No. 15-___

IN THE

Supreme Court of the United States

THEODORE H. FRANK,

Petitioner,

v.

JOSHUA D. POERTNER, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves a class-action settlement in which class counsel received $5,680,000 and their millions of class-member clients realized only $344,850 combined. In other words, class counsel received *over 94%* of the total cash recovery provided in the settlement. Breaking with other circuits, the Eleventh Circuit held that the district court did not abuse its discretion in approving that settlement because it added to the settlement's value other "benefits"—including a *cy pres* award requiring the defendant to donate some of its product to a charity of its choosing. The questions presented are:

1. Whether, or in what circumstances, a settlement that provides a disproportionate allocation of its pecuniary benefit to class counsel is "fair, reasonable, and adequate," under Federal Rule of Civil Procedure 23(e)(2).

2. Whether, or in what circumstances, the use of a *cy pres* remedy in lieu of attempting further distributions to actual class members is "fair, reasonable, and adequate," under Federal Rule of Civil Procedure 23(e)(2).

PARTIES TO THE PROCEEDING

Petitioner Theodore H. Frank was an objector in the district court proceedings and appellant in the court of appeals proceedings.

Respondent Joshua D. Poertner was a named plaintiff in the district court proceedings and appellee in the court of appeals proceedings.

Respondents The Gillette Company and The Procter & Gamble Company were defendants in the district court proceedings and appellees in the court of appeals proceedings.

Respondents Christopher Batman, Robert Falkner, Wanda J. Cochran, and Grace M. Cannata were objectors in the district court proceedings and appellants in the court of appeals proceedings.

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INTRODUCTION

Class actions play a vital role in the judicial system. Often, they are the only way plaintiffs can be compensated and defendants held to account for serious misdeeds that widely distribute their harms. Moreover, as with many cases, some class actions need to be settled, sparing both sides the costs and uncertainties of litigation. But as this Court has recognized, class-action *settlements* create special problems for our adversary system because, in that non-adversary context, it isn't always clear class counsel will have their clients' best interests at heart. *See, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619-620 (1997).

The basic problem is this: While class counsel and defendants have an incentive to bargain effectively over the *size* of a settlement, similar incentives do not govern their critical decisions about how to divvy it up—including the portion allocated to counsel's own fees. The defendant cares only about the bottom line, and will take any deal that drives it down. Meanwhile, class counsel have an obvious incentive to seek the largest possible portion for themselves, and will accept bargains that are worse for the class if their share is sufficiently increased. As Judge Posner has recently explained: "From the selfish standpoint of class counsel and the defendant, … the optimal settlement is one modest in overall amount but heavily tilted toward attorneys' fees." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014). That is hugely problematic because our adversary system—and the valuable role class actions

play within it—both depend upon unconflicted counsel's zealous advocacy for their clients, especially where (as here) those clients do not even get to choose their counsel for themselves.

Rule 23(e) thus requires courts to find that class-action settlements are fair and reasonable to absent class members before they approve them. But those decisions must be more than just "appraisals of the chancellor's foot kind … dependent upon the court's gestalt judgment or overarching impression." *Amchem*, 521 U.S. at 621. Instead, the vitality of the class-action mechanism depends on *how* courts scrutinize such settlements, and whether their doctrinal tests align the incentives of class counsel with those of the vulnerable, absent class members whose claims they purport to settle away.

This case is an object lesson in how the class-action mechanism can go wrong, and how doctrines adopted in other circuits would have set it right. Here, counsel settled a case about how Duracell deceptively marketed certain batteries by creating a huge class releasing the claims of 7.26 million plaintiffs nationwide in exchange for a relief package with (let's say) questionable value to that massive class. The parties' counsel structured the settlement to provide class counsel more than $5.6 million—a *multiple* of the "lodestar" value of their hourly bills—while all their clients together realized less than $345,000 in total and 99% of them got nothing at all. When counsel requested their $5+ million dollar fee, they estimated the settlement value at nearly $50 million based on the assumption that every class member would file a claim, even though they knew

for certain that only a tiny fraction would. The parties also agreed that Duracell would give $6 million worth of batteries (retail value) to third-party charities of its own choosing *over five years*, and to an injunction governing only a line of batteries Duracell had *already discontinued*. Class counsel plainly received by far the largest share of whatever benefits this settlement produced. And yet the Eleventh Circuit approved it because its precedent allows vague notions of the settlement's overall value to be included in assessing the share of pecuniary benefit that flows to the class as compared to its attorneys. *See* App. 8a-15a.

There is a clear conflict among the Courts of Appeals on whether a court can approve a settlement where such a disproportionate share of the overall relief flows to class counsel. *See, e.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013). Most notably, the Seventh Circuit has held that the attorney award must be a fraction of the amount *actually realized* by the class, a test this settlement would flunk spectacularly. *See Pearson*, 772 F.3d at 781. The circuits' disagreement also embraces the related *cy pres* question of when it is appropriate to direct recoveries to charity rather than the actual class plaintiffs whose claims are being sacrificed, as well as the propriety of *class* counsel then counting that relief to someone *other* than their clients as a justification for their fees. *Id.* at 781, 784. Members of this Court have already flagged these issues as appropriate for its consideration. *See, e.g.*, *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting denial of certiorari); *Int'l Precious Metals*

Corp. v. Waters, 530 U.S. 1223, 1224 (2000) (O'Connor, J., respecting denial of certiorari). And they are in vital need of immediate decision because, as this example vividly shows, the "class action math" in some circuits now allows the "fee collected by the plaintiffs' attorneys [to] outsize the benefit paid to consumers, an outcome that is increasingly more common in class action suits such as this." Jacob Gershman, *Value of Beck's Beer Settlement a Case Study in Class Action Math*, WALL ST. J. (Oct. 22, 2015) (noting circuit split).

This case, moreover, is a strong vehicle for their resolution. This settlement is flawed on its face: Class counsel realized over sixteen times more than their millions of clients combined, and even counting *all* of the *cy pres* award as a benefit to the class (which it is not) would still leave counsel with almost half the settlement value. Other courts have recently explained at length why they would reject deals that are much *better* than this one for the class relative to its attorneys, *see Pearson*, 772 F.3d at 781-87, and because nationwide class-action settlements are incomparably easy to forum shop, the predictable result of the Eleventh Circuit's far-more-permissive standard is that more and more dubious settlements are flowing into its courts. *See infra* p. 30 (noting that Eleventh Circuit courts have approved ten similar settlements in the last two years, three of which have *already* relied on this case).

If class actions are to serve their real purpose, the Court needs to step in now. Settlement proponents will inevitably complain that these cases are factbound because every settlement is different, but

the disagreement is real: Different courts use different *rules* that either succeed or fail in aligning class counsel's incentives with those of their clients. Permitting results like this one simply ensures that class counsel, when they plan the place and structure of their cases, can head for favorable fora and avoid any real incentive to maximize recovery for the people class actions are meant to protect. Indeed, while settlement proponents frequently raise the specter of a zero class recovery if settlements like these are rejected, all judicial experience is to the contrary: Remanding a case like this one most frequently results in a *better* settlement rather than no settlement at all. To the extent that class actions are really about the class members whose claims are sacrificed, they will plainly benefit from more searching judicial scrutiny at the settlement stage. This court should grant certiorari, and ensure that scrutiny is actually provided throughout the courts.

PETITION FOR CERTIORARI

Petitioner Theodore Frank respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion (App. 1a) is unpublished but available at 618 Fed. Appx. 624. The opinion of the Middle District of Florida (App. 16a) is unpublished.

JURISDICTION

The judgment below was entered July 16, 2015. Justice Thomas extended the time for this petition to

December 11, 2015. *See* No. 15A345. This Court has jurisdiction under 28 U.S.C. §1254(1).

PROVISIONS INVOLVED

Rule 23(e)(2) provides, with respect to a proposed settlement, that:

> If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

STATEMENT OF THE CASE

I. The Recognized Incentive Problems Of Class-Action Settlements

"Class-action settlements are different from other settlements. The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require court approval. In contrast, class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of unnamed class members who by definition are not present during the negotiations. And thus there is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own." *Pampers*, 724 F.3d at 715.

The potential for conflict is structural and acute because every dollar reserved to the class is a dollar defendants will not want to pay class counsel. Defendants care only about minimizing payments and are indifferent to allocation, and so a court must ensure that counsel is not self-dealing at the class's ex-

pense. *Supra* pp.1-2; *Redman v. RadioShack*, 768 F.3d 622, 629 (7th Cir. 2014); *Pearson,* 772 F.3d at 786-87; *Eubank*, 753 F.3d at 720; *Pampers,* 724 F.3d at 718; *In re Bluetooth Headset Litig.*, 654 F.3d 935, 948-949 (9th Cir. 2011). The problem, however, is that class counsel have various tools for obscuring some of the allocative decisions that get made between counsel and class recovery, and can very subtly trade benefits to defendants for bigger fees. These tools primarily function by inflating the settlement's apparent relief, which will in turn justify outsized fee requests absent rigorous doctrinal tests designed to weed them out.

To see this, imagine a lawyer actually tried to compromise a class action with a straightforward cash settlement paying him $5.6 million and paying the 7.26 million class members a total of $345,000—as this settlement ultimately did. It is hard to believe any judge would approve that deal. *See, e.g.*, *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (counsel receiving even 38.9% of settlement benefit is "clearly excessive"). Accordingly, to have any chance of surviving review, the deal must be structured to obfuscate the likelihood of this result. This is accomplished by larding the analysis with hypothetical class recoveries and amorphous "benefits" that ultimately have little value to the class, but are cheap for defendants to provide and so easy to include in the deal.

Chief among the means to this end is a "claims-made" structure where defendants agree to make a large amount of money *available* but only pay out on the claims that class members actually file. In con-

sumer-fraud actions, for example, it can be difficult to identify exactly who bought the product and so should share in the class recovery. Incentivizing counsel to actually seek them out can help ameliorate the problem. But the frequently invoked alternative is for the defendant to agree to make a small amount available to all of the many people who might make a no-proof claim (say, $5 each for 10 million possible claimants), and to simply publish this fact in a newspaper or the like. The predictable result is that most class members go totally uncompensated because they don't file a claim. *See, e.g.*, *Pearson*, 772 F.3d at 782 (citing Daniel Fisher, *Odds of a Payoff in Consumer Class Action? Less Than a Straight Flush*, FORBES (May 8, 2014) (discussing evidence in *this case*)); Alison Frankel, *A Smoking Gun in Debate over Consumer Class Actions?*, REUTERS (May 9, 2014) (noting that median claims rate in such cases is "1 claim per 4,350 class members"). But now counsel can say they made $50 million available and thereby seek to justify a fee award in the many millions of dollars. Some circuits (like the Eleventh) are favorites of class counsel because they permit this kind of calculation; some (like the Seventh) do not, focusing instead on the amount the class *actually* recovers. *See, e.g.*, Wright & Miller, 7B Fed. Prac. & Proc. §1803.1 & nn.43-44 (3d ed. 2015) (collecting cases on both sides of this split "in settlements in which it is agreed that unclaimed funds will revert to defendant").

Another tool for inflating the class's apparent relief is a hard-to-value injunction the defendant is happy to accept. For example, a class action often concerns a practice that is no longer material to a

defendant's business, which the defendant will promise not to resume. Such injunctions rarely inure much to the benefit of class members. *See, e.g.*, *Pampers*, 724 F.3d at 718-21; *Crawford v. Equifax Payment Servs., Inc.*, 201 F.3d 877, 882 (7th Cir. 2000); *Pearson*, 772 F.3d at 784-86. But it is easy for *both* settling parties to come to court and claim they have value. And this provides ready cover for a large fee award because objectors—who have no insight into negotiations and little opportunity or financial incentive to invest in expensive expert analysis of future-looking relief—are at an enormous disadvantage in trying disprove such a claim.

Cy pres awards can play a similar role. In some actions, it is nearly impossible to identify class members or get them their recovery, and *cy pres* awards (essentially, charitable donations) are used as alternative means of holding defendants to some kind of account. But, as critics have documented, these awards can "create the potential for conflicts of interest by ensuring that class attorneys are able to reap exorbitant fees regardless of whether the absent class members are adequately compensated." John Beisner et al., *Cy Pres: A Not So Charitable Contribution to Class Action Practice* 13 (2010); Martin Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 621 (2010). The issue is that defendants are much happier making *cy pres* awards than class payments: Duracell giving batteries to "Toys for Tots" plays a lot better in high-profile ads than providing recompense to fraud victims. *See Duracell-Quantum TV Spot,* http://www.ispot.tv/ad/76LH/duracell-quantum-toys-

for-tots. Sometimes, defendants already make these donations, so that the *cy pres* "award" is just a "paper tiger." *See, e.g.*, *Dennis*, 697 F.3d at 867-68. And yet, once again, including such provisions allows the parties to fluff a settlement's value, increasing the plausible fee request without taking any skin off the defendant's back.

The American Law Institute is among the many commentators who have recognized that *cy pres* awards are a growing issue in class-action settlement. *See* American Law Institute's Principles of the Law of Aggregate Litigation ("ALI") §3.07 (2010). So too are members of this Court. *See Marek*, 134 S. Ct. at 9. But while some circuits now seriously scrutinize their use and limit their role in fee awards, others (like the Eleventh, here) continue to take a highly permissive approach to directing relief to defendant-friendly charities rather than the actual class members who sacrifice their claims, and then counting that in the fee calculation as a benefit to the class.

Finally, settling parties also use a variety of legal "gimmicks" to limit scrutiny of class-action settlements. Two important examples are "clear-sailing" clauses (where the defendant agrees not to challenge the fee) and "kicker" clauses (where any reduction in the fee award reverts to defendants rather than the class). Together, these clauses limit the incentive and ability of *any* party to complain about class counsel's fees. They can also nudge district courts away from reducing abusive awards, on the theory that—as between class counsel and the defendants—it is at least better for counsel to get the

money. But what is buried below the surface is that such an arrangement is neither organic nor necessary, and if defendants are willing to pay the extra money to counsel, there is no doubt a way to structure the settlement to provide it to class members instead. Accordingly, while a few courts treat these "selfish" clauses as red flags even when negotiated at "arm's length," *see, e.g.*, *Redman*, 768 F.3d at 628, 637; *Pearson*, 772 F.3d at 786-87; *Bluetooth*, 654 F.3d at 947-49, others let them slide, App. 14a, and they frequently help prevent attacks on abusive settlements from succeeding or being brought at all.

Notably, *all* class-action settlements create problems for our adversary system: A district court faces parties who (1) want to settle, (2) have almost all the financial interest, and (3) have all the information, and they are both arrayed against third-party objectors asking the court to forge onward in a litigation the litigants want to abandon. It is easy to take the words of both active parties about what certain injunctions are worth, or what deals are possible, and reflexively view objectors as only flies in the ointment. That makes the tools discussed above all the more dangerous. Simply put, the inflation of settlement value for the sake of a fee award is—for structural reasons—already too easy because of the lack of adversary presentation. *See, e.g.*, *Eubank*, 753 F.3d at 719-20. And yet, settling parties have developed a variety of mechanisms to make it easier still.

Remarkably, this settlement combined all these tools at once. As explained below, it included: (1) a claims-made process that valued the settlement at $50 million but realized less than one percent of that

value; (2) a difficult-to-value injunction against already-abandoned practices; (3) a *cy pres* award allowing defendants to donate product at retail value to a charity it already supported; and (4) clear-sailing and kicker clauses, ensuring class members had no chance to share in a reduction of the outsized fee request. But rather than scrutinize these red flags, the Eleventh Circuit's highly permissive precedent allowed it to wave this deal through.

II. Factual And Procedural Background

In 2009, defendants began selling "Duracell Ultra" batteries, marketing them as longer lasting than other Duracells. Four years later, they discontinued the product, App. 2a-3a, with no evidence of any plan to reintroduce it. Instead, in August 2013, Duracell launched the "Quantum" brand as its longest-lasting product. Press Release (Aug. 15, 2013), http://goo.gl/skDkky.

In 2012, respondent Poertner sued defendants in Florida court on behalf of a class of Florida Ultra purchasers, alleging that the "longest-lasting" claim was fraudulent under state law. Defendants removed to federal court. In September 2013—a week after the class-certification hearing but before the court had ruled—the parties reached a global settlement. App. 3a.

The settlement expanded the case dramatically while providing only limited relief to class members. Poertner filed an amended complaint purporting to represent a nationwide class of 7.26 million Ultra purchasers, which allowed defendants to obtain a nationwide release. In exchange, defendants agreed that class members who filed timely claims could get

$3 per pack of batteries purchased, up to two packs ($6) without proof of purchase, and only up to four ($12) even if they could prove they purchased more. Class members who did not file claims would receive nothing. App. 3a. The parties attempted no means of identifying, notifying, or compensating class members other than publication notice of the claims process. App. 5a.

Defendants also agreed to an injunction against packaging Ultra batteries with the "longest-lasting" labeling. But the injunction had no effect on other brands of Duracell batteries, even though Ultra batteries had been discontinued and Quantum batteries were already being sold as the new "longest-lasting" variety. Defendants further agreed to make a *cy pres* donation of $6 million worth of batteries—calculated at *retail* value, and spread over *five years*—to "first responder charitable organizations, the Toys for Tots charity, or 501(c)(3) organizations." App. 4a. The settlement does not prohibit Duracell from fulfilling that "requirement" through its *existing* practice of donating batteries to Toys for Tots at holiday time—one it advertises aggressively. *See, e.g.*, *supra* pp.9, 12; Press Release (Nov. 22, 2013), http://goo.gl/7M51zx.

The settlement contemplated that counsel would apply for $5,680,000 in fees and costs without opposition from defendants. This represented about 11% of the $50 million at which counsel valued the settlement *on the assumption* that *every* class member made a two-pack claim. It was also a 1.56 multiple of counsel's "lodestar" estimate for their hourly bills. *See* App. 5a-6a & n.1. And if the court awarded less

than $5,680,000, the parties agreed the excess would revert to defendants, rather than the class. App. 14a & n.6.

Petitioner and class member Frank objected. Frank, who founded the non-profit Center for Class Action Fairness, has successfully challenged similar settlements in other circuits that likewise provided class counsel substantially more compensation than their clients. *See, e.g.*, *Pearson*, 772 F.3d at 787; Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES (Aug. 13, 2013) (calling Frank "[t]he leading critic of abusive class-action settlements"). The Center's objections have improved recoveries to class members by tens of millions. *See, e.g.*, *McDonough v. Toys "R" Us, Inc.*, 80 F. Supp. 3d 626 (E.D. Pa. 2015); *In re Citigroup Sec. Litig.*, 965 F. Supp. 2d 369 (S.D.N.Y. 2013). Frank's participation in these cases is often critical because, absent his issue-driven advocacy, there is frequently no one with an adequate incentive to fully contest potential abuses in cases aggregating low-value claims. *See infra* p.p. 32-33.

Frank in no way protested defendants' evident willingness to settle the case for (what he anticipated) would be about $6 million, but objected that the settlement's allocation was structured to primarily benefit counsel at the class's expense. Given the "claims-made" and "publication-notice-only" structure, the parties' self-serving valuation of the settlement at $50 million was obviously fictional—there was no prospect that every class member would file a two-pack claim. Instead, the fee award was almost certain to exceed 90% of the actual recovery, making

the settlement *per se* unfair. Frank further objected that an injunction respecting a discontinued product was valueless, and that the *cy pres* award had been permitted far too readily—with no showing that the money would not be better used trying to get actual recovery into the hands of class members. M.D. Fla Dkt. #12-803, Doc. 126. Frank noted, citing cases, that when settling parties actually want to disburse money to class members in consumer-fraud cases, they can frequently ascertain membership using subpoenas or otherwise-available data from retail loyalty programs or other tracking methods, permitting individualized notice or even direct payments. Doc. 162 at 14-17; Doc. 126-1, ¶7. Here, the parties did not even attempt any possible alternatives; they defaulted immediately to publication-only notice, which tends to conveniently inflate apparent settlement value well beyond anything defendants might actually pay.

In response, the parties argued that the amount class members actually receive is irrelevant to the valuation of the settlement pie as a whole. *See* App. 26a-27a. Defendants further averred that they did not possess individual customer data, which alone was sufficient to permit publication-only notice and resort to *cy pres*. App. 12a-13a.

To its credit, the district court ordered the parties to provide actual claims data, rather than rely exclusively on their $50-million estimate. As it turned out, only 55,346 class members made claims for a total of $344,850. App. 5a, 34a-35a. That represented less than 0.8 percent of the "predicted" settlement value. Ironically, class counsel defended

this result with a declaration from their settlement administration agent, whose data showed that publication-notice-only settlements will "almost always have a claims rate of less than one percent." App. 34a. But while that perhaps showed that this case's claims rate was not an aberration, it also proved that the parties *knew this would happen* when they negotiated a publication-notice-only settlement and told the court it was worth $50 million. Put otherwise, the settling parties essentially conceded that an honest, *ex ante* assessment of the likely value of the settlement to class members was less than $500,000—*an order of magnitude less* than what class counsel claimed for themselves, and *two orders of magnitude less* than what they told the court.

Surprisingly, the district court still approved the settlement and full fee request without any modification. App. 27a. It permitted the publication-notice-only procedure as "the best practical means of providing relief to the Class," merely because defendants represented that they did not have class-member data. App. 23a. Though it agreed that counsel's "$50 million calculation is somewhat illusory," it credited their efforts to make cash available, included the *cy pres* and injunctive relief as class benefits, and then held that the proposed $5,680,000 fee and 1.56 multiplier were reasonable. App. 22a, 26a-29a. In other words, the district court found it appropriate to actually *multiply* a full payment on all of class counsel's hourly bills based on the success of securing $345,000 for a class of 7.26 million people, an injunction respecting a discontinued product, and a *cy pres* award amounting to a donation Duracell already makes. In so holding, the district court

did not expressly address whether the allocation between class counsel and the class was unfair, or even mention the word "allocation."

III. The Decision Below

The Eleventh Circuit affirmed in an unpublished opinion that treated the egregious facts of this settlement as unproblematic in light of its precedent. *See* App. 9a-11a. Most importantly, the court found that there was no problem with structuring the settlement to provide so little to class members because "the use of a claims process is not inherently suspect." App. 9a. The court also approved the *cy pres* award, and its consideration in awarding attorneys' fees, simply because defendants did not themselves have any data regarding actual class-member identities—making distributions to class members "difficult." App. 10a-11a, 15a. It further viewed the injunction as valuable because the Ultra brand had been discontinued during the litigation, even if that decision predated the injunction and settlement. App. 11a-12a. And it held that the inherently self-dealing clear-sailing and kicker clauses were not self-dealing because they were negotiated at "arm's-length." App. 14a.

As a result, the court rejected Frank's "claim[] that the settlement is unfair because class counsel's slice of the settlement pie is too large." App. 14a-15a. It reasoned that "this objection is based on Frank's flawed valuation of the settlement pie: *limiting the monetary value to the amount of [defendants'] actual payments to the class*." App. 15a (emphasis added). Instead, it allowed the settling parties to fill in the pie with the other forms of "relief" the settle-

ment had made available, without requiring that it actually benefit class members as such. For that reason, it affirmed.

REASONS FOR GRANTING THE WRIT

The decision below presents an ideal and timely opportunity for the Court to resolve two separate circuit splits over the standards for reviewing class-action settlements and *cy pres* awards, and to provide much-needed guidance to the lower courts on these critical issues. The conflict is unmistakable: The Seventh Circuit has repeatedly held that the proper settlement valuation to compare to an attorney fee request is the amount class members *actually* recover, *Pearson*, 772 F.3d at 781; *Redman*, 768 F.3d at 630; the Eleventh Circuit here called that exact rule "flawed." App. 15a. It is clear that several other circuits would have rejected the egregious division of settlement value between class and counsel in this case, and that the *cy pres* award here would be rejected in other circuits even apart from the question of attorneys' fees. The problem is recurring and amenable to forum shopping, and further dubious settlements will continue to find their way to the Eleventh Circuit for approval unless this Court intervenes. This case's startling facts make it a perfect opportunity to do so, and the Court should take it.

I. The Decision Below Squarely Conflicts With How Other Circuits Evaluate The Attorney Share Of Class-Action Awards.

The most fundamental error in the Eleventh Circuit's decision is that it permits class counsel to

make itself the primary monetary beneficiary of a class-action settlement. On this point, the Eleventh Circuit is now in unmistakable conflict with decisions of the Sixth and Seventh Circuits. That conflict is twofold: First, other circuits value the "settlement pie" in a different manner for purposes of assessing the size of the attorneys' slice. Second, the conflict is outcome determinative in the sense that this settlement would never have been approved in other circuits.

First, as to the legal rule, the Seventh Circuit has now repeatedly held that the "ratio that is relevant ... is the ratio of (1) the fee to (2) the fee plus what the class members received." *Pearson*, 772 F.3d at 781 (alteration in original) (quoting *Redman*, 768 F.3d at 630). This comparison "gives class counsel an incentive to design the claims process in such a way as will maximize the settlement benefits actually received by the class, rather than to connive with the defendant in formulating claims-filing procedures that discourage filing and so reduce the benefit to the class." *Id*. Conversely, "[w]hen the parties to a class action expect that the reasonableness of the attorneys' fees allowed to class counsel will be judged against the potential rather than actual or at least reasonably foreseeable benefits to the class, class counsel lack any incentive to push back against the defendant's creating a burdensome claims process in order to minimize the number of claims." *Id.* at 783.

What the Seventh Circuit's rule recognizes, and the Eleventh Circuit's ignores, is that the legal rule must be structured to align class counsel's interests

with their clients' to the greatest extent possible. Evaluating the fee award based on the money class members *actually receive* puts those incentives in exactly the right place—class counsel will work very hard to get the settlement into their clients' hands, and derive no benefit from a hypothetical valuation that does not actually come to pass. By contrast, when the settlement pie can be stuffed with "potential rather than actual" benefits—as well as low-value injunctions and dubious *cy pres* awards, *id.* at 784—class counsel retains all its problematic incentives with respect to seeking actual payouts to the class. *See id.* at 787 (quoting *Eubank*, 753 F.3d at 720).

This split also extends to the proper evaluation of *cy pres* awards in the "settlement pie." The Eleventh Circuit here held that such an award should be included when evaluating the attorney share, App. 11a; the Seventh Circuit excludes such awards entirely because they "d[o] not benefit the class." *Pearson*, 722 F.3d at 784; *cf.* 28 U.S.C. §1712(e) (regarding *cy pres* coupons). Respected commentators have warned that the Eleventh Circuit's approach deprives class members of zealous counsel, who can obtain an equal benefit for themselves by sending the award to someone *other* than their clients. *See infra* p.p. 28-29. And while other courts sometimes permit including *cy pres* awards in the assessment of a fee request, they frequently discount them or scrutinize their value far more rigorously than the Eleventh Circuit permitted here. *See, e.g.*, *In re Baby Prods. Litig.*, 708 F.3d 163, 177-179 (3d Cir. 2013) (collecting cases with conflicting views on how and whether to include the value of *cy pres* awards). At an abso-

lute minimum, this is a badly confused area of law where multiple Justices of this Court have made clear that its intervention is needed. *See Marek*, 134 S. Ct. at 9; *Waters*, 530 U.S. at 1224.

A similar disagreement is evident with respect to the supposed value of an injunction like the one in this case. In *Pearson*, the Seventh Circuit refused to credit an injunction requiring modest changes in prospective marketing practices—partly because of its dubious value, and partly because *future* purchasers of the now-less-fraudulently marketed product are not the members of the class whose claims are being compromised in the settlement. *See* 772 F.3d at 784-786. Again, the Eleventh Circuit simply lumped in an injunction of dubious value here without scrutinizing its actual value *or* assessing how it benefitted *class members as such*, especially given that Ultra batteries no longer even exist. Unless courts require rigorous proof of injunction value from class counsel, they will inevitably provide cover for cheap settlements with outsized fee awards. That is particularly so because objectors have no incentive to invest in expensive experts to disprove such claims; *all* the information is held by the litigants, who have highly inflationary incentives.

The clearest example of the circuit conflict regarding injunction value is the Sixth Circuit's decision in *Pampers*, 724 F.3d at 718. There, class counsel sought an award of $2.73 million for a settlement conferring only injunctive relief. The Sixth Circuit made clear that to demonstrate that such a split of settlement value was fair, the settlement proponents would have the burden of *proving* the actual value of

the injunction, and would have to the prove its value *to class members* as such. *See id.* at 719. The injunctive relief in *Pampers* included a hard-to-use refund program (akin to the claims-made procedure here), and marketing changes on Pampers' boxes that the company claimed it was loathe to make, but did not provide much relevant information to consumers. The Sixth Circuit rejected the idea that such relief could justify the fee award, in language quite similar to the Seventh Circuit's rule.

> To be clear: "The fairness of the settlement must be evaluated primarily based on how it *compensates class members*"—not on whether it provides relief to other people, much less on whether it interferes with the defendant's marketing plans.

Id. at 720 (emphasis in original). Because (as here) there was no evidence that the injunctive relief provided any concrete monetary value to class members—especially compared to the concrete millions class counsel obtained for itself—the Sixth Circuit rejected the settlement. *Id.* at 721 ("The relief that this settlement provides to unnamed class members is illusory. But one fact about this settlement is concrete and indisputable: $2.73 million is $2.73 million.").

The foregoing demonstrates that there are real conflicts in terms of the legal standards that other circuits would use to evaluate the settlement here. But perhaps the best proof is that that these courts would plainly have rejected *this exact settlement*. Consider the following point-by-point comparison be-

tween the settlement approved in this case and the settlement rejected in *Pearson*:

- In *Pearson*, the parties obtained data from third parties (772 F.3d at 784) and gave individualized notice to 4.72 million class members; here, the parties did not even try anything more than publication notice.
- In *Pearson*, 30,245 class members claimed $865,284; here, 55,346 class members received $344,850.
- In *Pearson*, counsel requested $4.5 million but received only $1.93 million while the class received $865,284; here, class counsel received $5.68 million without reduction while the class received much less.
- In *Pearson*, *cy pres* issued only if class members failed to claim settlement-fund money; here, *cy pres* issued as a first resort, to a charity defendants already supported.
- In *Pearson*, a dubious labeling injunction was issued on a product that remained in the marketplace; here, the injunction runs only against a product that does not even exist.

This case would fail in the Seventh Circuit *a fortiori* on every relevant factor. That is the definition of a square circuit split.

Finally, it is important to note that this case contains an egregious fact pattern that was not even present in other recently rejected settlements. Here, after the settlement proponents estimated its value at $50 million, they submitted *their own* declaration

indicating that it was utterly predictable that the class would realize less than $500,000—itself a small fraction of their requested fee. It is doubtful that *any* other circuit would permit that result. *See, e.g.*, *Baby Prods.*, 708 F.3d at 179 (in evaluating the attorney's relative share of an award, the district court "should begin by determining *with reasonable accuracy* the distribution of funds that *will result* from the claims process") (emphasis added). Indeed, even crediting every dollar of the *cy pres* award to the settlement pie, the attorneys here claimed over 45% of their own expected settlement value. Worse than that, the Eleventh Circuit permitted class counsel to obtain a *multiple* on its hourly bills, notwithstanding how little class members actually received. Given that the Eleventh Circuit treated even these eyebrow-raising facts as beyond any concern, it is imperative that this Court bring it into line.

II. The Decision Below Squarely Conflicts With How Other Circuits Would Evaluate The Propriety Of *Cy Pres* Relief.

Apart from the question whether *cy pres* relief can be included in an evaluation of attorneys' fees, there is a manifest conflict among the circuits regarding when *cy pres* relief is appropriate at all. The Eleventh Circuit's decision holds that settling parties can turn to *cy pres* as a first resort simply because the defendants lack "records from which to identify actual purchasers." App. 12a-13a. Other circuits make clear that *cy pres* must be a last resort. On this point, the Eleventh Circuit is now in conflict

with decisions of at least the Third, Fifth, Seventh, and Eighth Circuits.

The American Law Institute recommends that *cy pres* awards are not "appropriate" if "individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable." ALI §3.07. Put otherwise, *all* the money must be given to class members if it is reasonably possible to do so. The majority of courts to consider the question have adopted this principle, in contrast to the Eleventh Circuit. For example, the Seventh Circuit forbids *cy pres* when distribution to the class is feasible, and further holds that payments to third-party charities should not be used to justify fees. *Pearson*, 772 F.3d at 778; *Holtzman v. Turza*, 728 F.3d 682, 689-90 (7th Cir. 2013) (citing §3.07).

Similarly, the Fifth Circuit also holds that *cy pres* is permissible "only if it is not *possible*" to compensate class members directly, reasoning that "settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members." *Klier v. Elf Atochem*, 658 F.3d 468, 474-475 & nn.15-16 (5th Cir. 2011) (emphasis added). *Klier* rejected a *cy pres* award of excess funds that had been allocated to one subclass, where members of another subclass had not been fully compensated for their injuries. *Id*. at 478-79. Chief Judge Edith Jones concurred, arguing that *cy pres* awards should be strongly disfavored due to the inevitable conflicts of interest associated with application of the doctrine to class-action settlements. *Id*. at 480-81.

The Eighth Circuit, following *Klier* and expressly adopting ALI §3.07, similarly struck down a *cy pres* distribution of $2.7 million left over in a settlement fund when it was possible to directly distribute the money to class members, rejecting self-serving arguments by class counsel that it was "difficult and costly" to do so. *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1063-67 (8th Cir. 2015). It called class counsel's decision to seek *cy pres* "contrary to the interests of" the class, and suggested that this by itself might be grounds to reduce a fee award. *Id.* at 1068. It is not enough to find, as the courts below did here, that distributions would be "difficult and costly"; the "inquiry *must* be based primarily on whether 'the amounts involved are too small to make individual distributions economically viable.' ALI §3.07(a)." *Id.* at 1064-65. In short, the Eighth Circuit has expressly rejected the "difficult [and] expensive" argument the district court and Eleventh Circuit relied upon here, App. 13a, because donating *someone else's money* to charity is permissible only if it is essentially impossible to return it to them.

The Eleventh Circuit opinion conflicts with the Fifth, Seventh, and Eighth Circuits because it ignores §3.07 and the obligation of class counsel to make *cy pres* distributions a last resort. App. 10a-13a. Here, the settling parties made no effort to use the $6 million they placed in *cy pres* to better advertise the claims process, to seek information about possible class members, or to increase the payout to those who did file claims (including those who could prove more than four purchases). Instead, the Court simply accepted the view that *cy pres* was appropriate because defendants lacked their own records on

class members' identities. That will be true in countless consumer class actions. If that alone permits settling parties to revert immediately to a large *cy pres* award justifying a large attorney payout—as the Eleventh Circuit held here—then any rigorous scrutiny of *cy pres* as a remedy of last resort will disappear entirely. As explained below, that is a serious invitation to abuse.

In addition, the Third Circuit has its own unique approach to *cy pres*—one that conflicts with both the Eleventh Circuit and the others. It holds that the critical factor in evaluating a proposed settlement containing a *cy pres* award is not whether further distributions to class members are feasible, but "whether the settlement provides sufficient direct benefit to the class." *Baby Prods.*, 708 F.3d at 176. In other words, the Third Circuit essentially asks whether the share given to the class and to charity is fair overall, expecting *cy pres* to "represent a small percentage of total settlement funds." *Id.* at 174.

Applying this rule, the Third Circuit recently vacated a claims-made class-action settlement that awarded only $3 million of a $35.5 million fund to a class of consumers while counsel were paid $14 million and the remainder went to *cy pres*. In rejecting that deal, the court noted that "[*c*]*y pres* awards—by ensuring that a settlement fund is sufficiently large to command a substantial attorneys' fee—can exacerbate" a conflict of interest between class and counsel. *Id.* at 178-79. But while this approach at least requires more scrutiny of *cy pres* than does the Eleventh Circuit's, it ultimately misses the mark as well: The question is not whether the shares allocated to

the class, to charity, and to counsel are all comparatively fair because the recovery *belongs* to the class members who sacrifice their claims, and allocations to charity are thus *only* appropriate if further allocations to those class members are impossible or pointless to make.

Ultimately, the Eleventh Circuit's opinion conflicts with all the circuits described above because it endorses *cy pres* without limits, regardless of the adverse effect on the class. *See* App. 10a-11a (citing *Nelson v. Greater Gadsden Hous. Auth.*, 802 F.2d 405 (11th Cir. 1986)). And again, at an absolute minimum, this is an area of the law in substantial confusion where members of this Court have already flagged the issue for review. *See Marek*, 134 S. Ct. at 9.

III. This Is An Ideal Vehicle For Intervention On An Important And Recurring Question.

For at least five reasons, the disagreements discussed above merit immediate resolution in this case.

1. First, it is clear from the vast amount of commentary attracted by this case and its recent cousins that the issues at stake are important and recurring. Respected commentators—including both those who tend to support and criticize class actions—have recognized that the issues raised in this case are critical, and becoming "increasingly more common in class action suits," Gershman (noting circuit split); *see also, e.g.*, Alison Frankel, *By Restricting Charity Deals, Appeals Courts Improve Class Actions*, REUTERS (Jan. 12, 2015); Daniel Fisher, *Judge*

Tosses Glucosamine Settlement, Citing Forbes, FORBES (Nov. 20, 2014); Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (2013). Moreover, many of the same commentators have written repeatedly on *this very case* and its eye-opening facts. *See, e.g.*, Gershman; Frankel, *Smoking Gun*; Fisher, *Odds*. Much of the dismay centers around the claims counsel make about settlement value—and the awards they ask for as a result—when they *know* that the class will ultimately realize much less than the attorneys themselves.

This commentary raises two important points. First, it makes clear that the issue is recurring—coming up in more and more settlements that use the same "class action math." Second, it makes clear that observers of the legal system of *all* stripes are beginning to lose faith in the fairness of the class-action mechanism and the benefits it actually provides to absent class members. The Seventh Circuit recently described a similar class-action settlement as "scandalous." *Eubank*, 753 F.3d at 721. Several more years of scandal in several circuits will only further erode the public trust in class actions and the federal courts.

2. This is particularly true because large class-action settlements—being both nationwide and non-adversary—can be easily forum shopped. Just as Poertner filed a new complaint here alleging a nationwide class to facilitate global settlement, little stops other settling parties from doing the same, and relocating the complaint to Florida for the breezier review. Indeed, such forum shopping may have oc-

curred *in this case*: The parties had the option of seeking approval in the Northern District of California (App. 17a n.3), but were using settlement provisions the Ninth Circuit criticized in *Bluetooth*. *Cf. Richardson v. L'Oreal*, 991 F. Supp. 2d 181, 188 (D.D.C. 2013) (parties settled, dismissed California class action, and refiled in D.D.C.).

This forum-shopping effect is not hypothetical. The decision in this case has already led to Eleventh Circuit district courts rubber-stamping ever more troubling settlements, which are obviously finding their way to those courts at an alarming rate. There have been at least *ten* similar settlements approved in Eleventh Circuit courts in the last two years alone—and the three most recent have *already* relied on the decision in this case.[1]

This is hardly surprising. As the unpublished nature of this decision demonstrates, Eleventh Circuit precedent has long been lax in this area, *see* App. 9a-11a, and the Court of Appeals has no apparent interest in providing the searching scrutiny Rule 23(e) requires. And now that those district courts have seen the numbers involved in this case, they no

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[1] *See, e.g.*, *Braynen v. Nationstar Mortg., LLC*, No. 14-CV-20726-Goodman, 2015 WL 6872519 (S.D. Fla. Nov. 9, 2015) (approving claims-made settlement and $5 million fee without claim-rate or actual recovery information); *Marty v. Anheuser-Busch Cos.*, No. 13-cv-23656-JJO, 2015 WL 6391185 (S.D. Fla. Oct. 22, 2015) (similar, $3.6m fee); *Lee v. Ocwen Loan Servicing, LLC*, No. 14-cv-60649-Goodman, 2015 WL 5449813 (S.D. Fla. Sept. 14, 2015) (similar, $10m fee); Gershman (discussing *Marty* and this case).

doubt recognize that essentially any relative level of recovery among class counsel and class members can be approved without risk of reversal. Litigants understand that as well, and will direct their class-action settlements to the Eleventh Circuit where they are free from stringent oversight.

Accordingly, there would be no benefit, and a substantial cost, for the Court to defer deciding the questions presented until still more courts of appeals line up on one side or another of these well-developed conflicts. Forum shopping will make such vehicles unusually rare, and limit the extent to which other circuits will consider these issues at all.

3. Nor is the Court likely to get a vehicle much better than this one. This is the first case ever to contain record evidence regarding the likelihood that publication-notice-only claims will actually be made. Class counsel have jealously guarded that data in the past. The split here is also unusually square: The settlement could only be approved by including in its valuation essentially all of the pieces that *Pearson* says to exclude, and compares unfavorably to the settlement the Seventh Circuit rejected in *Pearson* on virtually every axis. Moreover, class counsel did not just end up with over 90% of the settlement's pecuniary value, they received a *multiplier* on their hourly bills for recovering, on average, less than a nickel per class member. The Court is unlikely to get another opportunity equally stark and well-structured to clarify this difficult area of the law.

4. That is particularly so because these cases *result* from a breakdown in the adversary system, which makes it difficult to count on future vehicles.

Neither of the original litigants—who have the overriding stake—will bring a petition like this because both support the settlement. And not only can class counsel work with defendants to find favorable forums, they can also together discourage review with "clear-sailing" and "kicker" clauses designed to take the air out of objections. The reason claims rates are so low in these cases is because publication-only notice is hard for third parties to find in the first place, and even then, the value of making a claim may not be worth the time. Actually appearing in such cases to make an objection—and litigating it all the way to the Supreme Court—amounts to searching for needles in haystacks for the purpose of willingly poking yourself with them. And even when class members do come forward with meritorious objections, counsel with millions at stake can evade scrutiny by paying them to dismiss their appeals, *cf. Safeco v. AIG*, 710 F.3d 754 (7th Cir. 2013), and the incentive to do so only increases as the strength of the vehicle for certiorari improves.

It is thus neither fair nor wise to delay review and hope such cases will continue to come before the Court. In truth, it is only because of petitioner Frank's issue-driven mission—and his willingness to swear off settling objections—that these cases reach this Court at all. *See, e.g.*, Ashby Jones, *A Litigator Fights Class-Action Suits*, WALL ST. J. (Oct. 31, 2011) (noting that Frank is a "rare breed in the world of class-action objectors" because "[h]is stated mission is different" and "he tends to stay and fight"). There is no vested interest behind this work: Neither trial lawyers nor corporate defendants prefer vigorous enforcement of Rule 23(e)(2), and both have attacked

Frank for his efforts. So while the incentives to *make* these settlements and insulate them from review is overwhelming, the incentive to bring them before this Court is negative—a risk of resources and reputation for little personal gain. Waiting again and again when members of this Court have long flagged these critical issues for review thus seriously risks missing the last or best train.

5. Finally, this issue is of critical importance not only because outsized fee requests and *cy pres* awards are bad for the system, but because there is *real* good to do for absent class members. Settlement proponents frequently say that they have done as well as possible for the class; that the alternative to their settlement is zero recovery; that *cy pres* is the only way to do some good while punishing wrongdoers; and that objectors only risk all that. But this is just not true: The point of objecting is not to punish lawyers, but to endeavor to actually improve the outcomes of these settlements for the real parties in interest—the absent class members whose claims are being settled away. And make no mistake: When courts *do* blow the whistle, it works.

Most importantly, Judge Posner's suggestion that class counsel will respond to court-imposed incentives to "maximize the settlement benefits actually received by the class," *Pearson*, 772 F.3d at 781, has been borne out by experience. On remand from the *Baby Products* reversal, the parties arranged for direct distribution of settlement proceeds, and paid an additional $14.45 million to over one million class members—money the parties initially directed to *cy pres* before the successful objection led to an "expo-

nential increase" in class recovery. *McDonough*, 80 F. Supp. 3d at 660. After the Center objected to a similarly-structured settlement in *Bayer*, the parties used subpoenaed third-party retailer data to identify over a million class members (instead of the 18,938 who would have been paid in the original claims-made structure), and paid an additional $5.84 million to the class. Order at 4, *In re Bayer Corp. Litig.,* No. 09-md-2023, Doc. 254 (E.D.N.Y. Nov. 8, 2013). And on remand in *Pearson*, the parties renegotiated to give class members at least $5 million in cash, with any reduction in attorneys' fees now going to class members rather than back to defendants. Settlement ¶¶7-8, No. 11-cv-07972, Doc. 213-1 (N.D. Ill. May 14, 2015). In short, if you make lawyers get money to clients in order to get paid, that is *exactly* what happens.

Nor should *cy pres* awards be uncritically accepted as doing some limited good for class members while punishing defendants. As *amici* discuss in depth, *cy pres* awards often *benefit* defendants while they may even harm the class. When *cy pres* awards divorce attorneys' fees from their clients' recovery, the class may lose its zealous advocate. *See, e.g.*, Redish, *supra*, at 650 (suggesting that "[b]y disincentivizing class attorneys from vigorously pursuing individualized compensation for absent class members, cy pres threatens" their rights). Even worse, class counsel has no incentive to prevent defendants from directing *cy pres* awards to causes defendants might support *for selfish reasons*. To take one example, Facebook and Google have directed *cy pres* awards in privacy-breach cases to the Electronic Frontier Foundation, a nonprofit that "is often an ally of

Google and Facebook when it comes to staving off liability to rights holders over user-generated infringing content" and other public policy issues. Roger Parloff, *Google and Facebook's New Tactic in the Tech Wars*, FORTUNE (July 30, 2012). Giving class members' money to charity without their consent is problematic enough; it is far when (as in those cases, and here) requiring that donation serves no deterrent end.

As the Chief Justice has noted, the use of *cy pres* in class-action settlements is only growing, *Marek*, 134 S. Ct. at 9 (citing Redish, *supra*, at 653-656), as are settlements where "class action math" leads to fee awards that exceed the class relief. This case is a stark example, and one well framed to resolve two disagreements among the circuits about how to scrutinize these cases. The Court should take this opportunity to make class actions work better for the people whose rights are really at stake.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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