. PINCUS: I think that -- that

12 standing -- there are two ways that standing

13 can be contested by a defendant. One is based

14 on the allegations of the complaint, whether

15 they're sufficient. And the second is whether

16 the allegations of the complaint are, in fact,

17 backed up by real facts.

18 Both of those are preliminary

19 inquiries at the standing stage. In this case,

20 Google filed a motion to dismiss Mr. Italiano's

21 claim when the -- when the final consolidated

22 complaint was filed. The district court didn't

23 act on that motion.

24 But I think the question whether --

25 the Spokeo question, whether there's concrete

1 harm, has two components. One is, is it -- is
2 it the kind of harm that's generally
3 recognized? And then, if it's not, the
4 question is, is it an intangible harm that
5 because of its recognition at the common law or
6 because of what Congress may have elevated
7 makes it a harm that's actionable?
8 And I think, under the Stored
9 Communications Act, there's a real question.
10 It's an Act that both requires that a plaintiff
11 be aggrieved and it's an Act that two circuits
12 have said requires proof of actual damages to
13 recover.
14 And so there -- I think there's a very
15 significant question about whether that Act
16 could be said by -- to -- that in that Act,
17 Congress could have been said to elevate that
18 harm. But --
19 JUSTICE BREYER: Would the following
20 make sense if we get to the merits? Professor
21 Rubenstein's brief -- I'm referring to that,
22 interesting. Could we say something like this:
23 Where the actual plaintiffs receive something
24 significant so there were -- then quite often
25 there is money left over, a little bit, some or

1 sometimes more. But where -- and in those
2 circumstances, you apply the ALI four-step
3 thing and just do it and be sure it's done.
4 But where they get nothing, under
5 those circumstances, while we wouldn't say
6 never, what's happening in reality is the
7 lawyers are getting paid and they're making
8 sometimes quite a lot of money for really
9 transferring money from the defendant to people
10 who have nothing to do with it. And under
11 those circumstances, scrutinize very carefully
12 to see that the four standards are met.
13 MR. PINCUS: I think there should be
14 careful scrutiny.
15 JUSTICE BREYER: Yeah, but, I mean --
16 MR. PINCUS: I think --
17 JUSTICE BRYER: -- you heard -- I was
18 trying to make up a --
19 MR. PINCUS: Yes. I think -- I think
20 in -- there's a great difference between most
21 of the cases that Mr. Frank relies on, which
22 are cases where claimants have been identified
23 and there is nonetheless a separate
24 multimillion-dollar cy pres payment. That's a
25 very different case because you don't have the

1 question of the costs of identifying the
2 plaintiffs.
3 In this kind of case, where the
4 question at the outset is, is it worth the
5 candle to try and identify the claimants
6 because you have a very large class and a very
7 small settlement, there should be close
8 scrutiny and a three-part test. One is
9 feasibility. Is the amount that the class
10 members are likely to receive after
11 administrative costs, taking into account what
12 the claiming rate may be, so small that the
13 benefit of that payment to a class member is
14 outweighed by the indirect benefit from the
15 third-party's activity?
16 I think that's a -- a tough test. The
17 district court needs discretion because there
18 are two unknowns: What will the administrative
19 costs actually be of distributing the money?
20 And, two, how many class members will claim?
21 But that's the question the district court
22 should ask.
23 Second, the district court should look
24 at the link between the harm -- the claimed
25 injury and the recipients. We don't agree with

1 General Wall that there's a redressability
2 issue here. This is a settlement. Settlements
3 between individual parties are not limited to
4 things that would be awardable under the
5 statute. But, for the test to be satisfied, we
6 think the funds have to be used for a purpose
7 that will benefit the class members and address
8 injuries similar to those that are subject to
9 the lawsuit.
10 And the third test is no conflicts of
11 interest. The -- the lower courts here
12 actually addressed that test. We don't think
13 the fact -- the happenstance that the defendant
14 may have given contributions in the past to the
15 organization should rule them out, but the
16 court should make sure that this isn't a
17 displacement of money that the defendant would
18 otherwise give and --
19 CHIEF JUSTICE ROBERTS: On -- on that
20 --
21 JUSTICE KAVANAUGH: Why not a --
22 MR. PINCUS: -- that that organization
23 will control the money and decide how it's
24 going to be used.
25 CHIEF JUSTICE ROBERTS: On that point,

1 would you agree that the district court should
2 never be the one suggesting possible recipients
3 of the funds of a settlement he has to approve?
4 MR. PINCUS: I -- I totally agree,
5 Your Honor. I think this -- a settlement is an
6 agreement between the parties. The district
7 court's role here is to apply Rule 23(e) and
8 tell the parties that because one of these
9 three tests is not met, we would submit, that
10 the settlement is not approved. And then if
11 they -- if that -- then it's up to the parties
12 to go back and come up with different
13 recipients or a different process that -- that
14 meets the test.
15 JUSTICE KAVANAUGH: Why is it --
16 CHIEF JUSTICE ROBERTS: Why do you --
17 JUSTICE KAVANAUGH: Go ahead.
18 CHIEF JUSTICE ROBERTS: Why do you --
19 why do you assume that simply because someone
20 wants money in the settlement or is entitled
21 to, that he's also opposed to what gave rise to
22 the -- the wrong? I mean, you may be in an
23 auto accident with someone who's speeding.
24 That doesn't mean you automatically think that
25 highway safety is affected and the speed limit

1 should be changed.
2 MR. PINCUS: Well, I --
3 CHIEF JUSTICE ROBERTS: You just want
4 money because of what happened to you.
5 MR. PINCUS: And -- and I think that's
6 why I think the critical first inquiry is, is
7 the -- is the -- in the real world, is the --
8 is the cost of distributing the money going to
9 mean that people get essentially little or
10 nothing or -- or essentially nothing so that
11 this indirect benefit is better?
12 JUSTICE KAVANAUGH: Isn't it --
13 MR. PINCUS: I don't think the -- I
14 think --
15 CHIEF JUSTICE ROBERTS: I think
16 Justice Kavanaugh had a question.
17 MR. PINCUS: I'm sorry.
18 JUSTICE KAVANAUGH: Isn't it always
19 better to at least have a lottery system then
20 that one of the plaintiffs, one of the injured
21 parties gets it, rather than someone who's not
22 injured? Why isn't that always more
23 reasonable?
24 MR. PINCUS: We agree with the
25 government that a lottery system would be very

1 strange. If a class member takes the time to
2 file a claim, it just seems it would be a very
3 --
4 JUSTICE KAVANAUGH: This is strange
5 too.
6 MR. PINCUS: Well, I think this --
7 this --
8 JUSTICE KAVANAUGH: I mean, it's a
9 question of what's more strange, I think.
10 MR. PINCUS: Well, if I may answer the
11 question, I think this is actually -- and this
12 is partially an answer to the Chief Justice's
13 question. The -- the actual application of a
14 cy pres-like doctrine here is that the class
15 representatives and their lawyers are
16 essentially fiduciaries to the class. And
17 they're looking at this and saying, does it
18 make sense at the end of the day to have this
19 indirect benefit rather than a direct benefit
20 that is essentially going to be a dollar?
21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.
23 MR. PINCUS: Thank you, Your Honor.
24 CHIEF JUSTICE ROBERTS: Mr. Lamken.
25

1 ORAL ARGUMENT OF JEFFREY A. LAMKEN
2 ON BEHALF OF RESPONDENTS PALOMA GAOS, ET AL.
3 MR. LAMKEN: Thank you, Mr. Chief
4 Justice, and may it please the Court:
5 This case undoubtedly implicates
6 interesting policy and empirical questions, but
7 those are the types of questions that the
8 Administrative Office, the Judicial Conference,
9 the Advisory Committee, Congress can
10 investigate and answer.
11 JUSTICE ALITO: Where did the cy pres
12 doctrine come from? Was that created by
13 Congress?
14 MR. LAMKEN: No, Your Honor. The cy
15 pres doctrine comes out of -- and it's inaptly
16 named -- from the notion that what -- someone
17 who gets a reward, someone who gets an award,
18 can repurpose it to a different thing, to a
19 different purpose, if the current -- if the
20 existing purpose isn't used -- feasible.
21 So, for example, we cite the Beastie
22 Boys examples. Private parties regularly will
23 get an award or a settlement, but they can
24 actually, instead of having that settlement
25 come to them, go to a third-party for their

1 benefit.
2 And the question in this case is, is
3 there anything in Rule 23(e) that says that
4 classes, that class representatives, where it's
5 fair, reasonable, and adequate, cannot do
6 exactly what the Beastie Boys or any other
7 private party can?
8 And Rule 23(e) doesn't answer that
9 question by saying never. It answers that
10 question by providing a standard of fairness,
11 reasonableness, and adequacy.
12 JUSTICE KAVANAUGH: The question's
13 what reasonableness means.
14 MR. LAMKEN: I think that's right.
15 And the question is -- and the answer to that,
16 I think, is when the alternative, when you have
17 a possibility of getting millions of dollars of
18 indirect relief, it is better, it is fair,
19 reasonable, and adequate, to get that when the
20 alternative is likely nothing or the nominal
21 equivalent of nothing.
22 And that's the fundamental decision
23 that ALI made. If it's infeasible, if it's not
24 possible to give this money out to people
25 without it becoming practically zero or there's

1 a grave risk of that happening, then you can
2 take the money and give it to institutions for
3 particular uses that serve the interests of the
4 individual class members.
5 And that --
6 JUSTICE ALITO: In whose opinion do
7 they serve the interests of the individual
8 class members? In the opinion of the
9 individual class members?
10 MR. LAMKEN: Well, the decision is
11 initially made by the class representatives and
12 the lawyers, and it's subject to judicial
13 review by the court. And that -- in this case,
14 rather than simply giving money to -- and,
15 frankly, this is an issue that's not before the
16 Court because Petitioner didn't challenge the
17 requisite nexus between the recipients and the
18 interests of the class members.
19 But turning to it anyway, in this
20 case, specific proposals were provided, and
21 those proposals are actually quite closely
22 linked to not just the injury that occurred
23 here, that underlies both the cause of action
24 and the actual complaint, but also the specific
25 class.

1 JUSTICE KAVANAUGH: But there is the
2 appearance, as the district court said in the
3 hearing, the appearance of favoritism and alma
4 maters of -- of counsel.
5 MR. LAMKEN: Your Honor, I think, in
6 this case, the district court acknowledged that
7 there was the potential of conflict, but he did
8 what a district court should do. He took
9 evidence. He heard counsel -- from counsel
10 live in court, including the statement: I got
11 my degree from Harvard and that's simply the
12 end of it.
13 He reviewed detailed proposals which
14 carefully calibrated the -- the money to the
15 specific harms, the impact of search terms and
16 disclosures and third-party data flows. And
17 the district court found "no indication" that
18 counsel's allegiance to alma maters factored
19 into selection. Unless --
20 CHIEF JUSTICE ROBERTS: Well, don't
21 you think it's just a little bit fishy that the
22 money goes to a charity or a 501(c)(3)
23 organization that Google had contributed to in
24 the past?
25 MR. LAMKEN: So, Your Honor, remember,

1 because we're in the high-tech area and we're
2 in an emerging area, there's only so many
3 organizations that are going to have track
4 records of this. And so it's not at all
5 surprising --
6 CHIEF JUSTICE ROBERTS: I bet there
7 are other organizations active in the area that
8 Google had not contributed to in the past.
9 MR. LAMKEN: And -- and many were
10 included here. But one of the critical things
11 is, while Google was involved -- and this is at
12 page 40 of the Joint Appendix -- it was
13 involved in identifying potential recipients,
14 it -- counsel for class, the class, not Google,
15 vetted the actual proposals. Class counsel,
16 not Google, determined which recipients.
17 CHIEF JUSTICE ROBERTS: Well, I know,
18 but the allegation -- you know, I mean, the
19 allegation is that counsel for the class and
20 the defendant are working together because no
21 money is going to anybody else, it's just going
22 to counsel for the -- for the class, and that
23 Google for its part as part of the deal -- I'm
24 not suggesting that's what's going on -- but
25 the allegation, it says part of the deal, they

1 get to give money to their favorite charity.
2 MR. LAMKEN: And the district court
3 looked at it and understood that Google's role
4 ended at selecting potential recipients. It
5 had no role in defending who got how much money
6 either.
7 And the district court heard from
8 counsel and said: Look, it's not just an
9 accounting core change. And the Court
10 responded: I appreciate that. And that's at
11 Joint Appendix 135.
12 Google's own counsel explained to the
13 Court that if you look at the detail of these
14 programs and the lack of Google's involvement
15 in the development of the programs, it rebuts
16 that. That's Joint Appendix 155.
17 If you look at the actual recipients,
18 these are not necessarily flattering recipients
19 for Google. There's two that referred Google
20 to the FTC, resulting in a $17 million fine.
21 One of them is dedicating its money
22 to, among other things, auditing, from outside
23 the Google ecosphere, Google's compliance with
24 privacy policies.
25 And each of them, which is where I was

1 going just a moment ago, is specifically
2 directed to not just privacy on the Internet
3 but what happens when you do searches, for
4 example, the Brooklyn Center.
5 JUSTICE KAVANAUGH: The appearance
6 problem here, which has happened in many cases,
7 is symptomatic of a broader question, which is
8 why is it not always reasonable, more
9 reasonable in this situation, which is a
10 difficult one, to try to get the money to
11 injured parties, either through pro rata
12 distribution or some kind of lottery system.
13 Imperfect or strange as that may be,
14 it seems to me potentially less strange or why
15 isn't it less strange than giving it to people
16 who weren't injured at all, who have
17 affiliations with the counsel, and who in many
18 cases don't need the money?
19 MR. LAMKEN: Your Honor, in terms of
20 what the standard is, yes, absolutely, the
21 priority is to give the individual class
22 members money. That's the number one priority.
23 And only when it proves infeasible to do that
24 can you go to a cy pres result.
25 And in this case -- and I turn the

1 Court to Pet App 47a -- the district court
2 actually found, he looked and said, the cost to
3 do claims processing, cost to do claims forms,
4 cost to do distribution, and said it's clearly
5 infeasible when you look at those factors.
6 JUSTICE KAVANAUGH: How about a
7 lottery versus this?
8 MR. LAMKEN: So the lottery doesn't
9 really help much for two reasons. First, you
10 have to go and identify the class members in
11 order to determine who do you give your lottery
12 tickets to. So you now have to go out and find
13 the names of the 129 million people, or however
14 many you're going to submit, and ask. You have
15 to process and determine, are these valid
16 requests for lottery tickets, or is this person
17 not a Google user? So you have to verify.
18 JUSTICE KAVANAUGH: But at least it's
19 someone who -- who, quote, to use your analogy,
20 paid for the lottery ticket as opposed to
21 giving the billion dollar award to someone who
22 didn't buy the lottery ticket.
23 MR. LAMKEN: Well, I think --
24 JUSTICE KAVANAUGH: I mean, that's the
25 --

1 MR. LAMKEN: -- it is a little --
2 JUSTICE KAVANAUGH: -- that's, to use
3 your analogy, the --
4 MR. LAMKEN: It's a little passing
5 strange to start -- to use all the money,
6 virtually all the money, to actually set up
7 this lottery process to accept all these
8 claims, administer that process, and then
9 exclude the vast majority of the class and say:
10 And we're going to take some people who were
11 injured and entitled to money, and we're not
12 going to give them their money, we're going to
13 give that money to somebody else because they
14 won the lottery.
15 It's just a little unseemly, in
16 addition to being grossly inefficient, because
17 the only thing it reduces -- it doesn't reduce
18 claims administration cost in terms of
19 accepting claims. It doesn't reduce claims
20 administration cost in terms of vetting the
21 claims. The only thing it reduces is the end
22 mailing cost. That's the only thing it does.
23 JUSTICE KAVANAUGH: It -- it reduces,
24 to pick up on the Chief Justice's comments, the
25 appearance of favoritism and collusion --

1 MR. LAMKEN: And that --
2 JUSTICE KAVANAUGH: -- which is rife
3 in these cases. At least that's been the
4 allegation. There have been lots of courts
5 that have said that. And the district court
6 here, as you know in the transcript, was very
7 concerned about that.
8 MR. LAMKEN: Well, he wasn't concerned
9 about the collusion because he specifically
10 found that it did not enter into the decision.
11 And if the district court had -- the standard
12 everyone agrees is, if there's even doubt, if
13 there's substantial doubt about whether the
14 recipients were selected on the merits, that
15 doubt is called against the settlement. It's
16 called in favor of trying something different.
17 But, in this case, the court of
18 appeals and the district court both applied
19 that -- that ALI standard and both determined
20 that, after looking at all the evidence, after
21 looking at the detailed proposals, after
22 hearing from counsel, after doing all that,
23 there wasn't that substantial doubt.
24 And I think we can rely on our
25 district courts to make those determinations,

1 to be careful, and to not get engaged in the
2 type of process that brings the judiciary into
3 disrepute.
4 JUSTICE ALITO: I mean, if you step
5 back --
6 MR. LAMKEN: Now if someone's opposed
7 --
8 JUSTICE ALITO: -- if you step back
9 from what happened in this case and cases like
10 this, how can you say that it makes any sense?
11 The purpose of asking for compensation, it's
12 not injunctive relief that would benefit a --
13 benefit a broad class, but the purpose --
14 benefit the public -- it's compensation for the
15 -- for the class members.
16 And at the end of the day, what
17 happens? The attorneys get money, and a lot of
18 it. The class members get no money whatsoever.
19 And money is given to organizations that they
20 may or may not like and that may or may not
21 ever do anything that is of even indirect
22 benefit to them.
23 So how can -- how can such a system be
24 regarded as a sensible system?
25 MR. LAMKEN: So two parts to that.

1 The first is, with respect to fees, and we
2 don't believe -- because that's Rule 24(h), a
3 reasonable fee adder. We don't think that's
4 before the Court either.
5 But, with respect to fees, it's well
6 established that a court can reduce attorneys'
7 fees if it believes that the cy pres
8 distribution is less valuable to the class than
9 its cash equivalent.
10 It just happened in this case the
11 district court heard objectors' arguments and
12 said that he did not agree that the fees and
13 incentive awards are inconsistent with the
14 value of the class benefit, specific finding on
15 Pet App 60.
16 Moreover, class counsel's request is
17 not disproportionate to the class benefit. So
18 this is a situation where district courts on
19 the ground can value what is the cy pres
20 benefit and then make a determination: Is the
21 fee a disproportionate result? And they can
22 reduce it. And, in fact, they have in the past
23 in a number of cases reduced fees because it's
24 a cy pres distribution.
25 The second part, Justice Alito, is

1 that somehow this distribution doesn't benefit
2 the class. But this isn't a case where you
3 simply take money and give it to charity that
4 happens to be in a space that's similar to or
5 occupied by the underlying injuries.
6 There are specific proposals here with
7 a very close nexus. The injury here is that
8 search terms are given out -- and I'm going to
9 come back to standing in a moment if I have
10 enough time -- but that search terms of
11 individuals are given out to third parties
12 without their consent.
13 And the Stored Communications Act is
14 very clear, it's not illegal to give out that
15 information if there is consent. And both the
16 prospective relief, the modifications to
17 Google's FAQs, and all these organizations are
18 working towards making sure that the public is
19 properly notified that this is the consequence
20 of entering potentially extremely personal
21 information, what your worries, your concerns
22 are, into that search box will do.
23 So it is not at all even remotely the
24 case that this is not benefitting the class.
25 This is targeted precisely to the type of

1 injury and precisely the type of problem,
2 privacy invasion, that that class is subjected
3 to. And --
4 JUSTICE KAVANAUGH: You started -- you
5 started with what for me is a very good point,
6 which is why is this for us and not for
7 Congress and the committee. But, on the other
8 hand, the retort to that is that the committee
9 thinks it's for us.
10 And -- and -- and maybe Congress does,
11 too, because reasonable gives common law-like
12 power to the courts to figure out and to put
13 limits on these things. So how can we rely on
14 Congress and the committee if they're thinking
15 that --
16 MR. LAMKEN: Well, Your Honor, I think
17 --
18 JUSTICE KAVANAUGH: -- the court's
19 going to do it?
20 MR. LAMKEN: -- what the Court has
21 before it is the text of the rule, and the one
22 thing the Court can't do is substitute some
23 categorical rule that it thinks more efficient
24 or better than the rule itself.
25 We have to apply the rule --

1 JUSTICE KAVANAUGH: But isn't that
2 what courts do all the time with the word
3 "reasonable," is over time apply --
4 MR. LAMKEN: Well they --
5 JUSTICE KAVANAUGH: -- learn from
6 experience and then draw sometimes bright-line
7 rules?
8 MR. LAMKEN: As in Rule 23(h), where
9 it's a reasonable fee, courts typically fill
10 reasonableness with factors and considerations.
11 They typically don't substitute a different
12 test, such as to say cy pres is never fair,
13 reasonable, and adequate. And it certainly --
14 JUSTICE KAGAN: Mr. Lamken -- I'm
15 sorry, please.
16 MR. LAMKEN: No, and it certainly
17 should be fair, reasonable, and adequate when
18 the alternative is nothing.
19 JUSTICE KAGAN: Could I ask you to
20 address standing, please?
21 MR. LAMKEN: Yes. Okay. So turning
22 to standing very quickly. Look, neither court
23 below addressed the Stored Communications Act
24 or the other four causes of action under the
25 standard of Spokeo. Very few courts have.

1 There's a dearth of authority on it.
2 So this isn't a situation where the
3 Court should be going out on its own and
4 addressing the issue without the benefit of the
5 viewpoints of other jurists, without the
6 benefit of the refinement that occurs when the
7 case comes up from the lower courts.
8 They simply didn't apply that
9 standard. So the Court has two options in our
10 view. One is to remand. The alternative is to
11 dismiss as improvidently granted.
12 If the Court were inclined to think it
13 might grant again, I think that remand would be
14 the right answer, but this Court is so -- this
15 case is so rife with vehicle problems that I
16 think the proper answer under those
17 circumstances is to dismiss as improvidently
18 granted, but that aside, that is in the Court's
19 discretion.
20 Turning to the merits, if the Court
21 were to be the first to address this issue --
22 CHIEF JUSTICE ROBERTS: You can take
23 an extra minute on standing.
24 MR. LAMKEN: Okay. If the Court were
25 to be the first to address the Stored

1 Communications Act under Spokeo, since the
2 framing, the rule has been the disclosure of
3 another's communication without their consent
4 is actionable.
5 And the Court can look to the Justice
6 Story's opinion in Folsom versus Marsh for
7 that. Even the recipient of a letter was not
8 permitted to disclose that letter without the
9 author's permission.
10 This -- in Bartnicki versus Vopper,
11 that issue was thoroughly briefed by the United
12 States, among others, and the Court in Doe
13 versus Chao recognized that, for privacy harms,
14 they're often actionable without specific harm,
15 that the damage is presumed.
16 Congress is entitled to make that same
17 judgment in --
18 JUSTICE KAGAN: The -- the alleged
19 injury here, am I correct, is that a
20 third-party will know that a particular person
21 did the search. It's not what -- it's not
22 simply the nature of the search. Is that
23 correct?
24 MR. LAMKEN: I think that when it's
25 associated with you, that -- that is an injury.

1 But merely disclosing your letter, even if it
2 was an anonymous letter, to a third-party, I
3 think that would have been actionable at common
4 law. That would have been actionable before
5 the framing.
6 But -- and Congress did make the
7 judgment in this case that, even without
8 individual actual harm, that the presumed harm
9 is a submission because it gave as damages not
10 just actual harm, it gave as damages the
11 wrongdoer's profits. There's entitlement
12 to recover the wrongdoer's profits, which,
13 again, is consistent with the common law --
14 CHIEF JUSTICE ROBERTS: I --
15 MR. LAMKEN: -- but this is an
16 extraordinarily complex issue. You have to go
17 deep into history that, in the pageant pages we
18 had, we didn't. I think, under the
19 circumstances, the right answer for the Court,
20 given that this is a jurisdictional question,
21 is to dismiss or -- is to remand or dismiss as
22 improvidently granted.
23 Thank you very much.
24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Frank, you have three minutes
2 remaining.
3 REBUTTAL ARGUMENT OF THEODORE H. FRANK
4 ON BEHALF OF THE PETITIONERS
5 MR. FRANK: Thank you, Mr. Chief
6 Justice, and may it please the Court:
7 The -- my friend is alleging that the
8 district court made factual findings that it
9 simply did not reach because it believed its
10 hands were tied by the Ninth Circuit precedent.
11 It did not look at the potential
12 conflicts between Google and the recipients
13 because, in Lane versus Facebook, the Ninth
14 Circuit approved a settlement where Facebook
15 gave to a charity created by Facebook.
16 It did not look at the difficulty of
17 distributing to some class members because the
18 Ninth Circuit has a de minimis standard. And
19 as we discuss at page 22 of our reply brief,
20 what the district court found was that it would
21 be too hard to distribute to over 100 million
22 class members. We don't contest that, but
23 that's not the standard under any other court.
24 So returning to the question that a
25 number of Justices raised, why not leave this

1 to Congress? And I return to the example of
2 State Oil versus Khan, where the Court was
3 interpreting restraint of trade under the
4 Sherman Act. And not only was it interpreting
5 that, but it already had a three-decade-old
6 precedent, Albrecht, that it was being asked to
7 reverse.
8 And Congress had specifically
9 considered the rule in Albrecht over the --
10 those three decades and it never acted on it.
11 Yet, in 522 U.S. 3, State Oil versus Khan, the
12 Court unanimously reversed Albrecht and came to
13 the economically sound conclusion about the way
14 to interpret restraint of trade.
15 And we have courts here that are
16 already importing a proportionality requirement
17 into the reasonableness and fairness inquiries,
18 and at no point do my friends indicate that
19 Pearson versus NBTY, the Seventh Circuit
20 decision, is wrong or why it's wrong or why it
21 is not the superior rule here.
22 And as we document in our opening
23 brief, when courts demand that counsel is
24 faithful to their fiduciary obligations,
25 counsel responds to those incentives.

1 The Ninth Circuit's rule creates
2 incentives for class counsel to argue that it's
3 too hard to get money to the class, and, in
4 fact, the de minimis rule would take many
5 settlements that are settling now for less than
6 $1 per class member, for less than $2 per class
7 member, that distribute tens of millions, even
8 over $100 million to class members, it's now
9 appropriate under the Ninth Circuit's rule to
10 take all of that money and give it to the
11 defendant's favorite charity or the plaintiff's
12 favorite charity.
13 If there are no further questions, I'd
14 ask the Court to vacate and reverse.
15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel. The case is submitted.
17 (Whereupon, at 11:06 a.m., the case
18 was submitted.)
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