No. 15-765

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

PETITIONER'S REPLY BRIEF

THEODORE H. FRANK
ADAM EZRA SCHULMAN
COMPETITIVE ENTERPRISE INSTITUTE CENTER FOR CLASS ACTION FAIRNESS
1899 L St., N.W.
12th Floor
Washington, D.C. 20036
(202) 331-2263

THOMAS C. GOLDSTEIN
Counsel of Record
ERIC F. CITRON
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tg@goldsteinrussell.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY 1

I. There Is A Plain Split Regarding Attorney Shares Of Class-Action Awards 2

II. There Is An Undeniable Split On The Propriety Of *Cy Pres* Here 9

III. This Is An Ideal Vehicle 10

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Boeing v. Van Gemert, 444 U.S. 472 (1980) 8

Eubank v. Pella, 753 F.3d 718 (7th Cir. 2014).......... 6

Grok Lines v. Paschall Truck Lines, 2015 U.S. Dist. LEXIS 124812 (N.D. Ill. 2015) 6

Hall v. Bank of Am., 2014 WL 7184039 (S.D. Fla. 2014) 8

Hughes v. Kore, 731 F.3d 672, 676 (7th Cir. 2013)... 8

In re Dry Max Pampers, 724 F.3d 713, 720-21 (6th Cir. 2013)... 5

In re Southwest, 2013 WL 5497275 (N.D. Ill. 2013) 7

In re Southwest, 799 F.3d 701 (7th Cir. 2015).. 5, 6, 7

International Precious Metals v. Waters, 530 U.S. 1223 (2000) 1, 5

Marek v. Lane, 134 S. Ct. 8 (2013) 10

Pearson v. NBTY, 772 F.3d 778 (7th Cir. 2014)...passim

Redman v. RadioShack, 768 F.3d 622 (7th Cir. 2014)... 6

Strong v. BellSouth Telecomms., 137 F.3d 844 (5th Cir. 1998)... 8

Wilson v. Everbank, 2016 U.S. Dist. LEXIS 15751 (S.D. Fla. 2016) 11

Other Authorities

Advisory Committee Notes, 2003 Amendments to Rule 23 5

Frankel, *When Class Money Doesn't Go to Class Members*, Reuters, Dec. 14, 2015 11

Greene, *Here's Why Plaintiffs Lawyers Deserve Those Fat Fees*, AM. LAW., FEB. 9, 2016 11

Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 829 (1997) 10

Parloff, *Should Plaintiffs Lawyers Get 94% of a Class Action Settlement?*, Fortune, Dec. 15, 2015 11

Segal, *A Little Walmart Gift Card for You, A Big Payout for Lawyers*, N.Y. Times, Jan. 30, 2016... 11

Rules

Fed. R. Civ. P. 23(e) 1

Treatises

Wright & Miller, 7B Fed. Prac. & Proc. §1803.1 (3d ed. 2015) 1

REPLY

Respondents urge this Court to pass over their selfish fee deal because review will supposedly require applying complex, multifactor tests to special facts about their broader settlement. The reality is so much simpler. According to respondents' own evidence, they signed this deal expecting class counsel's take to exceed *ten times* that of all 7.26 million class members combined (which it did). The question presented is whether bargaining for such an outsized attorney share is presumptively "unfair" under Rule 23(e). The Sixth and Seventh Circuits correctly say yes; the Eleventh Circuit says no, and so approved this egregious deal. This case presents the exact question Justice O'Connor flagged in *International Precious Metals v. Waters*, 530 U.S. 1223 (2000), and on which the leading treatise has long acknowledged a split. *See* Wright & Miller, 7B Fed. Prac. & Proc. §1803.1 & nn.43-44. The time to resolve this issue has come.

The BIOs try to misdirect the reader's attention by focusing solely on the benefits *offered* class members, hoping you might miss where the money actually landed. But this case isn't about the class relief in isolation; it's about "the amount awarded to the attorneys," Class-BIO 1, and the use of *cy pres* to inflate that sum. At issue are doctrines that divorce class counsel's incentives from their clients', and so deprive class members of the real-world benefits of more zealous advocacy. Pet. 6-12. This case allows the Court to strengthen class actions by ensuring that they only reward attorneys for actually getting the relief they promise into their clients' hands. Certiorari should be granted.

I. There Is A Plain Split Regarding Attorney Shares Of Class-Action Awards

Respondents' main argument is that there is no split or error because the decision below turned on the special fact that their settlement "provided full compensation" to all class members. *See, e.g.*, Class-BIO i; Def-BIO i. While this is an unfair description of both the facts and decisions at issue, it still manages to isolate the legal question on which the circuits are divided and this Court's intervention is sorely needed.

To begin, no reasonable English speaker would say—as respondents endlessly do—that their settlement "provided" class members with complete relief, Class-BIO 11, 14, 20, 23, or (worse) that they "received" it, *id.* 21. Less than 1% of class members "received" anything at all. What respondents mean is that they *offered* full relief to anyone who saw their sparse ads and filed a claim,[1] and that this alone saves their excessive fee deal from scrutiny. Indeed, both BIOs expressly say it does not matter how much relief reached class members, because "[s]ettlements that provide 'essentially complete relief' to class members *who file claims* … would be approved in any circuit," Class-BIO 20 (emphasis added), without regard to fees.[2] At least two circuits

---

[1] Even *this* is false, because claims were capped even for those with proven purchases, and neither BIO ventures how such a cap could be consistent with "full compensation."

[2] *See also* Def-BIO 28 ("[I]n a case like this in which class members were offered full compensation, the likely (or actual) number of claims does not" matter).

reject that nonsensical rule, however, *infra* pp.4-5, and this case shows exactly why.

It's undisputed here that respondents' notice scheme was *calculated* to result in far less money reaching class members than their lawyers. The pre-negotiated plan was to run exactly six magazine spots and some Internet banner-ads, which respondents remarkably claim reached 92 million people (fully 28% of the population). Class-BIO 5-6; Dkt. 151 ¶4. You use batteries; you use the Internet. Did you know about this settlement? Do 70% of your friends? Did they make claims? Probably not, because as respondents' own evidence attested, the *expected* claims rate was miniscule, as was the actual rate. Pet. 15-16.

These results are a product of respondents' favored rule. On their view, any settlement that offers "complete relief" is equally valuable, whether class members receive a $6 check directly or must discover the process solely through publication notice and file a claim themselves. Accordingly, lawyers can claim equal compensation without even trying to work out a direct-payment or direct-notice scheme that would vastly multiply the relief actually "provided." As Judge Posner's decision in *Pearson v. NBTY* explains, 772 F.3d 778, 781 (7th Cir. 2014), such a rule creates awful incentives, because both class counsel *and* defendants now benefit when the fund looks big (*i.e.*, when it *offers* considerable total relief), but a low claims rate limits defendants' ultimate liabilities. No wonder respondents expended neither a day nor a dime attempting a direct-notice or direct-payment approach to distributing what they called a $50 million fund.

No rational class member would choose this bargain—spending an order of magnitude more on attorneys than on the critical "last mile" between class members and their money. If the incentives were right, counsel would use available funds to maximize actual distributions, perhaps paying retailers to track down battery purchasers from sales records, subpoenaing loyalty programs, or compensating online sellers if they email their battery purchasers. Respondents cannot dispute that, in several cases, attorneys who received far less than $5.7 million have used mechanisms just like these to make direct distributions they once called impossible after courts conditioned their fees on getting them done. *See* Pet. 33-34; Def-BIO 17. That's why, from a real-world perspective, allowing exorbitant fees to lawyers who do not bother getting the money to class members is so harmful.

In fact, under respondents' rule, as long as a settlement offers "complete relief," the parties could agree to give class counsel not just 16 times the class recovery (as here), but any amount they want. This, again, is dangerously wrong: Class members will never get zealous representation, especially in the critical claims-process design, unless fees remain tied to actual relief.

This is exactly why the Seventh Circuit adopted its default rule comparing "the ratio of (1) the fee to (2) the fee plus what the class members *received*." *Pearson*, 772 F.3d at 781 (emphasis added). And it is also why the Sixth Circuit in *Pampers* rejected a fee award in a settlement offering plaintiffs a full refund through an arduous claims process—thereby refusing to give a large and certain recovery to attorneys

who had earned a far less certain recovery for their clients. *In re Dry Max Pampers*, 724 F.3d 713, 720-21 (6th Cir. 2013). Contra respondents' view (Class-BIO 20), these cases hold that allowing huge fees for "providing" full relief only to those who "file claims" does *not* guarantee approval because it fails to dissolve the incentive to favor suboptimal claims procedures. *Pearson*, 772 F.3d at 782; *Pampers*, 724 F.3d at 721. Justice O'Connor emphasized this point when she flagged this question for review, *Waters*, 530 U.S. at 1224, and the Rules Committee agreed. *See* Advisory Committee Notes, 2003 Amendments to Rule 23 (citing, with approval, to statutory fee cap at a "reasonable percentage of the amount … actually paid to the class").

To be sure, the Eleventh Circuit rejects this default rule. Below, it dismissed the objection that "counsel's slice of the settlement pie [wa]s too large," because that objection was "based on [a] flawed valuation of the settlement pie" that "limit[ed] the monetary value to the amount of Gillette's actual payments to the class." Pet.App. 14a-15a. This rejected measurement is exactly the one that presumptively applies under *Pearson*, making the split obvious on the face of the decisions themselves.

There is no better proof of that split, however, than the case respondents rely most heavily upon, *In re Southwest*, 799 F.3d 701 (7th Cir. 2015).

As an initial matter, *Southwest* shows that respondents confuse the exception and the rule. Respondents outright claim that *Pearson*'s requirement to compare the attorney share to the amount the class actually received was "simply [a] factbound ap-

plication[] of settled circuit law," Class-BIO 14. But *Southwest* says the very opposite. There, the court fully endorsed *Pearson*'s rule, and explained that "the ratio of class relief to attorney fees" would "in most cases" represent "a powerful argument." 799 F.3d at 711. *Southwest* nonetheless allowed for a larger, lodestar-based recovery only because it involved an "exceptional settlement," where class members were "getting back exactly what they had before." *Id.* at 712. Thus, by its terms, *Southwest* is an "exception[]" to a Seventh Circuit rule the Eleventh Circuit expressly rejects, and so only emphasizes the split.[3]

Moreover, a comparison of this case and *Southwest* demonstrates that this settlement is far from "exceptional" and its fee arrangement would never survive Seventh Circuit scrutiny. In *Southwest*, the airline allegedly violated the law by deeming Business Select drink coupons expired. The settlement required Southwest to send *direct notice* to every *potential* class member, allowing them to claim an *uncapped* number of new coupons even *without proof* that their coupons expired (rather than being used or discarded). Coupons were the only possible relief because class members' monetary claims had already been dismissed. Moreover, Southwest had an

[3] Notably, other Seventh Circuit and district court cases have applied *Pearson*'s rules against abusive self-dealing, confirming its controlling force. *See Eubank v. Pella*, 753 F.3d 718 (7th Cir. 2014); *Redman v. RadioShack*, 768 F.3d 622 (2014); *Grok Lines v. Paschall Truck Lines,* 2015 U.S. Dist. LEXIS 124812 (N.D. Ill. 2015).

unusual incentive to actually get these coupons to class members, because "every replacement coupon can be used only by a customer who buys a plane ticket." *Id.* at 711. This direct-notice settlement thus provided "everything the client could hope for," *id.* at 712, with *no* risk that the defendants and attorneys had sought to minimize distributions. Nonetheless, the district court still reduced the requested fees by nearly half because they were too large relative to the actual value of the class recovery (although not nearly as bad as here). *See In re Southwest*, 2013 WL 5497275, at *11 (N.D. Ill. 2013).

This settlement has precisely none of these features. It provides no direct notice to anyone, and caps claims even for those with proof of purchase. Here, moreover, defendants and class counsel *do* share the typical incentive to minimize defendants' out-of-pocket expenses, and compromised away live money-damage claims. Nonetheless, the district court rubber stamped a "clear-sailing" fee and multiplier request sixteen times larger than what class members realized. So where *Southwest* was exceptional, this is a quotidian claims-made settlement, presenting the exact incentive problems and resulting bad outcomes foreclosed by Seventh Circuit doctrine.

Before moving on, we emphasize three other respects in which respondents misstate the law in an effort to confuse this easy case.

First, respondents imply that there is some rule making "windfall" distributions to class members "impermissible." Def-BIO 15, 30. There is not. The cited cases hold only that money available from the

defendants *need* not be distributed to claimants (rather than charity) once those claimants receive complete relief. Certainly, no case remotely suggests respondents' implied, lawyer-fever-dream rule that it's better to overcompensate class counsel than class members. Increasing per-claim payouts to avoid a 16-to-1, fee-to-recovery ratio would have been perfectly legal and obviously superior.

Second, respondents err in relying on *Boeing v. Van Gemert*, 444 U.S. 472 (1980)—a case that only emphasizes the confusion in the lower courts. *Boeing* was a *litigated* case where the defendant argued against basing the fee on the full, fixed fund won at trial. *See id.* at 480 n.5 (leaving question open where class judgment not "fixed"). In a litigated case, counsel's incentives are right where they belong—they and their clients want to win the biggest fund possible. Claims-made settlements involve very different incentives, however, which is why (in contrast to Eleventh Circuit courts) the Fifth and Seventh Circuits expressly refuse to apply *Boeing* to settlements like this. *Compare Strong v. BellSouth Telecomms.*, 137 F.3d 844, 852 (5th Cir. 1998), *and Pearson*, 772 F.3d at 782, *with, e.g.*, *Hall v. Bank of Am.*, 2014 WL 7184039, at *8 (S.D. Fla. 2014).

Finally, respondents suggestion that the Seventh Circuit would bless their claims procedure based on *Hughes v. Kore*, 731 F.3d 672, 676 (7th Cir. 2013), is absurd. There, the total fund was *statutorily* capped at $10,000, which obviously foreclosed a serious effort to track down class members. That says precisely nothing about a case like this. Where, as here, counsel tries to claim a share of what they call a $50 million fund, they should be required to either get

that money to class members, or claim a share of the smaller fund actually "provided" to their clients.

II. There Is An Undeniable Split On The Propriety Of *Cy Pres* Here

As to the *cy pres* award, respondents likewise say they are saved by their offer of "complete relief." But it is wildly implausible that courts like the Third, Fifth, Seventh, and Eighth Circuits would allow respondents to distribute $6 million to charity when they hadn't spent a penny of that money to track down the rightful owners of a supposedly $50 million fund. *See* Pet.25-28 (explaining that these circuits, in contrast to the Eleventh, allow *cy pres* only where distribution to class members proves infeasible). Moreover, neither BIO explains why, if this settlement already "provided" complete relief, defendants happily agreed to provide *even more* to charity.[4]

That's because the truth is uncharitable. *Cy pres* was included here to lard the settlement with illusory value; while respondents say the settlement prohibited defendants from counting batteries they "already" pledged, they don't dispute that Duracell's regular and well-advertised donation practices will easily fulfill this requirement over the *next five years*. Pet. 13. Still, the plan worked: In direct con-

---

[4] Respondents claim their "in-kind donation" is somehow better than *cy pres* because it was separately promised and not paid from unused class relief. Class-BIO 23. Every court below called it *cy pres*. Moreover, if there is a legal difference between "separate" third-party settlement donations and residual *cy pres*, the former is clearly worse, because it gives away class members' money without even *trying* to give it to them first.

flict with the Seventh Circuit, the Eleventh Circuit included this dubious donation in the "settlement pie" for purposes of assessing attorneys fees. *Compare* Pet.App. 12a *with Pearson*, 772 F.3d at 784.

The Eleventh Circuit's rule permitting settlements to use *cy pres* as a first resort reinforces a split the Chief Justice has already identified as appropriate for review. *Marek v. Lane*, 134 S. Ct. 8 (2013). Too-permissive *cy pres* standards exacerbate the problematic incentives discussed above. The Court should correct this problem as well.

III. This Is An Ideal Vehicle

Respondents' vehicle arguments are insubstantial, and this case ideally frames the questions presented for review.

As respondents ultimately admit, their efforts to raise factual smokescreens are not really about this case. In their words, the "underlying questions are inherently case-specific," Class-BIO 2; indeed, they suggest that this Court should *never* take a class-action case about "awards of attorneys' fees" or "wade into the morass of the terms of a settlement." *Id.* 25. It is exactly this hands-off view of the judicial role that leads to problematic settlements with exorbitant fees. *See, e.g.*, Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 829 (1997). Though it might make respondents like these very happy, class-action settlement approvals cannot be immunized from this Court's review.

Moreover, respondents take precisely the wrong message from the fact that petitioner does not contest many of the fact-findings below. *See* Class-BIO 25-29. That only simplifies the questions before the

Court and so supports review. Petitioner rests here on the express, *rule-based* disagreement between the Eleventh and Seventh Circuits in valuing the "settlement pie," along with the *one* uncontested fact that this settlement—as intended—gave over ten times more to the lawyers than the class. The same goes for the absence of express collusion (Class-BIO 29): At issue here are rules regarding the incentives toward *tacit* collusion, *Pearson*, 772 F.3d at 783; alleging a disbarment-worthy conspiracy would only confound that issue.

This petition has engendered substantial coverage as an example of self-enrichment by class counsel. *E.g.,* Frankel, *When Class Money Doesn't Go to Class Members*, Reuters, Dec. 14, 2015; Parloff, *Should Plaintiffs Lawyers Get 94% of a Class Action Settlement?*, Fortune, Dec. 15, 2015; Segal, *A Little Walmart Gift Card for You, A Big Payout for Lawyers*, N.Y. Times, Jan. 30, 2016. Yet even those supporting "fat fees" above 15 times the class recovery have called for this Court to grant, and resolve the circuit split. Greene, *Here's Why Plaintiffs Lawyers Deserve Those Fat Fees*, AM. LAW., FEB. 9, 2016. Respondents openly plead that the Court just wait and gore the oxen of the next set of lawyers. Class-BIO 30; Def-BIO 28 (agreeing many cases involve these issues). But delay has costs: While this petition was pending, a Florida district court rubber-stamped a claims-made settlement that paid counsel millions with no evidence that a *single* class member successfully navigated the complicated claims process. *Wilson v. Everbank*, 2016 U.S. Dist. LEXIS 15751 (S.D. Fla. 2016). Respondents don't even dispute that, in the Eleventh Circuit, this is now par for the course,

or that forum-shopping will only make matters worse.

Enough is enough. The problematic facts of this fee deal appear right on its face. The lawyers here got sixteen times what their clients received, they got a *multiplier* on their hourly rates for delivering, on average, one nickel per class member, their injunction ran against a discontinued product, and *cy pres* was used (1) without even trying to improve class recovery first; and (2) to "require" a set of donations defendants already happily make. The settlement also includes the problematic "kicker" and "clear-sailing" clauses that other circuits have identified as serious red flags. *See* Pet. 32. The only way class actions can fulfill their purpose is if lawyers are presumptively rewarded only for getting their clients *actual* relief. This case is a perfect opportunity to strengthen the system by resolving the split in favor of that rule.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Thomas C. Goldstein
Counsel of Record
Eric F. Citron
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave., Suite 850
Bethesda, MD 20814
(202) 362-0636
tg@goldsteinrussell.com