No. 17-961

In the Supreme Court of the United States

THEODORE H. FRANK and MELISSA ANN HOLYOAK,
Petitioners,

v.

PALOMA GAOS, on behalf of herself and 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

BRIEF IN OPPOSITION OF RESPONDENT GOOGLE LLC

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QUESTION PRESENTED

Whether this Court should review the determination of the two courts below that it was infeasible to distribute $5.3 million in settlement funds to 129 million class members who had been unable to plead any concrete injury resulting from the challenged feature of Internet searches, so that the district court acted within its discretion in approving the settlement's *cy pres* awards to six organizations with established Internet privacy programs.

RULE 29.6 STATEMENT

Respondent Google LLC is a wholly owned subsidiary of XXVI Holdings Inc., which is a wholly owned subsidiary of Alphabet Inc., a publicly traded company. No publicly held corporation owns more than 10% of Alphabet Inc.'s stock.

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BRIEF IN OPPOSITION OF RESPONDENT GOOGLE LLC

Petitioners (and professional objectors) Ted Frank and Melissa Holyoak seek this Court's review based on a phony circuit split along with broad policy objections to aspects of *cy pres* settlements not present here.

Petitioners describe a conflict that does not exist. The courts of appeals agree on the legal standards governing review of *cy pres* settlements. They agree that, as the court below acknowledged, *cy pres* settlements are "the exception, not the rule." Pet. App. 8. And they agree on the narrow circumstance that justifies the exception: when direct distribution to class members is infeasible.

At bottom, then, the petition presents a case-specific disagreement with the findings below that distribution was infeasible in this case, with its class estimated at 129 million members. Although this Court "do[es] not overturn a finding of fact accepted by two lower courts," *Texas Dep't of Housing & Community Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2544 (2015), petitioners' asserted conflict rests on their insistence that it is feasible to distribute a little over $5 million—an amount that petitioners concede is adequate to resolve the low-value claims in this case—to this enormous class. And while they ask this Court to depart from its established practice in order to overturn both lower courts' finding of infeasibility in this case, petitioners cannot offer even a speculative example of a case where distribution of a settlement fund would be infeasible under the legal standard uniformly prevailing in the courts of appeals.

Petitioners' restrictive approach would unduly constrain district courts and settling parties while providing no corresponding benefit to absent class members. The exacting standards applied by the courts of appeals to *cy pres* relief already protect against the abuses petitioners inveigh against, while appropriately permitting district courts to evaluate case by case whether generalized relief inuring to the entire class serves class interests more effectively than token payments to a tiny self-selected minority of class members.

Here, the *cy pres* payments will benefit the class as a whole by funding closely targeted projects that are directly connected to the Internet privacy issues raised by plaintiffs' claims. And because the recipient institutions are of the highest quality and specialize in Internet consumer issues, petitioners' quibbles with the district court's exercise of discretion in approving the recipients do not warrant this Court's attention. No more does petitioners' preference to provide nominal sums to a vanishingly small percentage of class members who were never harmed.

The circumstances of this case make it an especially inappropriate vehicle for changing the law to impose petitioners' vision. This case is unusually well-suited to a *cy pres* remedy because no class member appears to have been actually harmed by the challenged practices—as two district judges concluded in dismissing most of plaintiffs' claims. The case would have gone forward, if at all, based on the remote (and now-obsolete) prospect of obtaining a statutory damages award despite the absence of concrete injury. When this case settled, Ninth Circuit law permitted uninjured plaintiffs to pursue statutory damages, but this Court's decision in *Spokeo, Inc.*

v. *Robins*, 136 S. Ct. 1540 (2016), has since eliminated that risk. It is telling that neither petitioners, nor the usual suspects joining them as *amici*, engage with the obscure and hypertechnical claims, and lack of injury, in this case.[1]

As the standards of the courts of appeals reflect, parties should have the flexibility to compromise cases like this one that limp past the pleadings stage yet still pose a risk of huge liability based on uncertain substantive law at the time of settlement. The effectively black-and-white rule that petitioners ask this Court to consider would make these cases impossible to settle when the relatively low settlement value of the claims would yield a *de minimis* payment per class member. Instead, petitioners would impose on the parties and the judicial system the burden of continued litigation and continued risk. A perfect and friction-free system of class certification, liability determination, and award distribution might obviate the need for *cy pres* settlements, but the uncertainty of our own, entirely human legal system does not permit that rigid result.

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[1] For example, *amicus* Cato Institute submitted nearly identical arguments in *Frank* v. *Poertner*, No. 15-765, cert. denied 136 S. Ct. 1453 (2016). The same *amicus* joined a coalition of state attorneys general led by the Arizona Attorney General in support of the unsuccessful petition in *Blackman* v. *Gascho*, No. 16-364, cert. denied 137 S. Ct. 1065 (2017). Although they received notice of the settlement as the Class Action Fairness Act requires, none of the state attorneys' general now supporting the petition objected to the fairness of the settlement in either court below. See Pet. App. 51.

STATEMENT

Petitioners and their *amici* have almost nothing to say about *this* case—including the multiple dismissals of plaintiffs' complaints. Petitioners' two paragraphs (Pet. 8-9) omit the context of the settlement. Yet that context illuminates many of the deficiencies in the petition.[2]

A. Referrer headers and web history.

Respondent Google LLC operates a free Internet search engine, with over one billion user-generated search requests every day. SER 747, 749-750.[3] When users submit search terms on Google Search, within a fraction of a second Google returns to the user a list of relevant websites in a new web page, "the search results page." SER 749-750, 761-762.

To generate each search results page, Google's servers first generate a unique Uniform Resource Locator, or URL, that includes information about the user's search query used to generate that page. SER 761-762. Users can then click one of the links provided on the search results page, which will redirect the user to the desired site. SER 749-750.

In the normal course of operation, the user's web browser (*e.g.*, Internet Explorer, Firefox, Safari) transmits to that website what is known as "referrer header" information. See SER 760-762. The referrer header communicates the URL of the web page that

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[2] In light of the posture of the case at settlement, these facts are drawn largely from the allegations in plaintiffs' pleadings. Google does not admit the accuracy of these allegations.

[3] "ER __" refers to petitioners' Excerpts of Record in the court of appeals, and "SER __" refers to respondents' Supplemental Excerpts of Record.

the user last visited and by doing so informs the requested website how the user got to the page. SER 760-761; see also generally *In re Zynga Privacy Litig.*, 750 F.3d 1098, 1102 (9th Cir. 2014) (explaining how referrer headers work). So if a user clicks on a website from Google's search results page, the referrer header generated by the user's web browser will communicate the URL of the search results page, which, according to plaintiffs, includes the user's search terms. SER 760-761.

Plaintiffs have also raised allegations about Google's "Web History" service, which Google provides for its authenticated account holders. SER 712, 717-718. The "Web History" service tracks and stores account holders' web browsing activity on Google servers. *Ibid.* This service allows account holders to search the full content of pages they have viewed in the past, and also allows those who so desire to personalize their web browsing experience by creating recommendations tailored to their individual user preferences. *Ibid.* Unlike referrer headers, which are transmitted to third-party website operators as a standard and default web browser function, only the account holder has access to his or her Web History. *Ibid.*

B. The *Gaos* and *Priyev* actions.

The plaintiffs alleged that Google violated their privacy rights when referrer headers were disclosed to the owners of third-party websites on which a user clicked from a Google search results page. The purported privacy violation resulted from the alleged inclusion of search terms in the URL of the search results page.

1. In 2010, respondent Paloma Gaos filed a putative class action complaint against Google in the Northern District of California. See 5:10-cv-04809-EJD (N.D. Cal.), Dkt. No. 1. Gaos asserted violations of the Stored Communications Act of 1986 ("SCA"), 18 U.S.C. §§ 2701 *et seq.*)), as well as several California state-law claims. *Ibid.* Judge Ware granted Google's motion to dismiss the initial complaint because Gaos had "failed to plead facts sufficient to establish Article III standing" for any of her claims. SER 799-800.

Gaos's First Amended Complaint raised largely the same claims. Google again moved to dismiss, and Judge Davila (to whom the case had been reassigned) dismissed all but Gaos's SCA claim, which alleged only that the content of search queries, not linked back to Gaos in any way, was disclosed in referrer headers.

Judge Davila reasoned, much as Judge Ware had, that "Gaos does not identify what injury resulted" from the alleged dissemination of search queries in referrer headers, and thus had failed to "allege[] injury sufficient for Article III standing with respect to her non-statutory causes of action." SER 791-792.

Judge Davila concluded that Gaos nonetheless had standing to pursue her SCA claim based on then-current Ninth Circuit law holding that asserting the bare violation of a statute was sufficient to establish Article III standing "without additional injury." SER 792-793 (citing *Edwards* v. *First American Corp.*, 610 F.3d 514 (9th Cir. 2010), cert. granted, 131 S. Ct. 3022 (2011), cert. dismissed, 132 S. Ct. 2536 (2012)). Judge Davila further cautioned that "although Gaos ha[d] alleged sufficient injury for standing based on a violation of the SCA" in light of

Edwards, "this finding does not mean Gaos has properly stated a claim for relief under the SCA." SER 794.

Gaos, joined by additional plaintiff Anthony Italiano, filed a second amended complaint (SER 746-788) in an attempt to cure the defects identified by Judge Davila. That complaint speculated that a website operator or other unidentified third party could identify someone based on their search terms because Google's users, including plaintiffs, sometimes conduct "vanity searches"—*i.e.*, searches for their own name. SER 776. They further speculated that, although referrer headers do not specify a user's name, a hypothetical "adversary" could use the "Science of Reidentification" to "combine anonymized data" from Referrer Headers "with outside information to pry out obscured identities." SER 770-773.

Google again moved to dismiss, arguing that the plaintiffs still had failed to allege facts supporting Article III standing for any of their claims or for relief under them, and that the SCA preempted plaintiffs' state-law claims (which were in Italiano's name only). That motion had been fully briefed at the time of settlement, but was never decided.

2. In February 2012, respondent Gabriel Priyev filed a similar action in the Northern District of Illinois. See 12-CV-01467 (N.D. Ill.), Dkt. No. 1 (Feb. 29, 2012). Google moved to dismiss that complaint as well, contending, as in *Gaos*, that Priyev lacked Article III standing and failed to state a claim on which relief could be granted.

Rather than defend the original complaint, Priyev twice amended it. In the second amended complaint, Priyev, again like the plaintiffs in *Gaos*,

alleged that Google violated the SCA and asserted additional state-law claims. SER 708-745. He similarly speculated that unidentified third parties might be able to identify him from referrer headers because he "regularly engaged in vanity searches." SER 723. Priyev further alleged that, by including search terms in referrer headers, Google had disclosed account holders' Web Histories to third parties one search at a time, allegedly in violation of its privacy policies. SER 712, 717-718.

Before Google responded to the second amended complaint, the *Priyev* action was transferred to the Northern District of California and consolidated with *Gaos*. All of the plaintiffs then filed a consolidated class action complaint (SER 660-707), seeking to represent "[a]ll persons in the United States who submitted a search query to Google at any time between October 25, 2006 and the date of notice to the class of certification." SER 697 (emphasis omitted).

C. Settlement and approval proceedings.

After an all-day mediation session, the parties entered into a settlement agreement and release in March 2013. Pet. App. 69-111. The settlement class tracks the class definition in the consolidated complaint and is estimated to include approximately 129 million members. Pet. App. 5. Google agreed to pay $8.5 million, which was to be put into a settlement fund. After covering notice and administration costs, $5,000 incentive awards for each of the three named plaintiffs, and whatever amount of reasonable attorneys' fees and costs the district court awarded, the remainder (approximately $5.3 million) would be distributed proportionally among six *cy pres* recipients to fund projects specifically devoted to Internet privacy issues: Carnegie-Mellon University; World Pri-

vacy Forum; Chicago Kent College of Law Center for Information, Society, and Policy; Stanford Law School Center for Internet and Society; Berkman Center for Internet & Society at Harvard University; and AARP Foundation. Pet. App. 5.

Plaintiffs linked to each of the recipients' detailed proposals for the use of the *cy pres* distribution on the website created for class notice. SER 3, 56-58; see also SER 257-381. (A seventh proposed recipient, the MacArthur Foundation, withdrew from consideration during the settlement process. ER 142 n.3.) Upon reviewing the proposals, the district court compared them "to an application for a grant." ER 44.

Google also agreed to make additional disclosures on its website to better inform its users how referrer headers operate and to direct them to Google's privacy policies for more information on how Google handles search queries generally. Pet. App. 40, 82.

The district court granted preliminary approval of the settlement. ER 135-148. The court observed that "[t]his case is somewhat unique in that the size and nature of the class renders it nearly impossible to determine exactly who may qualify as a class member." ER 146. "In fact," it noted, "due to the popularity of Defendant's search engine and its rather ubiquitous position in American culture, this class potentially covers all internet users in the United States." *Ibid.* Under this circumstance, the court found, "the cost of sending out what would likely be very small payments to millions of class members would exceed the total monetary benefit obtained by the class." ER 145.

Recognizing that direct notice to the settlement class was not feasible, the district court approved the parties' proposed notice campaign—which petitioners did not challenge below. The notice campaign consisted of (1) Internet-based notice using banner ads in both English and Spanish; (2) articles in the press; (3) a website dedicated solely to the settlement, with both English and Spanish versions; and (4) a toll-free telephone number where class members can obtain additional information and request a written class notice. Pet. App. 6, 39; see also SER 146-161 (declaration of the claims administrator explaining the design of the notice campaign and its implementation).

Despite this extensive campaign, only 13 of the 129 million putative class members—about one in ten million, or 0.00001%—opted out of the class, and only five class members (including the two petitioners) entered written objections. ER 17, 98-134.

After an extensive fairness hearing (ER 29-97), the district court granted final approval of the settlement (Pet. App. 31-61), holding that petitioners and the other objectors had not met their burden of demonstrating that the settlement is not fair, adequate, and reasonable. In particular, the court rejected, as inconsistent with Ninth Circuit precedent, petitioners' argument that a *cy pres*-only settlement class should never be certified. Pet. App. 37-38 (citing *Lane* v. *Facebook, Inc.*, 696 F.3d 811, 826 (9th Cir. 2012); *Nachshin* v. *AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011)). The district court additionally noted that petitioners and the other objectors failed to overcome class counsel's showing that the "cost of distributing [the] settlement fund to the class members would be prohibitive" in light of the size of the

class and the administrative expense of direct distribution. Pet. App. 58.

The district court also recognized "the very real risk of never obtaining or losing class status in the absence of settlement." Pet. App. 45. And the court characterized the settlement amount as more than adequate in light of the "significant and potentially case-ending weakness in the SCA claim brought about by the Ninth Circuit's decision in *Zynga Privacy Litigation*." Pet. App. 58-59.

Finally, the court rejected the objectors' contention that the *cy pres* recipients were inappropriate due to alleged conflicts of interest. Having reviewed the recipients' proposals (Pet. App. 48; see also ER 44), the court observed that the recipients "have a record of promoting privacy protection on the Internet, reach and target interests of all demographics across the country, were willing to provide detailed proposals, and are capable of using the funds to educate the class about online privacy risks." Pet. App. 47-48.

D. The Ninth Circuit affirms.

The Ninth Circuit affirmed. Pet. App. 1-23. The court first rejected petitioners' argument that *cy pres*-only settlements are categorically improper. It recognized that "*cy pres*-only settlements are considered the exception, not the rule." Pet. App. 8. That exception is appropriate "where the settlement fund is 'non-distributable' because 'the proof of individual claims would be burdensome or distribution of damages costly.'" *Ibid.* (quoting *Lane*, 696 F.3d at 819).

The Ninth Circuit upheld the district court's finding that the settlement fund was not distributable. The court observed that the fund amount to be

distributed ($5.3 million) to the class of 129 million individuals left a "paltry" sum of four cents per class member. Pet. App. 9. In addition, the court approved the district court's finding that trying to compensate even a nontrivial percentage of class members would consume the settlement fund: "'sending out very small payments to millions of class members would exceed the total monetary benefit obtained by the class.'" *Ibid.* (quoting the district court).

The court of appeals further rejected petitioners' argument that the only permissible form of settlement is one that instead compensates a "miniscule portion of the class"—either through a "'random lottery distribution'" or by offering "'$5 or $10 per claimant' on the assumption that few class members will make claims." Pet. App. 9. The court recognized that this would amount to a categorical ban on *cy pres*-only settlements that would be inconsistent with its prior precedents. Pet. App. 10. And it noted that, although an alternative settlement of that kind may be technically "possible," it was not required so long as the actual settlement is fair, reasonable, and adequate under Rule 23(e) and the existing standards courts have adopted to scrutinize class-action settlements. Pet. App. 9-10.

The court then turned to the selection of the six *cy pres* recipients. It chastised petitioners for their "unfair and untrue" assertion that the district court "rubber-stamped the settlement." Pet. App. 12. Instead, the court of appeals held, the district court correctly found that the six *cy pres* recipients satisfy the "'nexus' requirement by being tethered to the objectives of the underlying statute and the interests of the silent class members." Pet. App. 12-13. The court noted the rigorous "selection process employed to vet

the *cy pres* recipients in this litigation," and the district court's "careful review" of the "detailed proposals" submitted by the recipients. Pet. App. 16. And because the recipients met the exacting standards mandated by the court's precedents, Google's previous donations to some of the recipients and the fact that some of the recipients "are organizations housed at class counsel's *alma maters*" were not the "absolute disqualifier[s]" urged by petitioners. Pet. App. 12-16.

In other words, as the court put it in terms of petitioners' own proposed rule, petitioners had failed to "'raise substantial questions about whether the selection of the recipient[s] was made on the merits.'" Pet. App. 14 (quoting Principles of the Law of Aggregate Litigation § 3.07 cmt. b (Am. Law Inst. 2010)). The court observed, for instance, that "some of the recipient organizations have challenged Google's Internet privacy policies in the past," and that "[e]ach recipient's *cy pres* proposal identified the scope of Google's previous contributions to that organization, and * * * explained how the *cy pres* funds were distinct from Google's general donations." Pet. App. 16-17 & n.7. Likewise, the court concluded that because "[t]he recipients are well-recognized centers focused on the Internet and data privacy," petitioners' argument that the settlement should be invalidated based on the mere fact that class counsel have degrees from some of the institutions that house the recipients "can't be entertained with a straight face." Pet. App. 19.

Judge Wallace concurred in part and dissented in part. Pet. App. 23-30. He "agree[d]" with the majority "that a *cy pres*-only settlement was appropriate in this case," Pet. App. 23, and "express[ed] no opinion

on the definitive fairness" of the settlement, Pet. App. 30. Instead, he would have remanded to the district court for further fact-finding about the selection of the specific *cy pres* recipients. Pet. App. 24, 30.

The Ninth Circuit denied rehearing. Pet. App. 67.

REASONS FOR DENYING THE PETITION

The petition seeks review of a case-specific exercise of discretion applying settled legal standards to unique facts and circumstances. Further review is unwarranted for several reasons.

First, there is no circuit conflict. All circuits agree with the Ninth Circuit that a *cy pres*-only settlement is appropriate in the rare circumstance where direct distribution to class members is infeasible, and all insist on a close nexus between the *cy pres* remedy and the interests of settling class members. Both the district court and the Ninth Circuit followed these established standards in carefully scrutinizing the settlement here.

Second, petitioners and their *amici* are also flat wrong that *cy pres*-only settlements are on the rise; their own source confirms that, since Chief Justice Roberts' statement respecting the denial of certiorari in *Marek* v. *Lane*, 134 S. Ct. 8 (2013), the number of *cy pres*-only settlements has *dropped* dramatically. That trend is all the more likely to continue in light of this Court's decision in *Spokeo*, which requires courts to weed out at the pleadings stage the kind of no-injury claims most likely to lead to proposed *cy pres*-only settlements.

Third, this case is a poor vehicle for consideration of the new and rigid limits on *cy pres* settle-

ments urged by petitioners. This case is especially well-suited to a *cy pres* remedy because class members have not alleged any actual harm from the challenged practice—making any direct payment, however modest, a windfall rather than compensation. And none of petitioners' concerns about *cy pres* abuses is actually presented here—which is not surprising because the circuits now uniformly demand that district courts safeguard against abuse.

Finally, the decision below was correct. Petitioners do not dispute that the settlement amount was more than adequate, and they have no real challenge to the findings of both courts below that individual distributions of the $5 million settlement amount to a non trivial portion of the 129-million-member class would be infeasible. Petitioners also cannot deny that the district court thoroughly evaluated the detailed proposals submitted by the *cy pres* recipients and ensured that the *cy pres* distribution would be spent on privacy and security issues closely tied to the class claims. Given these circumstances, as well as "the shakiness of the plaintiffs' claims" (Pet. App. 9), the district court acted well within its discretion in finding the settlement "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2), and the Ninth Circuit was correct to affirm that exercise of discretion.

A. The Purported Conflict Does Not Exist.

1. While petitioners rail against *cy pres* remedies, every circuit to address the issue has held that *cy pres* remedies may be appropriate in class action settlements. That's why, in one of the cases petitioners cite the most, the Third Circuit said that it "join[ed] 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." *In re Baby Products Antitrust Litig.,* 708 F.3d 163, 172 (3d Cir. 2013).

In particular, the courts of appeals have allowed *cy pres* remedies where a cash distribution of all or part of a settlement fund would not be feasible—either because class members cannot be identified, or because the amounts at issue would produce a negligible payment per class member (or be entirely consumed by the administrative costs of distribution). In those rare circumstances, the circuits uniformly have held that the parties may direct the distribution to a charity aligned with the interests of the settlement class. See, *e.g.*, *Baby Products,* 708 F.3d at 173 (noting general agreement that "*cy pres* distributions are most appropriate where further individual distributions are economically infeasible"); *Klier* v. *Elf Autochem N. Am., Inc.,* 658 F.3d 468, 475 & n.15 (5th Cir. 2011) (*cy pres* awards are appropriate "when direct distributions to class members are not feasible"); *Mirfasihi* v. *Fleet Mortg. Corp.,* 356 F.3d 781, 784 (7th Cir. 2004) (rejecting *cy pres* distribution where "there would be no reason for thinking distribution to the class members infeasible"); *Masters* v. *Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (*cy pres* remedy available in "circumstances in which direct distribution to individual class members is not economically feasible"); *Powell* v. *Georgia-Pacific Corp.,* 119 F.3d 703, 706 (8th Cir. 1997) (a "*cy pres* distribution is potentially appropriate" where "it would be extremely difficult to distribute the funds pro rata"); *New York* v. *Reebok Int'l Ltd.,* 96 F.3d 44, 49 (2d Cir. 1996) (approving *cy pres* distribution where the "impracticality of attempting to distribute the settlement proceeds among the multitude of unidentified possible claimants is obvious" and "distri-

bution 'would be consumed in the costs of its own administration'").

This uniformity reflects a consistent rationale. Rather than distribute negligible amounts to class members (or, as petitioners suggest, leaving almost all class members with nothing at all), the circuits reason that settlement funds are better used for projects that advance the interests of the class as a whole. See *Baby Products,* 708 F.3d at 172-73; *Powell,* 119 F.3d at 706; *Six Mexican Workers* v. *Ariz. Citrus Growers*, 904 F.2d 1301, 1305, 1307 (9th Cir. 1990). No court has joined petitioners in asking that federal class actions be turned into lottery where a tiny percentage of class members, either self-selected or selected by the court, receive payments that are not tied to any injury.

Petitioners try to fracture this uniformity by attacking a caricature of the decision below. Petitioners read the decision as adopting a new rule that a *cy pres*-only settlement is permissible whenever "it would be 'infeasible' to make payments to *every single class member*." Pet. 2; accord *id.* at 17. But the Ninth Circuit said no such thing. It pointed out the "4 cents in recovery" per class member to highlight the "dramatic" "gap" between the settlement fund and the size of the class. Pet. App. 9. And it upheld the district court's finding "that the cost of verifying and 'sending out very small payments to millions of class members would exceed the total monetary benefit obtained by the class.'" *Ibid.* Petitioners have no answer to that dispositive "finding of fact accepted by two lower courts." *Texas Dep't of Housing*, 135 S. Ct. at 2544. That imbalance of costs and benefits remains even if the "millions of class members" receiv-

ing payments amount to less (even far less) than the full 129 million.

2. Sweeping away petitioners' mischaracterization of the decision below makes clear that the supposed conflict reflects only the application of the same legal standards to different facts.

To begin with, Judge Posner's opinion in *Pearson* v. *NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014), adopted the same legal standard used below, recognizing that a "*cy pres* award is supposed to be limited to money that can't feasibly be awarded to the * * * class members." *Id.* at 784. The class in *Pearson* had only 4.72 million members (less than 4% of the class here)—notified at a cost of about 30 cents per person. *Ibid.* The much larger settlement amount in *Pearson* allowed all members of the much smaller class to be paid directly ($3 each by the court's calculation, less the incremental distribution expenses of processing the payments). *Ibid.* Thus, the parties "ha[d] not * * * demonstrated" that it was "infeasible to provide that compensation to the victims." *Ibid.*

Here, by contrast, both courts below found that it would be infeasible to pay directly a "unique[ly]" enormous class that "potentially covers all internet users in the United States." ER 146; see also Pet. App. 8-9, 46-47. And, in further contrast with *Pearson*, where there was no dispute that class members had purchased the product at issue at least potentially in reliance on the allegedly misleading labels, here no out-of-pocket injury is alleged. Indeed, as the

district court held, plaintiffs had not alleged any concrete injury at all. See SER 791-792.[4]

There also is no inconsistency between the decision below and the Eighth Circuit's decision in *In re BankAmerica Corp. Securities Litigation*, 775 F.3d 1060 (8th Cir. 2015). The Eighth Circuit expressly "*agree[d]* with the Ninth Circuit" that *cy pres* awards are permissible so long as they provide an "indirect class benefit" by going to "uses consistent with the nature of the underlying action." *Id.* at 1066-67 (emphasis added; quotation marks omitted) (citing *Nachshin*, 663 F.3d at 1040). The court of appeals rejected the *cy pres* award proposed in *BankAmerica* because the single recipient—a Missouri legal-services organization—had an insufficient nexus to the securities fraud claims asserted by the nationwide class. See *id.* at 1067. No similar objections have been or could be raised against the targeted projects proposed by the *cy pres* recipients here, whose Internet privacy activities have nationwide scope and effects.

The Fifth Circuit's decision in *Klier* has nothing to do with the decision below. Indeed, the court in

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[4] Petitioners also rely (Pet. 18 n.4) on the Seventh Circuit's 2004 decision in *Mirfasihi* v. *Fleet Mortgage Corp.*, 356 F.3d 781 (7th Cir. 2004). But they fail to mention that the Seventh Circuit ultimately *affirmed* a *cy pres* distribution in that case on a rationale similar to the lower courts' here: that the underlying claims were of dubious value and presented significant litigation risks for the plaintiffs. *Mirfasihi* v. *Fleet Mortg. Corp.*, 551 F.3d 682, 686 (7th Cir. 2008). Just as the courts here questioned the applicability of the Stored Communications Act to plaintiffs' claims, see Pet. App. 58-59, the Seventh Circuit found the inapplicability of the federal Fair Credit Reporting Act to weigh in favor of the *cy pres* settlement. See 551 F.3d at 685-86.

that case explained that its decision did not "implicate the line of authority giving careful scrutiny to class settlement agreements in which the parties agree to a *cy pres* distribution." 658 F.3d at 478 n.29 (citing, *inter alia*, *Six Mexican Workers*, 904 F.2d at 1304, 1307). Rather, the district court in *Klier sua sponte* ordered a *cy pres* distribution of unclaimed settlement funds in direct violation of the settlement agreement's explicit direction that any leftover funds in a subclass fund "'shall be distributed pro rata to all Claimants in that subclass.'" *Id.* at 476. That is, *Klier* involved a district court's injection of *cy pres* in an attempt to override a settlement rather than approve or enforce it. *Id.* at 476-77.

The decision below does not conflict with the Third Circuit's *Baby Products* decision; nor are the two decisions "in tension," as petitioners half-heartedly assert in the alternative. Pet. 19. *Baby Products* approvingly cited the Ninth Circuit's decision in *Lane* in "join[ing] 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." 708 F.3d at 172. Although the court noted that "*cy pres* distributions are most appropriate where further individual distributions [to class members] are economically infeasible," it declined to "hold that *cy pres* distributions are only appropriate in this context." *Id.* at 173. Instead, *cy pres* relief is permissible when it is "fair, reasonable, and adequate" under "the same framework developed for assessing other aspects of class action settlements." *Id.* at 174.

Finally, there is no "tension" between the decision below and the Second Circuit's decision in *Masters*. Pet. 20. *Masters* cited with approval the Ninth

Circuit's infeasibility standard from *Six Mexican Workers*, but faulted the district court for directing funds to charities without even considering whether a distribution to the class would be possible and when "neither side contend[ed] that * * * individual distribution [was] economically impracticable." 473 F.3d at 435-36.

As these cases illustrate, there is no conflict among the circuits over the standards for judicial review of *cy pres* settlements. Courts applying these standards properly reach different outcomes based on different facts and circumstances. These outcomes present no conflict on any important question of federal law that could warrant this Court's review.

B. The Purported Issue Lacks Recurrent Importance Because *Cy Pres*-Only Settlements Are Sharply Declining And Reserved For Exceptional Cases.

There is a complete mismatch between petitioners' assertion that "*cy pres* settlements are increasingly prevalent" and the question presented, which asks this Court to review *cy pres-only* settlements—*i.e.*, ones that "provide[] no direct relief to class members." Pet. i, 31-32.

As explained in an article petitioners cite, the number of *cy pres*-only settlements is in fact sharply declining, with only *3 percent* of all *cy pres* settlements falling into that category from 2013 through 2016—down from 29 percent from 2000 through 2012. See Natalie Rodriguez, *Era of Mammoth Cases Tests Remedy of Last Resort*, Law 360 (May 2, 2017), https://www.law360.com/articles/918296/era-of-mammoth-cases-tests-remedy-of-last-resort (cited at Pet. 32; State AG Br. 7-8). As the article explains,

that drop is consistent with the view that Chief Justice Roberts's statement respecting the denial of review in *Lane* in November 2013 "mark[ed] a turning point for cy pres." *Ibid.* Since that time, the article summarizes, class action settlements have "mostly use[d] cy pres to get rid of so-called drippings—unclaimed funds and uncashed checks sent to class members." *Ibid.*[5]

Moreover, while 2016 was the most recent year covered in the analysis, the decline in the number of *cy pres*-only settlements is likely to continue further still in light of this Court's 2016 decision in *Spokeo*. *Spokeo* clarifies that Article III requires lower federal courts to weed out putative class actions seeking statutory damages in the absence of actual harm. These are the cases that are most likely to result in proposed *cy pres*-only settlements if they make it past the pleadings stage; settlements are naturally smaller when the presence of any injury is unlikely.

In short, empirical data confirm the Ninth Circuit's observation below that "*cy pres*-only settlements are considered the exception, not the rule." Pet. App. 8. Petitioners offer no compelling reason why this Court should review a perceived problem that is neither real (see pages 24-28, *infra*) nor widespread.

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[5] The article also notes the positive development of parties and courts using a "grant-like approach" to thoroughly vet potential *cy pres* recipients—precisely the approach followed in this case. See page 9, *supra*.

C. This Case Is An Exceedingly Poor Vehicle To Consider Unprecedented Limitations On *Cy Pres* Settlements.

1. Class members were unharmed and unlikely to receive anything from further litigation.

The petition again and again refers to class members who have not been "compensated" for their "injuries." *E.g.*, Pet. 2-3, 7, 19-20, 23, 25. The underlying premise is that a class is undercompensated unless some class members receive a direct distribution—no matter how few class members would be paid or how little they would receive.

But the circumstances in this case provide no opportunity to test that premise. That is because plaintiffs failed to allege *any* actual harm that they or class members suffered as a result of the challenged practices—which led both Judge Ware and Judge Davila to dismiss most of plaintiffs' claims for lack of "injury sufficient for Article III standing." SER 792; see also page 6, *supra*.

Before this Court decided *Spokeo*, however, Ninth Circuit law permitted plaintiffs to pursue their statutory claims under the Stored Communications Act in federal court without pleading or proving any actual, concrete harm. See SER 792-793 (citing *Edwards*, 610 F.3d at 517). Accordingly, the lack of harm was not an ironclad defense to liability at the time of settlement.

The district court further observed in approving the final settlement that Google would have had strong defenses to the SCA claims on the merits. Pet. App. 43 (citing *In re Zynga Privacy Litig.*, 750 F.3d at 1107, issued after the settlement here and reject-

ing a claim under the SCA based on purported disclosures in a referrer header). Yet given a class size of 129 million individuals and statutory damages of $1,000 (18 U.S.C. § 2707(c)), even the highly remote possibility of class-wide liability in a litigated class action at the time of settlement justified a compromise resolution of the case.

For these reasons, any direct payment to class members would have amounted to a windfall, not compensation for injuries resulting from Google's alleged conduct—making this case uniquely suited to a *cy pres* settlement. Indeed, the absence of any harm in this case helps explain why only 13 individuals out of a class of roughly 129 million—one in ten million class members—considered it worthwhile to opt out of the class and preserve their individual claims.[6] Accordingly, this case does not present the issue whether and to what extent *cy pres* remedies are appropriate when class members suffer actual harm.

2. This case implicates none of the cy pres *abuses that petitioners decry.*

None of the "five [actually six] specific concerns" petitioners raise about *cy pres* awards is actually presented by this case.

First, petitioners' complaint that "*cy pres* awards typically fail to redress class members' alleged injuries" (Pet. 23) is a red herring, because the class

[6] The Cato Institute complains generally about notice in class-action settlements (Cato Inst. Br. 4-6), but does not address the notice campaign in this case. Nor have petitioners challenged the district court's finding that the multi-pronged notice campaign here satisfied the requirements of due process and Rule 23(c)(2)(B). Pet. App. 38-39.

members here had no actual injuries to redress for the reasons just discussed.

Second, there is no merit to petitioners' suggestion that the *cy pres* funds will be put to uses unconnected with the underlying claims. Pet. 24-25 & n.6. The Ninth Circuit and other circuits all account for this concern by uniformly requiring a nexus between the proposed *cy pres* recipients and the interests of the class, in order to ensure that the class receives some form of benefit for their claims. See *Koby* v. *ARS Nat'l Servs., Inc.*, 846 F.3d 1071, 1080 (9th Cir. 2017) (rejecting settlement with proposed *cy pres* distribution to a San Diego veterans' organization with "no geographic nexus" to the nationwide class or connection between the organization's work and the underlying claims involving "unfair debt collection practices"); *Baby Products,* 708 F.3d at 180 n.16 ("[c]ourts generally require the parties to identify 'a recipient whose interests reasonably approximate those being pursued by the class'"); *Nachshin,* 663 F.3d at 1036 (*cy pres* remedy "must account for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members"); *Powell,* 119 F.3d at 707 (approving *cy pres* local scholarship remedy that served class members' objectives and would directly benefit their descendants); *Six Mexican Workers*, 904 F.2d at 1308 (reversing where *cy pres* remedy benefited a group "far too remote from the plaintiff class"); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179, 184 (2d Cir. 1987) (approving *cy pres* distribution that would "benefit the entire class").

This issue is a red herring for an additional reason. As the court below noted, petitioners actually

"*do not dispute* that the nexus requirement is satisfied here." Pet. App. 12 (emphasis added).

Third, petitioners simply speculate that class counsel will pursue *cy pres* awards in lieu of compensating class members. Pet. 25-26. As discussed above (at 16-17), the circuits uniformly guard against that concern too, by permitting *cy pres* awards only when it is infeasible to distribute the fund directly to individual class members. More broadly, courts, including the Ninth Circuit, uniformly demand a "'higher standard of fairness'" in scrutinizing pre-certification settlements in order to guard against "collusion and other abuses." Pet. App. 7; accord *Hanlon* v. *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1988) (collecting cases). And petitioners have no genuine quarrel with the district court's findings that the *Hanlon* factors were satisfied here. Pet. App. 39-55.

Fourth, petitioners complain that defendants might negotiate for the selection of *cy pres* recipients that petitioners perceive as benefiting the defendants rather than the class members. But the court below specifically considered this concern and found it inapposite here, noting that "some of the recipient organizations have challenged Google's Internet privacy policies in the past"—even pressing a Federal Trade Commission complaint that resulted in a $17 million fine. Pet. App. 16 & n.7 (describing the efforts by the World Privacy Forum and the Stanford Center for Internet and Society).

The Ninth Circuit also considered and rejected petitioners' argument that the *cy pres* distribution reflects merely a change in accounting entries for organizations to whom Google may make other donations, pointing out that "there was transparency in this process," with each proposed recipient "ex-

plain[ing] how the *cy pres* funds were distinct from Google's general donations." Pet. App. 17.

Fifth, petitioners complain that the availability of *cy pres* remedies in class-action settlements makes it easier to satisfy the manageability requirement of Rule 23(b)(3). Pet. 28-29. But that is true of *any* settlement, not just one involving *cy pres* relief. This Court has held that manageability does not matter in a settlement class. *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591 (1997). "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, * * * for the proposal is that there be no trial." *Id.* at 620. Petitioners also offer no alternative means by which defendants can settle putative class actions when individual class members cannot feasibly be identified—short of overturning decisions from the Ninth Circuit and other courts holding that Rule 23 does not require an "'administratively feasible way to determine who is in the class'" (Pet. 29 (quoting *Briseno* v. *ConAgra Foods, Inc.*, 844 F.3d 1121, 1125, 1129 (9th Cir. 2017))), which goes well beyond the scope of the question presented in the petition.

Finally, petitioners fret over the possibility that district judges will approve of *cy pres* settlements that direct funds to organizations with a connection to the judge, creating "the appearance or reality of judicial conflicts of interest." Pet. 29-31. Yet petitioners have not alleged that Judge Davila has such a relationship with any of the *cy pres* recipients in this

case—making these concerns entirely hypothetical here.[7]

D. The Decision Below Is Correct.

Finally, review is unwarranted because the Ninth Circuit's decision was correct. Under the circumstances of this case, the district court acted within its discretion in approving the settlement after careful scrutiny, and the Ninth Circuit in turn correctly determined that the district court did not abuse its discretion.

Petitioners have not presented any basis to undermine the findings of both courts below that, in light of the enormous size of the class and the comparatively small value of the settlement fund, that fund is "non-distributable" directly to class members. Pet. App. 8, 47. Specifically, the district court found that, "[s]ince the amount of potential class members exceeds one hundred million individuals, requiring proofs of claim from this many people would undeniably impose a significant burden to distribute, re-

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[7] Some of petitioners' *amici*—but not petitioners themselves—raise the additional argument that *any* distribution on a *cy pres* basis raises First Amendment concerns. *E.g.*, Cato Br. 20-24; Center for Ind. Rights Br. 3-8; Center for Const. Juris. Br. 5-7. The argument makes no sense. Absent members of a proposed Rule 23(b)(3) settlement class are in no way "compelled" to support *cy pres* recipients with which they disagree because they are free to opt out of the settlement instead. In any event, petitioners' failure to adequately raise the First Amendment argument "at any stage of this litigation" is reason alone for the Court to "not consider it." *Atl. Marine Constr. Co.* v. *Dist. Ct. for the Western Dist. of Texas*, 134 S. Ct. 568, 580 (2013); see Pet. App. 131 (two-sentence objection to AARP as a *cy pres* recipient because of its "political positions," with no mention of the First Amendment).

view, and then verify," such that "the cost of sending out very small payments to millions of class members would exceed the total monetary benefit obtained by the class." Pet. App. 47.

Petitioners have not contended—let alone pointed to any evidence to show—that the district court's factual finding, and the Ninth Circuit's endorsement of it, were clearly erroneous. The two courts' determination therefore must be accepted here. See *Texas Dep't of Housing*, 135 S. Ct. at 2544. And both the district court's and Ninth Circuit's analyses complied with settled law, discussed above, holding that *cy pres* remedies are proper when individual distributions would be infeasible.

Instead, petitioners asked the Ninth Circuit to hold for the first time that, as a matter of law, a settlement *must* offer a mechanism to provide a windfall to a minuscule portion of class members—chosen either by lottery or by a claims process that petitioners expect to have a claims rate of "well below 1 percent"—rather than providing an indirect benefit to the class as a whole through the *cy pres* mechanism. Pet. 11.

Yet no circuit has endorsed that absolutist approach, and for good reason. Petitioners cannot explain why the interests of the class as a whole are invariably better served by giving a windfall to a very few and nothing to the rest. The court below rightly rejected petitioners' proposal to adopt a rigid requirement favoring small payments to a tiny fraction of class members over payments to fund research, analysis, education, and advocacy on Internet privacy issues that will benefit a much greater proportion (and quite possibly all) of the class.

Petitioners and their *amici* try to extract a mandatory rule from one district court's rejection of a proposed *cy pres*-only settlement in favor of attempting a claims process in which a handful of class members recovered $15 each, with the remainder distributed to *cy pres* recipients. See, *e.g.*, Pet. 11; State AG Br. 6 (citing *Fraley* v. *Facebook, Inc.*, 966 F. Supp. 3d 939 (N.D. Cal. 2013), aff'd *sub nom. Fraley* v. *Batman*, 638 F. App'x 594 (9th Cir. 2016), cert. denied *sub nom. K.D.* v. *Facebook, Inc.*, 137 S. Ct. 68 (2016). But one district court's exercise of discretion does not mean that the law has calcified so that no court could ever order *cy pres*-only relief instead. As the Ninth Circuit noted in rejecting this inflexible position, "the fact that there are other conceivable methods of distribution does not mean that the district court abused its discretion by declining to adopt them." Pet. App. 10 n.2.

Additional practical problems here demonstrated why the court below was right to reject petitioners' proposal. In contrast with an employee or subscriber class, in which putative class members can be readily identified from a defendant's records, here it would not be possible for Google to direct payment to any significant proportion of class members. Instead, members would have to identify themselves in a claims process, with notice and distribution costs that would inevitably swallow up the settlement fund, leaving little to nothing for class members. Cf. *In re Netflix Privacy Litig.*, 2013 WL 1120801, at *7 (N.D. Cal. Mar. 18, 2013) (approving *cy pres*-only settlement for a class of over 62 million Netflix members, because the amount set aside to attempt "a direct class cash payout" would "likely prove to be nullified by distribution costs"). Petitioners' proposal would only shift funds to class-action administrators

and away from the *cy pres* recipients and their educational, technological, and policy initiatives aimed at enhancing privacy protections for Internet users.

Petitioners' objections to the selection of the *cy pres* recipients were equally meritless. Petitioners do not dispute that the actual uses to which the settlement funds will be put are closely aligned with the class allegedly affected by referrer header disclosures. See pages 25-26, *supra*.

Instead, petitioners insisted below on another categorical rule: that any prior connection between a party or its counsel and a *cy pres* recipient, such as previous donations or an *alma mater* relationship, is an "absolute disqualifier." Pet. App. 14. The Ninth Circuit rightly rejected that proposal too. While "[o]f course it makes sense that the district court should examine any claimed relationship between the *cy pres* recipient and the parties or their counsel," petitioners' proposal failed even under the commentary that petitioners urged the court to adopt. Pet. App. 14. That standard, drawn from a Restatement, would require invalidating a *cy pres* remedy only when the "'significant prior affiliation with the intended recipient * * * would raise substantial questions about whether the selection of the recipient was made on the merits.'" *Ibid.* (quoting Principles of the Law of Aggregate Litigation, *supra*, § 3.07 cmt. b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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