No. 13-136

IN THE

Supreme Court of the United States

MEGAN MAREK,

Petitioner,

v.

SEAN LANE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, *ET AL.*,

Respondents.

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

RESPONDENT GINGER McCALL'S RESPONSE TO PETITION FOR CERTIORARI

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PARTIES TO THE PROCEEDING

Although not listed in the petition for a writ of certiorari, Ginger McCall, a class member who objected to the settlement in the district court and appealed to the United States Court of Appeals for the Ninth Circuit, is also a respondent in this Court under Rule 12.6, as she was a party to the proceeding in the court whose judgment petitioner requests that this Court review.

Respondent McCall was aligned with petitioner Marek in the court below within the meaning of Rule 12.6. Although she does not, in the words of the Rule, "support granting the petition," neither does she "take[] the position that the petition should be denied." S. Ct. R. 12.6. Because she agrees with petitioner's arguments on the merits and would support them if the Court were to grant the petition for certiorari, she has complied with the notice requirement of Rule 12.6 and is filing this response within 30 days of the docketing of the petition in order to avoid any doubt as to the application of the rule to this response.

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ARGUMENT

Respondent Ginger McCall, like petitioner Megan Marek, objected to the settlement of the class claims in this case and appealed to the Ninth Circuit from the district court's decision approving that settlement. For the reasons well stated in Judge Kleinfeld's dissent from the panel opinion and Judge Smith's dissent from the denial of rehearing en banc, Ms. McCall agrees with petitioner that the approval of a settlement that provided no real relief to the class, but only meaningless injunctive relief and a so-called "cy pres" distribution that does not benefit the class, was improper. Should this Court grant the petition for a writ of certiorari, respondent McCall intends to file a brief on the merits supporting petitioner's argument that the judgment of the court of appeals should be reversed.

Nonetheless, Ms. McCall did not herself file a petition for a writ of certiorari, nor does she affirmatively support this petition, because the decision below does not meet this Court's normal standards for granting certiorari. The courts of appeals do not appear to be in disagreement about the standards by which to judge settlements involving cy pres distributions; rather, there is an emerging consensus among the circuits, including the Ninth Circuit, that such settlements must be subjected to searching review to ensure that they actually materially benefit the class and that other forms of relief would be impracticable. The decision below is an incorrect application of the law, including the precedents of the Ninth Circuit itself, to the particular facts of this settlement. Ordinarily, however, this Court does not review cases involving the erroneous application of law to specific facts or the

failure of a court of appeals to follow its own precedents. *See* S. Ct. R. 10.

As petitioner's citations of appellate case law demonstrate, recent decisions have moved strongly toward a consensus that settlements involving cy pres payments may be approved, but only when distributions to individual class members are impracticable or when class members to whom distributions are practicable have been fully compensated for their losses. Courts also agree that they should closely scrutinize cy pres arrangements to ensure that they adequately benefit members of the class in ways that have a sufficient relationship to the claims asserted by the class. The Ninth Circuit, far from being out of step with this trend, has long been a leader in it. *See Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012); *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011); *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003);[1] *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990).

The panel of the Ninth Circuit that decided this case had no power to overrule, and did not purport to overrule, any of the circuit's holdings limiting the use of cy pres settlements. Instead, it claimed to be applying them. Thus, the panel majority stated that a cy

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[1] The Ninth Circuit overruled *Molski's* holding on an unrelated point relating to the propriety of certifying a class seeking both injunctive and monetary relief under Federal Rule of Civil Rule 23(b)(2) in *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010), which this Court in turn reversed in *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541 (2011), but those decisions in no way diminish the authority of *Molski*'s holding limiting the circumstances in which cy pres settlements are permissible.

pres award could be sustained only if distribution of settlement proceeds to individual class members would be unduly burdensome and if the court assured itself that "the *cy pres* remedy 'account[s] for the nature of the plaintiff's lawsuit, the objectives of the underlying statutes, and the interests of the silent class members ….'" Pet. App. 11 (quoting *Nachshin*, 663 F.3d at 1036). Although the court unaccountably failed to reach the result that these principles should dictate in this case—disapproval of the settlement—the rules of law the court said it was applying largely correspond to those advocated by the petitioner and the opinions on which she relies. As respondent McCall argued in her petition for rehearing en banc, the principal problem here lies in the court's failure to properly apply the precedents of its own circuit to the circumstances of this case.

The leading case cited by petitioner to demonstrate the existence of a conflict, *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013), strikingly illustrates that the decision below reflects not intercircuit conflict over legal principles governing cy pres, but an incorrect application of accepted principles. In *In re Baby Products*, the Third Circuit vacated a district court's approval of a cy pres settlement because the district court did not properly assess whether the settlement was in the interest of the class as a whole. In so doing, the Third Circuit stated its agreement with Ninth Circuit law and in fact cited the decision in this case: "We join 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 directing the distribution of excess settlement funds to a third party to be used for a purpose related to the class injury. *See*

Lane v. Facebook, Inc., 696 F.3d 811, 819–20 (9th Cir. 2012) ….” 708 F.3d. at 172. The Third Circuit also cited the Ninth Circuit’s decisions in *Six Mexican Workers*, *Dennis*, and *Nachshin*, among others, in support of its holding that the district court was required to consider further whether the settlement reflected a sufficient direct benefit to the class and whether class counsel merited compensation for their efforts. *See id.* at 177, 179, 180 n.16.[2]

Similarly, the circuits appear to be in general agreement with the view, recommended by the American Law Institute, that cy pres awards, when appropriate, go to “recipient[s] whose interests reasonably approximate those being pursued by the class.” Pet. 25 (quoting ALI, Principles of the Law of Aggregate Litigation § 3.07 (2010)). As petitioner points out, the First Circuit explicitly endorsed this principle in *In re Lupron Marketing & Sales Practices Litigation*, 677 F.3d 21, 33 (1st Cir. 2012). That court also expressly recognized that it was *following* the Ninth Circuit:

> Other courts have similarly applied the reasonable approximation test. *See, e.g., Nachshin v. AOL, LLC,* 663 F.3d 1034, 1040 (9th Cir. 2011) (rejecting, in a nationwide privacy class action, a

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[2] In respondent McCall’s petition for rehearing en banc, she pointed to an apparent conflict between the panel opinion and Third Circuit law on one point: the Ninth Circuit’s acceptance of the district court’s failure to make a quantitative estimate of the class’s range of recovery in assessing the overall adequacy of the settlement amount. *See In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 354-55 (3d Cir. 2010). Petitioner mentions that point in passing but does not focus on the lack of quantification itself as a conflict meriting certiorari, and *Pet Food* did not address the subject of cy pres settlements on which the petition centers.

> cy pres distribution to local Los Angeles charities because it did not "account for the broad geographic distribution of the class," did not "have anything to do with the objectives of the underlying statutes," and would not clearly "benefit the plaintiff class"); *Six Mexican Workers v. Ariz. Citrus Growers,* 904 F.2d 1301, 1311–12 (9th Cir. 1990) (invalidating a cy pres distribution to the Inter-American Fund for "indirect distribution in Mexico," *id.* at 1304, in a class action brought by undocumented Mexican workers regarding violations of the Farm Labor Contractor Registration Act, because the distribution was "inadequate to serve the goals of the statute and protect the interests of the silent class members," *id.* at 1312) ….

Id. at 34.

The decision below did not overrule *Nachshin* and *Six Mexican Workers*, nor did it disagree that a cy pres recipient must have interests reasonably approximating those of the class. Rather, it restated those principles and held them satisfied in this case. *See* Pet. App. 14–15. The panel majority's application of that principle to the circumstances of this case was wrong, but despite that error, the law in the Ninth Circuit remains consistent with *Lupron*, *Nachshin*, *Dennis*, the ALI Principles, and what petitioner claims it should be: A cy pres distribution must have a substantial nexus not only to the general interests of the class, but to pursuit of the particular interests protected by the laws on which the class's claims are based.

Respondent McCall agrees with petitioner that the cy pres distribution was also improper—in part—because of the possibility of creating a subclass of

plaintiffs with statutory damage claims to whom a monetary distribution would have been feasible. The court's failure to so hold, however, does not create a conflict with *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781 (7th Cir. 2004), which required reconsideration of a settlement that extinguished claims of an already-certified subclass while providing no benefit to it whatever (not even cy pres), where the district court had not found "that the class had no realistic prospect of sufficient success to enable an actual distribution to the class members." *Id.* at 786. Nor does the decision below conflict with the holding of *Klier v. Elf Autochem North America, Inc.*, 658 F.3d 468 (5th Cir. 2011), which was that residual settlement funds should go to an already-certified subclass to which a distribution was feasible rather than to cy pres.

Similarly, respondent McCall agrees that it was improper to direct a cy pres award to a grant-making organization that lacks any track record of benefiting the plaintiff class and that is partially controlled by the defendant. Nonetheless, any tension between that result and the 26-year-old decision of the Second Circuit in *In re Agent Orange Product Liability Litigation*, 818 F.2d 179 (2d Cir. 1987), does not in itself merit this Court's review, particularly given that the Ninth Circuit's decision in *Six Mexican Workers* and its recent decision in *Dennis* address petitioner's point about the problem of the indefiniteness of the ultimate grant recipients more directly than the decision below and are fully consistent with petitioner's position.

There is always, of course, tension between decisions that are incorrect and decisions that are correct, but that tension in itself does not constitute an inter-

circuit conflict, especially when, as here, established precedents within the circuit whose decision is challenged are fully in accord with the law in other circuits. Moreover, this Court generally does not intervene where, as here, courts are applying general principles to circumstances that involve significant factual variations from case to case.

Respondent McCall agrees with petitioner that reining in the misuse of cy pres settlements, while allowing their appropriate use, is an important goal for the judicial system as a whole. Notwithstanding the decision below, the trend within the federal appellate courts both nationwide and in the Ninth Circuit has been toward both the articulation of standards to prevent abuses and the conscientious application of those standards to particular settlements. The decision below appears to be an outlier in the latter respect—a failure to live up to the standards the Ninth Circuit has set for itself and the courts under its supervision that is unlikely to be repeated by other panels. It would have been desirable for the Ninth Circuit to have granted en banc review to address the decision's failings. Even so, unless future decisions either articulate rules of law that conflict with decisions of other circuits or demonstrate that the Ninth Circuit has in practice abandoned its own precedents demanding rigorous scrutiny of class settlements featuring cy pres awards and such other red flags as disproportionately large attorney fee awards, special treatment for class representatives, and relief of dubious value to the class, the need for this Court to intervene to ensure consistency among the circuits will not be pressing.

The Court may, of course, exercise its discretion to intervene for error-correction purposes. And, to reiterate, respondent McCall agrees with petitioner that the panel in this case erred under a proper application of principles established by appellate precedents within and outside the Ninth Circuit. Whether the circumstances are so egregious as to bring this case within the rule that the Court will grant certiorari when a federal court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power," S. Ct. R. 10(a), seems doubtful, but is a question best decided by the Court for itself.

CONCLUSION

For the foregoing reasons, respondent Ginger McCall takes no position on whether the petition for certiorari should be granted.

Respectfully submitted,

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