No. 13-136

IN THE

Supreme Court of the United States

MEGAN MAREK,

Petitioner,

v.

SEAN LANE, ET AL.

Respondents.

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

BRIEF OF RESPONDENT FACEBOOK, INC. IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in approving a class action settlement that involved injunctive relief and a *cy pres* distribution of substantial funds to a non-profit foundation, where it was undisputed that direct monetary payments to individual class members would have been *de minimis* and the district court found that the distribution to the foundation would further the interests sought to be vindicated through the action.

PARTIES TO THE PROCEEDINGS

Respondent Facebook, Inc. incorporates the statement of parties to the proceeding from the Petition (Pet. ii), and also notes that additional parties in this Court are Respondents Ginger McCall and Benjamin Trotter, both of whom were objectors in the district court proceedings and appellants in the court of appeals proceedings, but did not file a petition in this Court. *See* Sup. Ct. R. 12.6.

CORPORATE DISCLOSURE STATEMENT

Respondent Facebook, Inc. has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

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INTRODUCTION

Although couched in terms of conflicts and broad policy issues, the Petition ultimately seeks review of a case-specific question: whether the district court abused its discretion under Rule 23(e)(2) by approving a class action settlement that includes injunctive relief and a *cy pres* distribution of substantial funds to a privacy-related organization, where it was undisputed that any cash payment to individual class members would have been *de minimis*, and where the district court carefully evaluated the terms of the *cy pres* structure to ensure that it would further the interests sought to be advanced by the lawsuit.

The Petition should be denied. Despite Petitioner's efforts to portray a circuit conflict on the applicable legal standards, there is none. All of the other circuits apply essentially the same standards as did the Ninth Circuit here, including the factors to be considered in evaluating the fairness of class action settlements generally, the circumstances in which such settlements may include a *cy pres* remedy, and the specific criteria that such a remedy must meet in order to protect the interests of class members. The Petition also does not present an important question of law warranting this Court's review, but rather quarrels with the district court's exercise of discretion as to specific factual aspects of the settlement. Even were there a need to take up the general issue of *cy pres* remedies, this case is a poor vehicle because it was conceded below that direct payments to class members would be infeasible; Petitioner did not dispute before the appellate court that a *cy pres*

remedy was an available option in this case; and the settlement included injunctive relief in addition to the *cy pres* distribution. Finally, the Ninth Circuit's decision affirming the district court approval of the settlement as "fair, reasonable, and adequate" under Rule 23(e)(2) was correct on the merits.

STATEMENT

Respondent Facebook, Inc. operates an online social network that allows users to connect and share information with family and friends. This case involves Facebook's short-lived "Beacon" program, which was launched in November 2007. As initially structured, the program shared certain information about a user's activities on third-party websites with that user's Facebook friends, unless the user declined publication by clicking a "pop-up" dialog box. If the user closed the box or took no action, the information would post to the user's Facebook profile. Pet. App. 3–4.

The Beacon program drew immediate complaints that Facebook was publishing information about users' online activities without their affirmative consent. Facebook responded within a month with a privacy tool allowing users to opt out of the Beacon program, and ultimately discontinued the program altogether. Pet. App. 4.

In August 2008, nineteen Facebook users filed a putative class action in federal district court against Facebook and various online merchants included in the Beacon program. The complaint alleged that defendants violated various federal and state privacy laws by gathering and disseminating information

about users' online activities without their consent.[1] It sought statutory and actual damages and equitable relief. Pet. App. 4–5.

Facebook denied liability and moved to dismiss the complaint. Facebook's motion asserted that each of plaintiffs' legal theories failed to state a claim, among other reasons, because plaintiffs offered no theory of actual damages and their claims for statutory damages could not be aggregated. While the motion was pending, the parties attempted to settle the dispute through mediation. After many months of what the district court called "protracted arm's-length negotiations conducted in good faith and free from collusion," the parties reached a settlement. Pet. App. 57–58.

The settlement agreement provided for class relief in the form of an injunction terminating the Beacon program and a payment by Facebook in the amount of $9.5 million, approximately $3 million of which would be used to pay any court-directed attorneys' fees, administrative costs, and incentive payments to the class representatives. Given the size of the class (over 3.6 million members), it was agreed by all parties—and by the district court and the Ninth Circuit upon review—that any cash distribution to the class of the remaining $6.5 million would have involved *de minimis* payments. Accordingly, the

[1] The complaint asserted claims under the Electronic Communications Privacy Act, 18 U.S.C. § 2510, the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, the Video Privacy Protection Act, 18 U.S.C. § 2710, the California Consumer Legal Remedies Act, Cal. Civ. Code § 1750, and the California Computer Crime Law, Cal. Pen. Code § 502.

settlement provided that the $6.5 million would be distributed to a new non-profit organization called the "Digital Trust Foundation" ("DTF"). The idea of creating the foundation originated from the mediator after the parties could not agree upon existing organizations to receive the settlement funds. Pet. App. 5–6.

The stated purpose of DTF, set out in the settlement agreement and in DTF's Articles of Incorporation, is to "fund and sponsor programs designed to educate users, regulators, and enterprises regarding critical issues relating to protection of identity and personal information online through user control, and the protection of users from online threats." Pet. App. 6. The Articles establish a three-member board, the initial members of which are (1) a director of the Information Privacy Programs at the Berkeley Center for Law & Technology; (2) a member of the federal Online Safety & Technology Working Group; and (3) a Facebook employee experienced in the areas of online privacy and data security. The settlement provides that the directors must unanimously approve a plan for the term and succession of future officers and directors. Any amendment to the bylaws or the Articles also requires the unanimous vote of all three directors. Decisions on funding and matters of DTF governance or operations must be approved by a majority—a requirement that prevents any single director from unilaterally approving or blocking a particular funding proposal. Finally, DTF's Articles bar it from engaging in litigation, lobbying, or other political activity. Pet. App. 6–7.

The settlement agreement also provides for a two-member Board of Legal Advisors to advise and monitor DTF to ensure that it acts consistently with its stated mission. Plaintiffs' counsel and Facebook's counsel serve as the initial members of this Board. Pet. App. 7. Contrary to the Petition's repeated assertion (*e.g.*, Pet. 1), neither the Board of Legal Advisors nor any other iteration of "the defendant and class counsel" in any way "controls" DTF.

In February 2010, following preliminary approval and class notice, the district court held a fairness hearing. Only 108 class members out of over 3.6 million had opted out, and four members, including Petitioner, filed written objections. Neither Petitioner nor her counsel appeared at the hearing, although counsel for a different objector, Ginger McCall, did appear. At the hearing, the court recognized its obligation to give closer scrutiny to a settlement, such as this one, reached before class certification. The court found, with respect to the proposed disposition of the settlement funds, that any individual payments to class members "would be *de minimis* for each class member" and thus would not be "a practical way to proceed." Dist. Ct. Dkt. No. 141, at 25. Counsel for the objector concurred, and added that individual cash distributions to the entire class would yield only about $1.12 per class member. *See id.* at 63.

On March 17, 2010, the district court issued an order approving the settlement as "fair, reasonable, adequate and proper and in the best interests of the Settlement Class." The court applied a set of factors drawn from Ninth Circuit precedent, including the amount of the settlement; the strength of the

plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; and the reaction of class members. Pet. App. 54–55.

The court found that the novelty of plaintiffs' privacy-related claims and related litigation risks were factors supporting the settlement. It noted that the claims raised factual issues that would be "vigorously disputed," including the type and sufficiency of information each class member received about the Beacon program during specific time periods, the nature of class members' agreements with Facebook, and the extent to which Facebook's alleged treatment of their information was unauthorized. The court also noted that plaintiffs' legal theories were "novel," with "little in the way of prior decisions to assist in gauging the likelihood of success." It cited in particular a series of difficulties with plaintiffs' claims for statutory damages under the Video Privacy Protection Act ("VPPA"), 18 U.S.C. § 2710, including the lack of authority supporting aggregation of statutory damages awards. These factual and legal problems, the court found, increased the risk, complexity, duration, and likely expense of any further litigation and made the outcome highly uncertain. After detailing a series of specific examples, the court found that all of these factors supported "the fairness, reasonableness and adequacy of the Settlement." Pet. App. 48, 54–56.

In light of these risks and the untested nature of plaintiffs' privacy claims, the court found that the proposed $9.5 million payment "is substantial and, further, is directed toward a purpose closely related to Class Members' interests in this litigation." The court disagreed with the objectors' view that cash

payments should be made available to class members, noting that the objectors had offered no theory of compensation except statutory damages under the VPPA, which the court reiterated were "speculative at best, given the inherent and particular litigation risks the Class would face in proceeding to trial." The court reiterated that a cash distribution of the settlement fund to the class would result in *de minimis* individual payments and that "the certainty of the Settlement, as constituted, provides more meaningful relief to the Class." Pet. App. 56, 59.

The court also addressed objectors' arguments that DTF is an improper *cy pres* recipient because it is newly formed and one of its three initial directors works for Facebook. The court cited the constraints on DTF's decisionmaking process—including the requirements of unanimity for structural changes and a majority for funding decisions—and found that "the structure of [DTF], and the individuals who will be involved with it, are sufficient to ensure that the settlement funds will be disbursed in a manner that furthers the interests of the Class." Pet. App. 60–61.

Following its order approving the settlement, the district court issued a separate order awarding attorneys' fees of $2.36 million to class counsel. The court rejected counsel's proposal for an award of approximately $3.17 million, or one third of the settlement amount. Pet. App. 66–67. On May 27, 2010, the district court entered a final judgment approving the settlement and maintaining jurisdiction over its implementation and enforcement, as well as over the disposition of settlement funds. *Id.* at 68, 71–72.

Petitioner and two other objectors appealed.[2] In her brief to the Ninth Circuit, Petitioner stated that she did "not challenge usage of a *cy pres* remedy to resolve this class action," but rather sought review of the particular *cy pres* distribution to DTF called for by the settlement agreement. CA9 Dkt. No. 14-1, at 21 (Case No. 10-16398).

The Ninth Circuit affirmed. The court applied its established standards for evaluating class action settlements, including those involving *cy pres* remedies—standards that, as set out below, mirror those in other circuits. The court noted that the ultimate question for the district court is whether the settlement is, in the words of Rule 23(e), "fair, reasonable, and adequate," and that such a determination will not be set aside except upon a "strong showing" of a "clear abuse of discretion." In making the fairness determination, the panel noted, the district court must evaluate the settlement as a whole, by reference to a set of factors described in *Hanlon* v. *Chrysler Corp.*, 150 F.3d 1011, 1027 (CA9 1998), and must conduct a more exacting review if the settlement is reached before class certification—a measure designed to ensure that the class representatives and counsel do not secure a disproportionate benefit at the expense of absent class members. Emphasizing this last point, the court stated that it "will not affirm" if it appears that the district court did not sufficiently evaluate the settlement for possible collusion. Pet. App. 11.

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[2] Petitioner Megan Marek, along with another objector, filed a single appeal from the district court's judgment. A third objector, Ginger McCall, filed a separate appeal. The appeals were consolidated after briefing.

The Ninth Circuit also noted that *cy pres* remedies are permissible where the "class-action settlement fund is 'non-distributable,'" *i.e.*, where "proof of individual claims would be burdensome or distribution of damages costly." Pet. App. 11 (citing *Nachshin* v. *AOL, LLC*, 663 F.3d 1034, 1038 (CA9 2011) and *Six Mexican Workers* v. *Ariz. Citrus Growers*, 904 F.2d 1301, 1305 (CA9 1990)). The panel explained that the district court must assess such remedies to ensure that they "bear[] a substantial nexus to the interests of class members" by accounting for the nature of the plaintiffs' claims, the objectives of the underlying statutes, and the interests of the silent class members. Pet. App. 14 (citing *Nachshin*, 663 F.3d at 1036).

Applying these standards to the settlement here, the Ninth Circuit upheld the district court's critical findings—both conceded by the objectors—that a direct cash distribution to the class would be impracticable because of the *de minimis* individual amounts, and that the proposed *cy pres* remedy bears a substantial nexus to the interests of class members. On the latter point, the court stressed that DTF's distribution of settlement funds to entities that promote the causes of online privacy and security "will benefit absent class members and further the purposes of the privacy statutes that form the basis for the class-plaintiffs' lawsuit." This feature of the *cy pres* award, the court found, distinguished it from prior Ninth Circuit cases disapproving *cy pres* awards that lacked the required nexus to class interests. The Ninth Circuit also agreed with the district court that the provisions in the settlement and DTF's Articles

directing its grant-making activities satisfied any structural concerns. Pet. App. 14–17.

The Ninth Circuit disagreed with the objectors' argument that the district court should have assigned a specific monetary value to the class members' statutory claims and compared that value to the $9.5 million settlement award. The panel noted that the district court did assess the strength of the plaintiffs' claims as part of evaluating the settlement, but that it was not required to make "a specific finding of fact as to the potential recovery for each of the plaintiffs' causes of action." The Ninth Circuit found that the record "convincingly establishe[d]" that the district court meaningfully accounted for the potential value of class members' claims, including by specifically evaluating the lack of authority for aggregating statutory damages awards under the VPPA and concluding that the prospects for those claims were "questionable." The Ninth Circuit concluded that the district court did not abuse its discretion in finding the $9.5 million settlement amount "substantial" in relation to any potential claims. Pet. App. 19-21, 23.

The Ninth Circuit also found that the district court properly scrutinized the settlement for possible collusion, following the rule of "heightened review" for pre-certification settlements. It pointed to the size of Facebook's $9.5 million payment—an amount not suggestive of collusion—and to the fact that the class received notice and a chance to opt out. The court also credited the district court's finding that the settlement was reached "'after intense and protracted arm's-length negotiations conducted in good faith and free from collusion.'" The court concluded that the district court's careful factual review of the history

and structure of the settlement ensured that "class representatives and their counsel did not throw absent class members under the proverbial bus to secure a disproportionate benefit for themselves." Pet. App. 23–24.

Finally, the Ninth Circuit rejected the objectors' claim that the injunctive relief provided under the settlement agreement—the permanent termination of the Beacon program—was "illusory" because Facebook already had ceased the program, noting that, absent the settlement, Facebook could revive the program at any time. Pet. App. 24–25.

Judge Kleinfeld dissented, taking issue with the settlement amount and the *cy pres* distribution to DTF and asserting that the panel departed from a series of Ninth Circuit cases in which the court disapproved *cy pres* awards. Pet. App. 37–46.

The panel denied rehearing and the court of appeals denied rehearing en banc. Judge Milan Smith dissented from the latter decision, joined by five other judges. The dissent took issue with the use of a new organization, rather than an existing charity, and contended that the *cy pres* remedy at issue here did not comply with Ninth Circuit precedent because there was an insufficient nexus between the proposed use of funds and the interests of class members. The dissent did not object to the amount of the settlement or the concept of a *cy pres* remedy as part of such a settlement. Pet. App. 75–80.

One of the four objectors, Megan Marek, filed this petition for certiorari on July 26, 2013.

REASONS FOR DENYING THE PETITION

The Petition seeks review of a case-specific decision that applies settled law to the unique facts of a particular case, and is correct on the merits.

There is no circuit conflict as to the standards to be applied to class action settlements, including those involving a *cy pres* payment in lieu of a *de minimis* cash distribution to class members. Every circuit to address the issue has held that district courts may approve *cy pres* settlements where individual distributions would be economically impracticable and where there is a close nexus between the *cy pres* remedy and the interests of putative class members. Courts have recognized that the use of a *cy pres* award under these circumstances serves the policies favoring settlement and benefits the class. They also have recognized the need to scrutinize such settlements to ensure that they are fair to class members and that there are no indicia of collusion. Both the district court and the Ninth Circuit followed these established standards in evaluating the proposed settlement here.

The Petition tries to manufacture a conflict by citing cases where other circuits have disallowed *cy pres* awards, but none of these cases applied a different legal standard; they merely reached different results based on different sets of facts. This is evidenced by the fact that the Ninth Circuit itself has struck down *cy pres* awards that did not meet the established standards. In the end, what the Petition offers is an argument—drawn from the dissents below—that the Ninth Circuit panel misapplied its own prior precedent. But the claimed misapplication

of a properly stated rule of law does not warrant review by this Court. Sup. Ct. R. 10; *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). The Petition would draw the Court into a case-specific examination of whether the district court correctly applied settled legal standards to the facts of this case, including its evaluation of plaintiffs' novel and untested privacy claims, the difficulties with plaintiffs' claims for statutory damages, the specific amount of the settlement fund, and the nature and structure of the entity designated to receive the settlement funds. Any such inquiry would be further complicated by Petitioner's failure to preserve the principal arguments that she now presents.

Finally, the decision below was correct. Objectors conceded that individual distributions of the settlement amount would be infeasible, and the bargained-for terms of the settlement agreement ensured both that the multi-million dollar *cy pres* distribution would be spent on educational programs tied to the interests of the class, and that DTF could not be controlled by Facebook. Given these and other considerations, including the speculative nature of plaintiffs' claims, the district court acted within its discretion in finding the settlement "fair, reasonable, and adequate."

I. The Petition Presents No Circuit Conflict.

The Petition purports to describe a series of "fundamental" conflicts between the Ninth Circuit and other courts of appeals on the subject of *cy pres* remedies in the class action settlement context. Pet. 18–29. But there are no such conflicts—as confirmed by the fact that no circuit court has suggested

disagreements on any of the relevant issues. On the contrary, the body of federal appellate decisions addressing *cy pres* remedies used in class action settlements is remarkably uniform: the circuits apply essentially the same legal standards to determine when *cy pres* remedies are permissible; they identify the same sets of concerns about *cy pres* remedies, including the risk of collusion between defendants and class counsel; and they employ the same types of safeguards to address those concerns. The Ninth Circuit not only has followed these standards, but often has taken a lead role in developing them—including by striking down *cy pres* awards that insufficiently protect the interests of class members. The decision below adheres to this common approach, and creates no circuit conflict.

A. The circuits all apply essentially the same set of standards for evaluating *cy pres* remedies.

All of the circuits to address the issue have held that *cy pres* remedies—such as a distribution of funds to a third party charity aligned with the interests of the class—may be used in the class action context in appropriate circumstances. *See*, *e.g.*, *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 172 (CA3 2013) ("join[ing] other courts of appeals in holding that a district court does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component"); *In re Pharmaceutical Industry Average Wholesale Price Litig.*, 588 F.3d 24, 33 (CA1 2009) ("In class actions, courts have approved creating *cy pres* funds, to be used for a charitable purpose related to the class plaintiffs' injury").

The most common circumstance is which courts have allowed *cy pres* remedies is where a cash distribution of all or part of a settlement fund would not be feasible—either because class members cannot be identified, or because the amounts at issue would result in a negligible payment per class member. In such cases, the circuits uniformly have held that the parties may direct the distribution to a third party charity aligned with the interests of the settlement class. *See*, *e.g.*, *Baby Products*, 708 F.3d at 173 (noting general agreement that "*cy pres* distributions are most appropriate where further individual distributions are economically infeasible"); *Klier* v. *Elf Autochem N. Am., Inc.*, 658 F.3d 468, 475 & n.15 (CA5 2011) (*cy pres* awards are appropriate "when direct distributions to class members are not feasible" such as where the "marginal cost of making an additional pro rata distribution to the class members exceeds the amount available for distribution"); *Pharmaceutical Industry*, 588 F.3d at 34 (*cy pres* remedies may be appropriate "when it is economically infeasible to distribute money to class members"); *Mirfasihi* v. *Fleet Mortg. Corp.*, 356 F.3d 781, 784 (CA7 2004) (rejecting *cy pres* distribution where "there would be no reason for thinking distribution to the class members infeasible"); *Masters* v. *Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (CA2 2007) (*cy pres* remedy available in "circumstances in which direct distribution to individual class members is not economically feasible"); *Powell* v. *Georgia-Pacific Corp.*, 119 F.3d 703, 706 (CA8 1997) (holding that a "*cy pres* distribution is potentially appropriate" where "it would be extremely difficult to distribute the funds pro rata"); *New York* v. *Reebok Int'l Ltd.*, 96 F.3d 44,

49 (CA2 1996) (approving *cy pres* distribution where "impracticality of attempting to distribute the settlement proceeds among the multitude of unidentified possible claimants is obvious" and "distribution 'would be consumed in the costs of its own administration'"); *accord* American Law Institute, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 cmt. b (2010).

The theory of *cy pres* awards in this context is that, rather than undertake an administratively costly class distribution that would yield a negligible payment for each class member, the settlement funds could better be put to a cause (the so-called "next best" use) that would advance the class members' interests. *See Baby Products*, 708 F.3d at 172–73; *Pharmaceutical Industry*, 588 F.3d at 34; *Molski* v. *Gleich*, 318 F.3d 937, 954–55 (CA9 2003), *overruled on other grounds by Dukes* v. *Wal-Mart Stores, Inc.*, 603 F.3d 571 (CA9 2010); *Powell*, 119 F.3d at 706; *Six Mexican Workers*, 904 F.2d at 1305, 1307. The courts of appeals also have recognized that, by facilitating settlement in cases where a direct distribution would be infeasible, *cy pres* remedies avoid needless litigation and serve the objectives of benefitting the class, allowing access to judicial relief for small claims, and providing deterrence. *See Baby Products*, 708 F.3d at 172; *Pharmaceutical Industry*, 588 F.3d at 33–34: *see generally* 3 Alba Conte & Herbert B. Newberg, NEWBERG ON CLASS ACTIONS § 10:15 (4th ed. 2002).

While acknowledging the utility of the *cy pres* device in these circumstances, the circuits also uniformly have recognized—and guarded against—the possibility that *cy pres* remedies might be

misused. The Ninth Circuit has taken a lead role on this point, noting the "inherent risk" that "class counsel may collude with the defendants, tacitly reducing the overall settlement in return for a higher attorneys' fee." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (CA9 2011); *see also Dennis* v. *Kellogg Co.*, 697 F.3d 858, 868 (CA9 2012); *Nachshin*, 663 F.3d at 1039–40. For this reason, in the Ninth Circuit and elsewhere, district courts are instructed to reject settlements that are suggestive of collusion. *See Bluetooth*, 654 F.3d at 946–47 (vacating approval of settlement in case with "warning signs" of collusion); *Mirfasihi*, 356 F.3d at 785 (because class actions are "rife with potential conflicts," district courts must scrutinize a proposed settlement to ensure that class counsel are acting "as honest fiduciaries for the class as a whole"); *Baby Products*, 708 F.3d at 175 (same).

The circuits also have uniformly required a nexus between the proposed *cy pres* remedy and the interests of the class, in order to ensure that the class receives some form of benefit for their claims. *See Baby Products*, 708 F.3d at 180 n.16 ("[c]ourts generally require the parties to identify 'a recipient whose interests reasonably approximate those being pursued by the class'"); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 32–33 (CA1 2012) (*cy pres* recipients must be those "whose interests reasonably approximate those being pursued by the class"); *Nachshin*, 663 F.3d at 1036 (*cy pres* remedy "must account for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members"); *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 681–82

(CA8 2002) (requiring connection between *cy pres* distribution "and the subject matter of this class action"); *Powell*, 119 F.3d at 707 (approving *cy pres* scholarship remedy that would equate with objectives of class members); *Six Mexican Workers*, 904 F.2d at 1308 (reversing where *cy pres* remedy benefited a group "far too remote from the plaintiff class"); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179, 184 (CA2 1987) (approving *cy pres* distribution that would "benefit the entire class"). Courts also have given closer scrutiny to *cy pres* distributions unilaterally directed by the district court—as distinguished from payments, such as the present one, that are designated by the parties as part of a settlement. *See Pharmaceutical Industry*, 588 F.3d at 34 (collecting authorities).

Significantly, none of courts of appeals has noted a circuit split on any of these legal issues. To the contrary, they have indicated broad agreement with each other on the applicable legal standards. *See*, *e.g.*, *Masters*, 473 F.3d at 436 (Second Circuit decision citing with approval the Ninth Circuit's observation in *Six Mexican Workers* that "[f]ederal courts have frequently approved [the Cy Pres] remedy in the settlement of class actions where the proof of individual claims would be burdensome or distribution of damages costly"). Indeed, the Third Circuit's opinion in *Baby Products*, upon which the Petition primarily relies in asserting divisions among the circuits, cites the Ninth Circuit's decision below with approval with respect to its *cy pres* holding. 708 F.3d at 173.

In the present case, the Ninth Circuit followed these settled standards. It approved the *cy pres*

remedy only after upholding the district court's finding, conceded by the objectors, that individual distributions were infeasible, and only after concluding that the distribution to DTF "bears a direct and substantial nexus to the interests of absent class members and thus properly provides for the 'next best distribution' to the class." Pet. App. 15.

B. The cases cited in the Petition reflect nothing more than the application of the same legal standards to different sets of facts.

1. The Petition is incorrect that there is a circuit conflict because other circuits have rejected *cy pres* remedies purportedly "similar[]" to the one at issue here. Pet. 1, 19–25. The cited cases all apply the same legal standards, and none contains any statement of law that conflicts with the decision below. Some courts, including the Ninth Circuit, have struck down settlements that included *cy pres* remedies. But they have done so only because the particular remedies failed to satisfy settled legal standards—such as where a cash distribution would have been feasible, where there was an insufficient "nexus" between the *cy pres* payment and the interests of the class, or where the district court's evaluation of the settlement was otherwise less than thorough.

The Third Circuit's decision in *Baby Products*, for example, involved a $35 million antitrust settlement fund from which claims would be paid out at a discount on a three-tiered basis, with a bottom tier of $5 for claimants who lacked proof of purchase. 708 F.3d at 170-71. The balance remaining after payment of the three tiers would be paid on a *cy pres* basis to

appropriate charities. *Ibid*. The flaw in the settlement, the Third Circuit found, was that the parties had defended the three-tiered payout structure to the district court based upon incorrect information that drastically underestimated the percentage of claims that would fall into the $5 category, with the result that the district court, when it approved the structure, assumed a much larger class payout than actually would be the case. *Id*. at 171, 175–76. On appeal, new information emerged showing that virtually all the claims would be paid out at the $5 level, resulting in significantly less to be distributed to the class (and therefore significantly more for the proposed *cy pres* fund) than the parties had told the district court. There was no suggestion that it would be infeasible to pay more than $5 to the claimants—in fact, larger payments had been expected—or that any of them would be over-compensated if paid more than $5. *Id*. at 171, 175. The Third Circuit was troubled that the district court, when it approved the settlement, did so based upon flawed information about the rate and level of claims. The court remanded so that the district court, in its discretion, could account for the new data and decide whether the claims structure still made sense. *Id*. at 175-76.

Contrary to Petitioner's suggestion, the court in *Baby Products* did not establish a general rule requiring district courts to estimate dollar values for all claims to be resolved through a settlement. Indeed, the Third Circuit has made clear—as did the Ninth Circuit below—that "the weighing of a claim against compensation cannot be … exact, [n]or should it be, since an exact judicial determination of the

values in issue would defeat the purpose of compromising the claim." *In re Penn Cent. Transp. Co*., 596 F.2d 1102, 1114 (CA3 1979); *accord* Pet. App. 19 (district court need not "find a specific monetary value corresponding to each of the plaintiff class's statutory claims and compare the value of those claims to the proffered settlement award," a process that would be "onerous" and often "impossible").

In fact, the Ninth Circuit *does* require a district court to assess "the strength of the plaintiffs' case" and "the risk, expense, complexity, and likely duration of further litigation," Pet. App. 10, 19 (citing *Hanlon*, 150 F.3d at 1026), and the district court did so here, Pet. App. 55–56. That standard tracks the Third Circuit's rule. *See In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 317 (CA3 1998) (district court should consider, *inter alia*, "the risks of establishing liability [and] damages," and "the complexity, expense and likely duration of the litigation").

The Ninth Circuit's analysis also comports with the Seventh Circuit's various rulings in *Mirfasihi* v. *Fleet Mortgage Corp*. *See* Pet. 22–24. There, the parties had agreed to a *cy pres* remedy of approximately $243,000 for a 1.4 million member class, which would have amounted to 17 cents per class member if distributed to the entire class. *See* 450 F.3d 745, 746–47 (CA7 2006). The Seventh Circuit noted that this distribution would be proper if the class "had no claim—more precisely no claim large enough to justify a distribution to them," 356 F.3d 781, 785 (CA7 2004); it remanded to the district court, twice, because the district court failed to evaluate the plaintiffs' claims under all of the

relevant state statutes. *See ibid.*; 450 F.3d at 750–51. The Seventh Circuit instructed the district court to do essentially what the district court did here—consider the "probability of plaintiff prevailing on its various claims" and the "expected costs of future litigation." 450 F.3d at 748.

Significantly, in a third decision that the Petition fails to cite, the Seventh Circuit ultimately *affirmed* the *cy pres* distribution on a rationale similar to the Ninth Circuit's here: that the underlying claims were of dubious value and presented significant litigation risks for the plaintiffs. *Mirfasihi* v. *Fleet Mortgage Corp*., 551 F.3d 682, 686 (CA7 2008). Among other things, the Seventh Circuit discounted the plaintiffs' claims for statutory damages because some of the relevant statutes did not permit the aggregation of such claims through a class action—a rationale similar to that applied here. *Id*. at 685; *see also* Pet. App. 20. And just as the courts here questioned the applicability of the VPPA to Facebook, *see* Pet. App. 20–21, the Seventh Circuit found the federal Fair Credit Reporting Act inapplicable to the defendant. *See* 551 F.3d at 685–86. Nothing in this set of decisions creates a conflict with the decision here.

The Second and Fifth Circuit decisions striking down *cy pres* remedies in *Masters* and *Klier* also are consistent with the decision below. Both cases involved substantial residual funds that the courts found could feasibly be distributed to class members, and neither involved a *cy pres* remedy that was specifically contemplated or authorized by the settlement agreement. *See Masters*, 473 F.3d at 436; *Klier*, 658 F.3d at 478 & n.29. Indeed, in *Klier*, the district court unilaterally ordered a *cy pres*

disposition of residual funds *in contravention* of the parties' agreement, which specifically directed that such funds be distributed to the class. *See* 658 F.3d at 478. And in *Masters*, the court directed the funds to charities without even considering whether a distribution to the class would be possible. *See* 473 F.3d at 436. These decisions create no conflict with the Ninth Circuit's decision below.

2. There also is no conflict concerning the "required nexus between a *cy pres* award and class members' interests." Pet. 25. Again, the Ninth Circuit follows the same standard as other circuits.

In *In re Airline Ticket Commission Antitrust Litigation*, a class action brought on behalf of travel agents, the Eighth Circuit rejected a settlement that distributed *cy pres* funds, not to travel agents, but to a public interest law group with no connection "between its purposes and the subject matter of [the] class action." 307 F.3d. at 681–82. The court stressed the need to tailor a *cy pres* distribution to the nature of the underlying lawsuit. *Id.* at 682–83.

Likewise, the Seventh Circuit in *Houck* v. *Folding Carton Administration Committee*, 881 F.2d 494, 496–97 (CA7 1989), a nationwide class action alleging antitrust violations on behalf of folding carton purchasers, rejected a settlement agreement that distributed *cy pres* funds to two law schools in Chicago for "research projects in the area of class actions, and particularly antitrust law." Because the settlement involved a nationwide class, the Seventh Circuit directed the district court to consider a recipient or recipients with a broader geographical scope. *Id.* at 502–03.

The Second Circuit in *In re Agent Orange Product Liability Litigation* approved of the proposal to establish an independent "class assistance foundation." Its decision turned on the finding that the foundation would "benefit the entire class" by "set[ting] aside a portion of the settlement proceeds for programs designed to assist the class." 818 F.2d at 184–85. The Ninth Circuit applied the same standards here.

None of these cases creates a conflict on the required "nexus" between *cy pres* remedies and the interests of the class. That some of these cases rejected *cy pres* remedies merely reflects the fact that those decisions—unlike this one—addressed awards to charitable entities lacking a sufficient substantive or geographic connection to class members' interests. Indeed, these decisions closely parallel the Ninth Circuit's own decisions striking down *cy pres* awards that similarly lacked the requisite nexus. *See Six Mexican Workers*, 904 F.2d at 1308; *Nachshin*, 663 F.3d at 1036; *Dennis*, 697 F.3d at 868.

3. Finally, there is no split concerning whether a district court must "supervise the administration of an open-ended *cy pres* award to ensure that it achieves its intended purpose," Pet. 28—a question on which the circuits do not disagree and that ultimately is highly fact-specific. In this case, as the Ninth Circuit emphasized, the district court will retain jurisdiction over the implementation of the settlement and the disposition of settlement funds, and in so doing can ensure that DTF acts in accordance with its purpose. Pet. App. 71–72; *see also id*. at 17 n.4.

Moreover, the two cases Petitioner cites involved district courts that ordered *cy pres* distributions on their own initiative, and neither established any general set of rules regarding court supervision of *cy pres* recipients. In *Agent Orange*, the district court had proposed a "class assistance foundation." The Second Circuit thought that court supervision of the distribution process was warranted for several reasons, including the fact that the foundation's broad mandate allowed it to engage in "political advocacy," 818 F.2d at 186—an activity that DTF's Articles specifically prohibit. The Second Circuit never has read *Agent Orange* to require ongoing court supervision of any entity receiving *cy pres* funds.

And in *In re Lupron*, the First Circuit affirmed a district court's ruling distributing excess settlement funds to charity, including "an oversight plan which required [the charity] to submit regular reports to account for the grant awards and expenditures." 677 F.3d at 28. The First Circuit clarified that an annual audit was an intended part of the district court's order. *Id.* at 38–39. But, again, the court did not adopt any general rule requiring an annual audit of any *cy pres* recipient.

As these cases illustrate, the question of judicial supervision of *cy pres* remedies generally arises and is resolved on a case-specific basis. Indeed, the Ninth Circuit required supervision in *Six Mexican Workers*, 904 F.2d at 1307–09, where there "was no way of knowing whether the organization would use the funds to the benefit of class members." Pet. App. 17. Here, the Ninth Circuit found this aspect of *Six Mexican Workers* inapposite because the settlement agreement and DTF's Articles of Incorporation "tell

us exactly how funds will be used." *Ibid*. Again, there is no circuit conflict on this point.

II. The Petition Does Not Present an Important Question of Federal Law That Warrants This Court's Review.

The Petition also presents no important question of federal law warranting this Court's review. Petitioner's broadside attack on the use of *cy pres* funds ignores both the benefits of *cy pres* remedies in advancing the judicial policies favoring class action settlements, and the district court's discretionary power under Rule 23(e) to ensure that such remedies are appropriately limited and structured.

Petitioner's derision of *cy pres* remedies as "pathologies of the class-action procedure" (Pet. 30) ignores their important and well-established role in resolving class actions where the relatively low settlement value of the claims would yield only a *de minimis* payment per individual class member. *Cy pres* remedies allow the aggregated funds to be put to a use that, if properly defined, will benefit class members by approximating the interests sought to be furthered by the class action. The alternative would be either to force the parties to continue to litigate the low-value claims, or to insist on a higher settlement amount that would overvalue the claims at issue—neither solution being consistent with the strong judicial policies favoring settlement.

For all its rhetoric about the potential for abuse of *cy pres* settlements, Pet. 30–35, the Petition offers no alternative, much less one that is superior to the criteria already being employed by the courts of

appeals to ensure that such settlements do not serve as vehicles for unfairness or collusion. These concrete criteria include judicial scrutiny of the purposes of the organization and its nexus to the interests of the class members. Combined with the district courts' broad discretion under Rule 23(e)(2) to "appraise the reasonableness of particular class-action settlements on a case-by-case basis, in the light of all the relevant circumstances," *Evans* v. *Jeff D.*, 475 U.S. 717, 742 (1986), these criteria are sufficient to ensure that the *cy pres* device is used only when it furthers the appropriate interests and includes the requisite safeguards. Presumably, the courts of appeals will continue to weigh each proposed *cy pres* settlement under these standards, striking down some that do not comply, or that bear signs of collusion, and upholding others. In fact, the evident collaboration among the federal circuits in this area, and the consistency of their approaches, are strong indications that the process of judicial review is working. There is no need for this Court to intervene.

III. This Case Is a Poor Vehicle for Addressing the Legal Standards Governing *Cy Pres* Remedies in Settlement Agreements.

Even if the Court wished to evaluate the use of *cy pres* remedies in class actions, this is a poor vehicle because Petitioner failed to preserve the lead argument in the Petition, namely "whether a *cy pres* distribution is appropriate" where there is to be no direct distribution to class members, Pet. 19. Petitioner's appellate brief in the Ninth Circuit conceded this argument away:

> "This appeal does not challenge usage of a cy pres remedy to resolve this class action. On the contrary, such a remedy may be appropriate based on, for example, the size of the class when balanced against the overall size of the fund. Rather, this appeal concerns the settling parties' failure to demonstrate that the charitable foundation is an appropriate usage of class settlement funds and the lack of district court involvement and oversight…."

CA9 Dkt. No. 14-1, at 21 (Case No. 10-16398). This Court normally does not entertain an argument that was waived in the courts below. *United States* v. *Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994).

Nor did Petitioner preserve the argument, implicit in the Petition, that a distribution of settlement funds to individual class members would have been feasible. Despite the specific findings on this point by the district court, Petitioner did not contest the issue either in that court or in the Ninth Circuit—and indeed, appellate counsel arguing on behalf of objectors conceded the point at argument. CA9 Recording of Oral Argument 6:25–7:07; *see also* Pet. App. 15. Given this history, Petitioner is not in a position now to argue that individual distributions would have been feasible. *See Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (declining to review concurrent findings of fact by two courts below absent "a very obvious and exceptional showing of error").

Another reason this case is a poor vehicle is that it involves a host of fact-specific issues. These include, among others, whether the district court correctly evaluated the total settlement amount, the monetary and non-monetary benefits provided to the class, the strength of plaintiffs' claims and Facebook's defenses, the costs and risks of further litigation, the *bona fides* of plaintiffs' VPPA claims, and the nexus between the *cy pres* distribution and the interests of the class. Far from offering this Court an opportunity to provide broad "guidance" for the lower courts, this case would require the Court to focus its attention on a multitude of factual issues bound up in the alleged error asserted by the Petition.

IV. The Decision by the Court of Appeals Is Correct on the Merits.

Finally, certiorari is unwarranted because the Ninth Circuit's decision was correct. The district court acted within its discretion in approving the settlement reached after months of protracted, good faith negotiations.

The district court recognized its obligation to scrutinize the proposed settlement—a duty it noted was "particularly pronounced" because the class settlement arose before class certification. Dist. Ct. Dkt. No. 141, at 6. It then conducted a comprehensive analysis of the record before it. In particular, it weighed the amount of the $9.5 million settlement against the strength of plaintiffs' claims, including the possibility that the VPPA claims might allow statutory penalties. Pet. App. 20, 54–61.

After briefing and argument on the VPPA claims, the court concluded that those claims were "speculative at best." Pet. App. 59. It reached this conclusion after hearing arguments concerning (1) plaintiffs' failure to support the theory of aggregated statutory damages; (2) the fact that the VPPA applies only to a "video tape service provider," a defined term that likely did not cover Facebook;[3] (3) the Ninth Circuit's refusal to read secondary liability into a related statute, *Freeman* v. *DirecTV, Inc.*, 457 F.3d 1001 (CA9 2006); and (4) the fact that the only real candidate for liability under the statute, defendant Blockbuster, was on the verge of bankruptcy. *See* Pet. App. 20–21, 59. It was not an abuse of discretion for the district court to discount plaintiffs' claims and conclude that "the $9.5 million offered in settlement is substantial." *Id.* at 56.

It also was within the district court's discretion to approve a *cy pres* remedy where individual distributions "would be *de minimis* for each class member." This factual point was conceded by the only objector who appeared at the fairness hearing, and was supported by the district court's independent analysis. The court's decision complied with settled law, discussed above, holding that *cy pres* remedies are proper where individual distributions would be infeasible. Moreover, both the district court and the Ninth Circuit noted that the *cy pres* distribution was only one component of the settlement agreement

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[3] *See* 18 U.S.C. § 2710(a)(4) (defining "video tape service provider" to mean "any person, engaged in the business, in or affecting interstate or foreign commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials….").

because the class also receives a direct benefit from the injunctive relief in the settlement requiring Facebook permanently to terminate the Beacon program. Pet. App. 5.

Finally, it was within the district court's discretion to approve DTF as the *cy pres* recipient. DTF's purpose and funding objectives are tailored to the interests underlying the class claims. It must direct the settlement funds to a narrow category of activity, specifically "critical issues relating to protection of identity and personal information online through user control," and "protect[ing] users from online threats." Pet. App. 6. As the objectors conceded, DTF's distribution of settlement funds "will benefit absent class members and further the purposes of the privacy statutes that form the basis for the class-plaintiffs' lawsuit." *Id*. at 15. Plaintiffs' desire to ensure that the foundation could not be controlled by Facebook is reflected in the two-thirds voting requirement for funding decisions, which ensures that any director who is a Facebook employee cannot unilaterally force or block any funding decision.

Although the Petition takes issue with the distribution of *cy pres* funds to a new charity rather than an existing organization, it points to no case law suggesting that this is impermissible. And the concern that DTF lacks a "track record," Pet. 2, is mitigated, as the Ninth Circuit recognized, by the strict language in the settlement agreement that governs DTF's purpose, activities, and governance, and by the fact that the initial members of the board of directors, which includes a director of the Information Privacy Programs at the Berkeley Center

for Law & Technology and a member of the federal Online Safety & Technology Working Group, have substantial experience in this space. Pet. App. 6–7.

In the end, Petitioner quarrels with the details of the settlement to which Facebook and plaintiffs agreed, at the urging of an experienced private mediator, after many months of arm's-length negotiations. But the district court recognized that its role was not to dictate the agreement of private parties, but only to determine whether that agreement was "fair, reasonable, and adequate" under Rule 23(e)(2). In turn, the question before the Ninth Circuit was simply whether the district court's approval fell within its "broad discretion" under Rule 23(e)(2). Pet. App. 9. Both courts correctly applied these standards to the facts before them.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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