No.

In The

Supreme Court of the United States

Gizella Weisshaus and Jacob Friedman, on behalf of themselves and all other persons of all national origins, ethnic groups, races, creeds and colors, similarly situated as victims and survivors of the Nazi Holocaust,
Cross Petitioners,

v.

Union Bank of Switzerland, et al.,
Respondents.

On Petition for Writ of Certiorari to the United State Court of Appeals for the Second Circuit

CROSS PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

What legal standard applies to a federal court's distribution of funds on a *cy pres* basis in a class action?

PARTIES TO THE PROCEEDINGS BELOW

Respondents are:

Holocaust Survivors Foundation USA, Inc., G.K. a Holocaust Survivor and member of the New American Jewish Club of Miami, L.K., a Holocaust Survivor and member of the New American Jewish Club of Miami, F.K., a Holocaust Survivor and member of the New American Jewish Club of Miami, David Schaecter, individually and as President of the Holocaust Survivors Foundation-USA, Inc., Leo Rechter, individually and as President of the National Association of Jewish Holocaust Survivors {NAHOS}, National Association of Jewish Holocaust Survivors, David Mermelstein, Individually and as President of the New American Jewish Club of Miami and President of the South Florida Holocaust Survivors Coalition, New American Jewish Club of Miami, South Florida Holocaust Survivors Coalition, Alex Moskovic, individually and as Co-President of the Child Survivors/Hidden Children of the Holocaust, Inc., Child Survivors/Hidden Holocaust Survivors, Fred Taucher, individually and as President of the Survivors of the Holocaust Recovery Project {SHARP}, Survivors of the Holocaust Recovery Project {SHARP}, Nesse Godin, individually and as President of the Jewish Holocaust Survivors and Friends of Greater Washington, Jewish Holocaust Survivors and Friends of Greater, Henry Schuster, individually and as President of the Holocaust Survivors Group of Southern Nevada, Holocaust Survivors Group of Southern Nevada, Herbert Karliner, individually and as a member of the Holocaust Survivors Foundation-USA, Inc. and the South Florida Holocaust Survivors Coalition, Lea Weems, individually and as President of the Houston Council of Jewish Holocaust Survivors, Houston Council of Jewish Holocaust Survivors, Sam Gasson, individually and as President of the Habonim Cultural Club, Survivors of the Holocaust, Habonim Cultural Club, Survivors of the

Holocaust, Holocaust Survivors of South Florida, Dena Axelrod, individually and as a member of the Child Survivors of the Holocaust, South Florida Group and the South Florida Holocaust Survivors Coalition, Saul Birnbaum, individually and as President of the Holocaust Survivors Club of Boca Raton {Century Village}, and the Holocaust Survivors Club of Boca Raton {Century Village}.

Appellants below.

Additional Respondents are:

Union Bank of Switzerland, Swiss Bank Corp., also known as Swiss National Bank, Banking Institutions # 1-100, John Does # 1-100, Certain Swiss Bank Accounts described as follows, Swiss Bankers Assoc., Swiss Bankers Association, Bank of International and Bank of International Settlements,

Defendants-Appellees below,

Judah Gribitz,

Special Master Below,

World Jewish Restitution Organization, South Florida Holocaust Coalition and Thomas Weiss,

Intervenor-Plaintiffs below,

Washington State Insurance Commissioner, Gregory Tsvilichovsky, Matvey Yentus, Sofiya Bloshteyn, Olga Tsvilikhovskya, Larisa Ryabaya, Rosa Yentus, Pavel

Aronov, Lubov Starodinskaya, Eliazar Bloshteyn, Plaintiff's Executive Committee Settlement Class,

Interested-Parties below,

Polish American Defense Committee, Inc., a non-profit California Corporation, Irving Wolf, Disability Rights Advocates and Director of International Affairs and Representation,

Movants below,

Pink Triangle Coalition, Karl Lange and Pierre Seel,

Interested Parties-Cross-Appellants below,

Miriam Rubin, Individual Holocaust Survivor, Doris Fedrid, Individual Holocaust Survivor, Helga Gross, Individual Holocaust Survivor, National Federation of the Blind, USA, German Council of Centers for Self-Determined Li, Finist, Russia, Equal Ability Limited, United Kingdom, Through the Looking Glass, USA, Disabled Persons International, Canada, World Institute on Disability, USA, Center for Independent Living, Bulgaria, Disability Rights Education and Defense Fund, US, Center for Independent Living, Berkeley. USA, California Foundation for Independent Living Cen, Independent Living Resource Center San Francisco, Computer Technologies Program, USA, Ragged Edge/Avacado Press, USA, Legal Advocacy for the Defense of People with Di, National Confederation of Disabled Persons, Greece and De juRe Alapitvany, Hungary,

Other Appellants below.

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CROSS PETITION FOR WRIT OF CERTIORARI

Cross Petitioners[1] respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The first of the principal decisions below is the district court's March 9, 2004 decision explaining its reasoning for allocating funds on a *cy pres* basis to a minority of Looted Assets Class members. The decision is published at 302 F. Supp. 2d 89 and is reproduced as Appendix G to the Petition for Certiorari filed by the Holocaust Survivors Foundation USA, Inc., et. al ("Foundation") on April 3, 2006.

The second principal decision below is the Second Circuit's September 9, 2005 decision affirming the district court's allocation of funds on a *cy pres* basis. The decision is unreported but reproduced in the Foundation's Petition for Certiorari as Appendix A (*In re Holocaust Victim Assets Litigation*, 424 F.3d 132 (2d. Cir. 2005)).

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[1] This brief is submitted on behalf of the entire Class. Counsel of Record represents thousands of class members individually, serves as Class Counsel in the Court-appointed role of Co-Chair of Plaintiffs' Executive Committee, is one of three attorneys who was a principal negotiator of the Settlement Agreement, and is Settlement Class Counsel. *See generally* S.E. Eizenstat, Imperfect Justice (Public Affairs 2003). The position of the Class as represented by the undersigned, is different from the position of the Court-appointed Settlement Lead Counsel, Burt Neuborne, whom the lower court has described as its "General Counsel."

Other decisions of the district court that provide background for the litigation are reproduced in the Foundation's Appendix to its Petition for Certiorari.

JURISDICTION

The Second Circuit issued its Opinion on September 9, 2005. The Foundation moved for rehearing and rehearing enc banc, which were denied on January 3, 2006. These same parties filed a Petition for Certiorari on April 3, 2006. This Court has jurisdiction to hear this Cross Petition pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rules 12.5 and 13.4.

STATUTORY PROVISION INVOLVED

Rule 23 of the Federal Rules of Civil Procedure provides the procedural structure for class actions. However, no provision of Rule 23 governs the standards for distribution of settlement funds on a *cy pres* basis.

STATEMENT OF THE CASE

The distribution of $1.25 billion from an historic class action settlement raises an issue of national importance as to the legal standard for *cy pres* distribution of settlement funds. The January 26, 1999 Settlement Agreement with Swiss Banks resolving World War II Holocaust claims included compensation for five (5) subclasses of victims of Nazi oppression in return for a countrywide release from those subclasses to all Swiss entities. After approving the Settlement Agreement, the Court distributed monies to four of the subclasses on a claims-made basis. However, the lower court concluded -- after expiration of the opt-out period

-- that problems associated with distribution to the Looted Assets Subclass[2] were such that no claims-based compensation could be paid, notwithstanding that 424,000 Subclass members submitted detailed questionnaires as to their losses and released their claims against all Swiss entities.

After six years of laborious claims administration for the four subclasses, the process is almost complete and will leave approximately $500 million for distribution pursuant to the *cy pres* doctrine. Even before finalization of the claims administration process, the district court authorized on a *cy pres* basis an interim payment of $100 million for humanitarian purposes heavily weighted (75%) for needy Jews in the former Soviet Union ("FSU"), people described as "double victims," that is, victims of both the Holocaust and communism. *See* S.E. Eizenstat, Imperfect Justice, 28 (Public Affairs 2003). The specific distribution was to social service agencies earmarked $90 million for Jewish survivors and $10 million for non-Jewish survivors, with a total of 75% to be distributed in the FSU, 12.5% in Israel and 12.5% in the rest of the world. When the $100 million was exhausted, the Court approved another $45 million for distribution in the same formula. After exhausting the $45 million, the district court, in its March 9, 2004 decision, approved $60 million more.

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[2] The lower court concluded that objective criteria for payment of claims to the Looted Assets Subclass was wanting, and the average payment may be under $1,000. On appeal, the Second Circuit affirmed the conclusion that the lower court need not distribute money to the Looted Assets Subclass on a claims-made basis. *In re Holocaust Victim Assets Litigation*, 2001 WL 868507, at *2 (2d Cir. July 26, 2001).

Certain individual class members appealed this decision to the Second Circuit. The Cross Petitioners herein filed a brief supporting the distribution of the $60 million at issue but arguing that the district court had not followed the principles for a *cy pres* distribution. Cross Petitioners further requested that the Circuit bar any further *cy pres* distribution until the lower court rendered a decision on the final distribution of *cy pres* funds in accordance with the principles stated in *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 179 (2nd Cir. 1987). The reasoning was that the prior disproportional *cy pres* distributions could be addressed and remediated in the plan for the remaining monies. Lead Settlement Counsel, whom the district court has described as its "General Counsel," filed a brief supporting the lower court decision in its entirety.

The Second Circuit affirmed the district court's opinion without requiring that the district court's *cy pres* distribution comply with the principles in *Agent Orange*, stating:

> in a traditional class action brought to remedy an injury that had occurred shortly before initiation of suit, the amounts allocated among claimants would normally vary primarily by the effect of the injury upon different claimants.... But in the circumstances presented by this case, we think the equitable principles of the *cy pres* doctrine permit the geographic variation that the District Court adopted ....

App. A25 (*In re Holocaust Victim Assets Litigation*, 424 F.3d at 147).

The Holocaust Survivors Foundation USA, Inc. filed a Petition for Certiorari on April 3, 2006. The Settlement Class has now filed a Cross Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the decision below fails to apply any legal standard for *cy pres* distribution. The total distribution of money on a *cy pres* basis in this class action settlement – over $700 million – will be the largest in judicial history. The distribution is also highly contentious. This Court has never ruled on the criteria for *cy pres* distributions even though a *cy pres* distribution occurs in virtually all class action settlements with "leftover" monies. Several circuit courts have adopted differing criteria – or simply rubber-stamped the discretion of the lower court. The instant case provides a vehicle for this Court to establish a uniform legal standard which must be followed by lower courts in making *cy pres* distributions. The framers of the Constitution, who created a careful system of check and balances, never intended or envisioned that Article III judges would have unbridled discretion – the equivalent of private foundations – to distribute vast sums of money.

I. THE ISSUE PRESENTED IS OF NATIONAL IMPORTANCE

The remedy of *cy pres* developed as a trust law concept to allow distribution of trust monies to related interests after the primary purpose of a charitable trust had failed. *See Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 784 (7th Cir 2004). *Cy pres* is derivative of the Norman French expression, *cy pres comme possible,* meaning "as near as possible." *See In re Airline Ticket Commission Antitrust Litigation*, 307 F.3d 679, 682-83 (8th Cir. 2002). In the context of American class action settlements, *cy pres* has come to mean the indirect distribution of unclaimed funds.

Although *cy pres* distributions are rendered in virtually all class action settlements, *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990), the amounts are typically small relative to the overall settlements. Usually the amount is under $100,000 so that the cost and expense of a supplemental distribution to class members is not warranted.

However, in the past two decades the size of some *cy pres* awards has grown. Some of the reported decisions rendering large *cy pres* awards include: *In re Infant Formula Multidistrict Litigation*, 2005 WL 2211312, at *2-3 (N.D. Fla. 2005) ($1,010,073.17 unclaimed funds donated to the American Red Cross); *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 362 F. Supp. 2d 574, 576-77 (E.D. Pa. 2005) ($436,000 donated to NFL Youth Education Town Centers); *In re Motorsports Merchandise Antitrust Litigation*, 160 F. Supp. 2d 1392 (N.D. Ga. 2001) ($2.4 million of unclaimed settlement funds donated to nine charities); *In re Mexico Money Transfer Litigation*, 164 F. Supp. 2d 1002, 1031-34 (N.D. Ill. 2000) ($4.6 million donated to charities); *In re Toys "R" Us Antitrust Litig.*, 191 F.R.D. 347, 353-4 (E.D.N.Y. 2000) (donating toys worth $36.6 to children's charities); *Powell v. Georgia-Pacific Corporation*, 119 F.3d 703 (8th Cir. 1997) ($1 million donation to scholarship funds); *Superior Beverage Co. v. Owens-Illinois*, 827 F. Supp. 477 (N.D. Ill. 1993)($2 million donated to fourteen non-profit legal groups, law schools and an art museum); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396 (E.D.N.Y. 1985), *aff'd in relevant part*, 818 F.2d 179 (2d Cir. 1987) ($45 million *cy pres* award).

Lower courts frequently designate nonprofit organizations of their choosing as the recipients. These rulings evade challenge since class counsel normally have no incentive to attack the court's ruling, and defendants have no interest in litigating over funds that only benefit the plaintiff

class. Only when the recipient is especially controversial is the court's ruling challenged. For example, in *Houck on Behalf of U.S. v. Folding Carton Admin. Committee,* 881 F.2d 494 (7th Cir. 1989), the lower court's choice to fund an antitrust foundation was challenged and reversed by the circuit court. Therefore, the opportunity for appellate review is infrequent.

The amount available for discretionary distribution by the lower court in the instant case -- about $700 million -- is far in excess of any amount ever distributed on a discretionary basis by any federal court. There are many worthwhile causes and legions of good charities, but the Settlement Fund was not created as a private foundation for the lower court to distribute monies to generic causes and charities. Were the Settlement Fund a foundation, it would rank as the 75th largest foundation in the United States in regard to total assets. *See* http://www.fdncenter.org /findfunders/topfunders/top100assets.html (April 26, 2006). If the assets are distributed over 10 years, as originally proposed by the lower court, the fund would rank as the 45th largest foundation in the United States in annual payout. *See* http://foundationcenter.org/findfunders/statistics/pdf/11_topf dn_type/top50_tg_all.pdf (April 26, 2006).

An Article III court is not a foundation and should not take on the mantel of a foundation. *Cf. In re "Agent Orange" Product Liability Litigation*, 818 F.2d at 185-86. The framers of the United States Constitution never intended that an Article III court would have plenary discretion over the distribution of such a large amount of money and act, in effect, as a private foundation. Indeed, such discretion is contrary to the separation of powers doctrine whereby fiscal matters are subject to checks and balances. The standardless doling of enormous sums of money inevitably invites patronage. The framers intended that the judicial branch of government possess "no patronage and no control of purse or

sword." *United States v. Lee*, 106 U.S. 196, 223, 1 S.Ct. 240, 27 L.Ed. 171 (1882). "The cost of the practice of patronage is the restraint it places on freedoms of belief and association." *Elrod v. Burns*, 427 U.S. 347, 355, 96 S.Ct. 2673, 49 L.Ed. 2d 547 (1976).

There is a mistaken notion, encouraged by the lower court, that a *cy pres* award of residual settlement funds is purely charitable in nature and should be administered on a charitable basis. In this case, the lower court used two factors totally unrelated to the cause of action or settlement in awarding 75% of $205 million to class members: financial need and residence in former "iron curtain" countries. While the gesture may be admirable and the recipients worthy, the legal justification is lacking. There was no attempt to fashion *cy pres* relief for members of the Looted Assets subclass as a whole. And the lower court is committed to replicating its past *cy pres* awards with the remaining *cy pres* monies. The settlement of this litigation was intended to place compensation back in the hands of Holocaust victims or their heirs. Need and residence are not distribution criteria. Certainly no court administering an antitrust or securities class action fund would propose distribution to class members on a need or residency based formula. *See e.g. Van Gemert v. Boeing Co.*, 553 F.2d 812 (2d Cir. 1977) (proportionate distribution to securities class members).

Fashioning of *cy pres* relief is not an opportunity to transform a federal court into a foundation, nor does it empower an Article III judge to make decisions as to which class members are more deserving of benefits and dole those benefits out as welfare. In this case, where the residual monies are not "unclaimed" and the Subclass has not received any compensation, a *cy pres* remedy must reach most of the Subclass members directly or indirectly to be lawful. The *cy pres* benefit here is an entitlement, not a gift or alms.

II. THERE IS NO CONSISTENCY OR UNIFORMITY IN CIRCUIT COURT DECISIONS APPLYING THE *CY PRES* DOCTRINE

The operative law in the Second Circuit is that money which cannot be distributed on a "claims made" basis to class members may be distributed in a mode that will "benefit" the class. *See In re "Agent Orange" Product Liability Litigation*, 818 F.2d at 185. Under *Agent Orange*, there must be "equivalen[cy]," or at least "fluidity," between the class claiming injury and the class receiving a recovery. *Id.* However, the Second Circuit chose not to apply or even cite its own seminal decision, preferring to affirm the lower court's exercise of discretion as *sui generis*. This tracks a growing trend of the circuit courts to invoke the talisman phrases "in the unusual circumstances of this case" or "under the exceptional facts of this case" to justify departures from established precedent.

The standard in the Eighth Circuit for the *cy pres* distribution of unclaimed settlement funds requires "distribut[ion]" for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated." *In re Airline Ticket Commission Antitrust Litigation*, 307 F.3d at 682. In the Ninth Circuit *cy pres* monies must be distributed based on the objective of an applicable statute, and the interests of class members. *See Six Mexican Workers*, 904 F.2d at 1307. In the Eleventh Circuit a *cy pres* distribution must benefit the majority of class members. *See Nelson v. Greater Gadsden Housing Authority*, 802 F.2d 405, 409 (11th Cir. 1986).

As is evident from the above, there is no consistent or uniform standard in the circuits for the *cy pres* distribution of

residual settlement funds. At a minimum, this Court should adopt a standard for *cy pres* distributions that requires a lower court to benefit the large majority of class members with near equivalency either directly or indirectly. There are various modes of distribution of the remaining $500 million of *cy pres* funds in the instant case which could satisfy this standard. One possible mode, already proposed by Class Counsel to the lower court, is to reimburse medical expenses or medical insurance premiums up to $1,000 for Holocaust survivors who are members of the Looted Assets Subclass. Without a standard, lower courts with large sums to distribute on a discretionary basis will continue to act as virtual foundations, inviting patronage and threatening the independence of the judiciary.

CONCLUSION

This Court should grant this petition for a Cross Writ of Certiorari, affirm the decision of the Second Circuit insofar as it upheld the *cy pres* allocation of $205 million, and direct that all future decisions regarding *cy pres* distributions be in accordance with the legal standard established by this Court.

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