



## Supreme Court Remands Cy Pres-Only Class Action Settlement Question Over Standing Concerns

***Frank v. Gaos,***  
**No. 17-961**

Decided March 20, 2019

The Supreme Court determined that questions concerning plaintiffs' standing to challenge Google's alleged violations of user privacy prevented the Court from deciding whether cy pres-only class action settlements are fair, reasonable, and adequate under Federal Rule of Civil Procedure 23(e).

### Background:

Plaintiffs, on behalf of a putative class of 129 million users of Google's search engine, alleged that Google violated users' privacy under the Stored Communications Act, 18 U.S.C. § 2701 *et seq.*, by disclosing the search terms they used to third-party websites. The parties agreed to an \$8.5 million class action settlement consisting of \$2 million in attorneys' fees and costs and \$6.5 million distributed as a cy pres award to various institutions studying internet privacy and information sharing. Under the proposed settlement, class members would receive no money. The district court approved the settlement, concluding that it would not be feasible to distribute the \$6.5 million portion of the settlement to class members. The Ninth Circuit affirmed.

### Issue:

Whether a class action settlement is fair, reasonable, and adequate under Federal Rule of Civil Procedure 23(e) when class members receive no direct, monetary relief and instead all of the settlement funds are distributed to cy pres beneficiaries.

*“Resolution of the standing question should take place in the District Court or the Ninth Circuit in the first instance. We therefore vacate and remand for further proceedings.”*

Per Curiam

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## Court's Holding:

The lower courts should decide in the first instance whether any named plaintiff has Article III standing.

## What It Means:

- Although the Supreme Court granted certiorari to decide an important question concerning cy pres awards, the Court, in response to an argument raised by the Solicitor General in an *amicus* brief, ordered supplemental briefing on whether any named plaintiff had Article III standing. The Court ultimately accepted the Solicitor General's view that the case should be remanded for the lower courts to address that question in the first instance—thus demonstrating the effect that an *amicus* brief can have on the outcome of a case.
- In the lower courts, the plaintiffs alleged that they had Article III standing because Google, by disclosing their search terms, allegedly violated their rights under the Stored Communications Act to be free from unlawful disclosure of certain communications. But the Supreme Court questioned whether those allegations established Article III standing in light of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), which recognized that the alleged violation of a statutory right does not automatically satisfy Article III's injury-in-fact requirement.
- Justice Thomas dissented. As in his concurring opinion in *Spokeo*, Justice Thomas reiterated that “a plaintiff seeking to vindicate a private right need only allege an invasion of that right to establish standing.” He would have held that the named plaintiffs had standing based on the alleged violation of Google's private duties owed to them under state and federal law. Justice Thomas also would have reversed the class certification and class settlement orders and held that the absent class members' interests were not adequately represented because only the named plaintiffs and class counsel received significant benefits, and the lack of relief for absent class members rendered the settlement unfair and unreasonable under Rule 23(e).

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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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