No. 21-1535

In the Supreme Court of the United States

DAVID LOWERY, PETITIONER

v.

BENJAMIN JOFFE, *ET AL.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR GOOGLE LLC IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, as every court of appeals to address the question has recognized, a district court properly exercises its discretion under Federal Rule of Civil Procedure 23(e)(2) in approving a settlement that provides both injunctive and *cy pres* monetary relief, where—as the district court found and the circuit court affirmed—"it [is] not feasible to distribute funds directly to class members." App. 2a, 20a.

2. Whether, under Rule 23(b)(3), a district court must find that individual class members can be identified without significant difficulty or expense before certifying a class for purposes of settlement.

CORPORATE DISCLOSURE STATEMENT

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

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INTRODUCTION

The petition rests principally on the premise that this case is "functionally identical" to *Frank* v. *Gaos*, 139 S. Ct. 1041 (2019), where this Court took up (but did not resolve) the circumstances in which *cy pres* class action settlements satisfy Rule 23(e)(2). Pet. i. That premise is false. The unique circumstances that led to the settlement here distinguish this case from *Gaos* and underscore that the ruling below neither breaks new ground nor conflicts with any decision of another court of appeals. Petitioner ignores the undisputed facts and portions of the decisions below that illustrate why this is so, and none of his other arguments justify review.

This case arises from the unwanted acquisition by Google Street View vehicles of transmissions from open and unencrypted Wi-Fi networks—acquisitions that ceased more than 12 years ago. In 2010, a group of plaintiffs filed suit under the Wiretap Act, asserting claims both on their own behalf and for a class comprising all persons who had Wi-Fi "payload" data collected between 2007 and 2010. Petitioner "does not dispute" that "verifying that a person has a valid claim would require making three determinations: (1) the [claimant] had maintained an unencrypted Wi-Fi network in the relevant period; (2) a Street View vehicle passed within range of that network; and (3) substantive communications * * * were transmitted" at "the precise fraction of a second when the Street View vehicle passed by." Pet. 18a-19a. It is also undisputed that "'[t]he only evidence' of class membership 'is the intercepted data,'" which are "not in the class member's possession or readily accessible." App. 20a.

That is why it "took three years of intensive investigation and analysis" to analyze the standing claims of eighteen named plaintiffs. App. 19a. That is why "meaningful forensic verification" of 60 million claims "would be prohibitively costly and time-consuming." *Ibid*. That is why Petitioner's cure-all—having class members self-identify—"would be pure speculation." App. 20a. And that is why the district court "f[ound] that it was not feasible to distribute funds directly to class members" (App. 2a)—an unchallenged finding that distinguishes this case from all of Petitioner's cases rejecting *cy pres* settlements.

Once it becomes clear that there is no "viable way" to "verify *any* claimant's entitlement to settlement funds" (App. 18a), the asserted circuit split—and any need for this Court's intervention—evaporates. The circuits not only agree on the general standards governing *cy pres* relief, but uniformly recognize that such relief is lawful "'when it is not feasible to make further distributions to class members.'" *E.g.*, *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064, 1065 (8th Cir. 2015) (quoting *Klier* v. *Elf Atochem N.A., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011)). In every one of the cases that Petitioner cites in asserting a split, the settlement gave *cy pres* recipients residual funds that could "feasibly be awarded" to "class members." *E.g.*, *Pearson* v. *NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir. 2014). Indeed, every case involved residual *cy pres*—*cy pres* distribution of settlement funds left unclaimed after an initial monetary payment to class members. Those cases by definition involve no issues with identifying class members.

This case is different. As the court of appeals explained, none of those cases "involved the sort of technical challenges to identifying class members present

here" (App. 18a), much less holds that *cy pres* settlements are unlawful when class members cannot be identified. And the petition's allegedly conflicting decisions on the second question presented involved the standards for certifying classes for *litigation*, not *settlement*—an important difference that the petition glosses over.

Numerous other factors support denying review. Since *Gaos* and *Marek* v. *Lane*, 571 U.S. 1003 (2013) (Roberts, C.J.), *cy pres* settlements have become the even-rarer "exception, not the rule." App. 15a. The facts here, recognized by both courts below, make this a uniquely fitting case for a form of settlement that all agree should be used sparingly. Petitioner's standing to object to the settlement is questionable. The settlement here included meaningful injunctive relief and a *cy pres* distribution that, as both courts below recognized, provided real benefits to the class. And it involved none of the potentially troubling features—such as self-dealing by class counsel or funneling money to preferred organizations—that have led courts to raise concerns about *cy pres* class action settlements.

In short, the district court acted well within its discretion in finding that the settlement here lawfully and sensibly brought an end to an unusual, long-running case that otherwise might have been impossible to settle. There is no conflict and nothing else that warrants this Court's review. Certiorari should be denied.

STATEMENT

A. Factual background

In 2007, Google launched a feature called Street View, which provides users with panoramic, street-level photographs of roads around the United States. Street View images are taken by cameras mounted on cars that drive down public roads while photographing their surroundings. For a time, Street View vehicles were outfitted with off-the-shelf radio equipment and open-source software that passively collected network-identifying information openly broadcast by Wi-Fi networks along the roads they traveled, which could enable Google to provide users with enhanced location-aware services.

In May 2010, Google learned that its Street View vehicles had also acquired so-called "payload data"—fragments of information being transmitted across Wi-Fi networks that were configured to be open (*i.e.*, networks that were not password-protected or encrypted). But the acquisition of payload data was limited. First, data were acquired only if transmitted over an unencrypted Wi-Fi network at the precise moment that a Street View vehicle happened to pass by. Second, Google's software for identifying networks cycled through available Wi-Fi channels at the rate of five times per second—meaning that data would only be acquired if transmitted during the one-fifth of a second when the software could see that specific Wi-Fi network. App. 46a.

Google had no interest in acquiring these payload data, and it has never used the data in any of its products or services. See App. 4a. Upon learning of the unwanted data collection, Google promptly grounded its Street View cars, segregated the acquired payload

data, made the data inaccessible, and hired a third party to review what had happened. *Ibid.* Google also publicly described these events on its official blog, apologized for collecting payload data, and put procedures in place to prevent it from happening again. *Ibid.*

Shortly after Google's public disclosures, federal and state agencies began investigating its conduct. Although the federal agencies ultimately declined to take action against Google, a joint investigation by 38 state attorneys general was resolved in 2013 with an Assurance of Voluntary Compliance. C.A. App. 167-179. That agreement required Google to: (1) delete or destroy the payload data it had collected; (2) not collect and store payload data for use in any product or service without notice and consent; (3) maintain a privacy program; and (4) implement a public-service and educational campaign. C.A. App. 171-173. Google also agreed to pay $7 million. *Ibid.*

B. The complaint and the initial proceedings below

Beginning in May 2010, shortly after Google disclosed its collection of payload data, more than a dozen putative class-action lawsuits challenging that activity were filed in courts around the country. The Judicial Panel on Multidistrict Litigation eventually transferred those cases to the Northern District of California for pretrial coordination.

Respondent Benjamin Joffe and the other named plaintiffs alleged that, sometime between 2007 and 2010, payload data transmitted over their unencrypted Wi-Fi networks were collected by Google. Plaintiffs sought to represent a class consisting of all individuals whose Wi-Fi payload data were collected

during that time period. The plaintiffs' Consolidated Class Action Complaint, filed in November 2010, asserted claims under the federal Wiretap Act, 18 U.S.C. §§ 2510 *et seq*., various state wiretap laws, and California's unfair competition law.

Google moved to dismiss. The district court granted the motion as to the state law claims, ruling on preemption and standing grounds, but held that the complaint stated a claim under the Wiretap Act. *In re Google Inc. St. View Elec. Commc'ns Litig.*, 794 F. Supp. 2d 1067 (N.D. Cal. 2011). The court certified an interlocutory appeal on that claim and stayed further proceedings. The Ninth Circuit affirmed. *Joffe* v. *Google, Inc.*, 729 F.3d 1262 (9th Cir.), amended and superseded on reh'g, 746 F.3d 920 (9th Cir. 2013).

C. Jurisdictional discovery

On remand, the district court ordered limited jurisdictional discovery into the plaintiffs' standing. As Google explained, a plaintiff would have standing only if their WiFi payload data were actually acquired by Google. At a minimum, that would require that: (1) the plaintiff had maintained an unencrypted Wi-Fi network during the relevant period; (2) a Street View vehicle passed within range of that network; and (3) payload data were transmitted within the precise fraction of a second when the Street View vehicle passed by.

The district court appointed a special master to oversee the "intensive" three-year-long process of examining the collected data and to assess the named plaintiffs' standing. App. 46a. The special master first had "to organize the data into a searchable database." *Ibid.* That required recovering and forensically preserving the data on the hundreds of individual

hard drives used by Google's Street View vehicles. He then had to develop custom software for processing the raw data before organizing the data in a database. App. 6a. Further complicating matters, the networking information that could identify the plaintiffs' Wi-Fi networks had been segregated from the payload data, so the special master had to match the frames containing that networking information with the corresponding frames of payload data. In addition, he had to convert the raw, machine-readable data into something people could read.

That was just the beginning. The special master then spent two years "design[ing] and conduct[ing]" the "complex technical searches" needed to determine whether the payload data contained any communications intercepted from the plaintiffs. App. 46a. The plaintiffs turned over personal information and forensic evidence relating to their wireless network equipment, including media access control ("MAC") addresses, email addresses, and service set identifiers ("SSIDs").[1] *Ibid.* After developing a master search protocol, the special master used a variety of methods to search the data set. *Ibid.* He implemented three search methodologies: for email addresses, for MAC addresses, and for SSIDs near certain GPS coordinates. *Ibid.* Hits on these searches would indicate that basic networking information had been collected,

[1] A MAC address is a unique 12-digit hexadecimal identifier assigned by manufacturers to the computer hardware component that connects a computer to a computer network. An SSID is the name of a wireless network, which is required to connect to the network. SSIDs are customizable by the user and not necessarily unique.

but further inquiry was needed to determine if payload data from these networks had also been collected.

At the end of the special master's intensive three-year process, he filed a report with the district court, which was "still not entirely conclusive on whether Google had intercepted payload data from the named plaintiffs." App. 6a. In addition to disputes about what the forensic examination of the data showed, other significant questions remained in the case, including whether Google had "violated the [Wiretap Act], whether Plaintiffs' data was 'readily accessible to the general public,' and whether, even if Plaintiffs won, the Court would award statutory damages." App. 68a. And as the district court explained, delay resulting from continued litigation over these legal issues would make it more difficult for individual class members to recover: "every year that passes makes it increasingly likely that class members would replace and dispose of the Wi-Fi routers they used between 2007 and 2010, which are critical to demonstrating that Google actually intercepted their data." *Ibid.*

D. The class settlement

In June 2018, facing these uncertainties and more —and having already spent eight years litigating a case involving events that took place between 2007 and 2010—the parties settled. App. 88a-110a. The settlement class comprised "all persons who used a wireless network device from which Acquired Payload Data was obtained" from January 1, 2007, through May 15, 2010. App. 92a.

The settlement included both monetary and injunctive relief. Google would pay $13 million into a non-reversionary settlement fund. App. 95a-96a. After attorneys' fees and costs, incentive awards to

named plaintiffs, and claims administration costs, the remainder of the fund would be divided among *cy pres* recipients, selected by the district court, who were dedicated to promoting and protecting class members' privacy interests. App. 97a-98a. Google had no role in the selection or approval of the *cy pres* recipients.

The settlement also included multi-pronged injunctive relief, including requirements that Google "destroy all Acquired Payload Data"; refrain from "collect[ing] and stor[ing] for use in any product or service Payload Data via Street View vehicles, except with notice and consent"; host and maintain educational webpages about configuring wireless networks securely; and extend for at least two additional years Google's obligations under its Assurance of Voluntary Compliance. App. 98a-99a. While the Assurance of Voluntary Compliance had similar provisions, the settlement agreement extended the time of Google's obligations and expanded its obligations to host and maintain educational webpages. Indeed, because of the settlement agreement, Google has already significantly revised and expanded its educational webpages to make them clearer, more detailed, and better able to inform the public about how to protect their home-Wi-Fi networks and opt out of certain location-based services. See D. Ct. Dkt. 210 at 20.

E. The district court's approval decision

The plaintiffs moved for preliminary approval of the settlement. They proposed eight *cy pres* recipients, and a ninth entity separately petitioned the district court to receive *cy pres* funds. The district court (Breyer, J.) granted preliminary approval, adding the ninth group as a *cy pres* recipient.

Before the final approval hearing, only two putative class members objected. Petitioner David Lowery objected to the settlement approval, *cy pres* recipients, class certification, and the fee request. App. 111a-153a. Petitioner's claim of standing rested solely on a declaration stating "[o]n information and belief" that "Google surreptitiously collected, decoded, and stored data from [his] WiFi connection, including payload data," during the class period. Dkt. 188-1 at 2. Another objector submitted a similar one-page letter. A group of state attorneys general filed an amicus brief objecting to the *cy pres* relief.

After holding a fairness hearing in early 2020 that included arguments from the plaintiffs, Google, Petitioner, and the Arizona Attorney General's Office, the district court approved the settlement. App. 43a-84a. In a comprehensive decision, the court rejected Petitioner's argument that some claims process was feasible, holding that a *cy pres* distribution best benefited the class because the settlement fund was otherwise "non-distributable." App. 69a-76a. The court expressly found that it would be impossible for class members to self-identify: "[U]nlike a case in which a class member could self- identify as having bought, for example, a particular brand of cereal during the class period, no member of the class here can know whether Google intercepted his or her data" because "[t]he only evidence is the intercepted data," which "is not in the class member's possession." App. 71a-72a.

Informed by its experience with the three-year Special Master process, the court found that examining the data to determine class membership would be prohibitively costly and time-consuming, requiring the parties to "comb[] through nearly 300 million frames of collected payload data and try[] to associate

it with individual Class Members." App. 71a. "Even assuming that * * * process would work," the court explained, it would not be "desirable." App. 72a. Only a small fraction of a class would be "able to file a claim" —because the overwhelming majority would not, in 2018, have the information relating to the Wi-Fi systems they used in 2007-2010—which "would leave 99% of the class with no benefit from the Settlement Fund." App. 73a.

A *cy pres* settlement, on the other hand, would benefit the class by "increas[ing] the funding" for "some of the most effective advocates for internet privacy in the country" and "likely yield actual improvements to internet privacy." App. 74a. The district court also found that the settlement provided for "adequate" injunctive relief beyond the mandates imposed by the Assurance of Voluntary Compliance. App. 76a-77a.

F. The court of appeals' decision

The Ninth Circuit unanimously affirmed. App. 1a-35a. In an opinion authored by Judge Bade, the court began by explaining that settlements "provid[ing] monetary relief only in the form of *cy pres* payments to third parties" are not categorically unlawful. App. 16a. Full *cy pres* settlements are permissible so long as "settlement funds are not distributable," the "disbursements 'account for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members,'" and the settlements "satisfy the appropriate standards for fairness." App. 16a-17a (quoting *Lane* v. *Facebook, Inc.*, 696 F.3d 811, 821 (9th Cir. 2012), cert. denied sub. nom. *Marek* v. *Lane*, 571 U.S. 1003 (2013))).

In approving the settlement, the court of appeals affirmed the district court's finding that direct distributions to class members were "not feasible" here, as "self-identification would be pure speculation, and any meaningful forensic verification of claims would be prohibitively costly and time-consuming." App. 20a. Petitioner, the court observed, failed to identify "a viable way" to "verify *any* claimant's entitlement to settlement funds." App. 18a. He "d[id] not dispute" that the only verification process would be "the method the special master used—a process that took three years of intensive investigation and analysis to verify the claims of eighteen named plaintiffs." App. 19a.

Petitioner pointed to other class settlements with direct payments, but "none of the examples [he] cite[d] involved the sort of technical challenges to identifying class members present here." App. 18a n.5. Nor was self-identification viable, as "'[t]he only evidence" of class membership "is the intercepted data, and that evidence is not in the class member's possession' or readily accessible to the claims administrator." App. 20a (quoting App. 72a (district court)).

The court also rejected Petitioner's "Rule 23(b)(3) 'superiority' argument" that for the class device to be superior to alternatives, settlement funds must be "distribut[able] * * * to class members." App. 21a. This argument, the court reasoned, "essentially repackage[d]" Petitioner's already-rejected argument for "a blanket prohibition" on *cy pres*-only settlements and was "similar" to the argument rejected by *Briseno* v. *ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), which held that Rule 23 did not require that identifying class members be "administratively feasible." App. 21a. After reaffirming those precedents, the court

also rejected Petitioner's premise "that it is impossible to provide meaningful relief to a class when there is no feasible way of identifying class members," explaining that a *cy pres* award with the required nexus to the class would "particularly 'benefit the plaintiff class'" and "necessarily prioritize[] class members' interests, even if it also provide[d] a diffuse benefit to society at large." App. 22a-23a.

Judge Bade concurred in her own opinion for the court, writing separately "to express some general concerns about *cy pres* awards"—though not about the particular settlement in this case. App. 36a. And Judge Bade did not claim that Ninth Circuit's approach to cy pres conflicted with the approaches of other circuits. To the contrary, in her opinion for the court, she observed that "other circuits have generally taken a similar approach to * * * approving *cy pres* settlements." App. 17a.

The Ninth Circuit denied rehearing and rehearing en banc, with "no judge * * * request[ing] a vote on whether to rehear the matter en banc." App. 87a.

REASONS FOR DENYING THE PETITION

I. The circuits uniformly permit *cy pres* relief where direct distributions are infeasible.

Petitioner's lead argument for certiorari is that "the Ninth [Circuit] stands alone on *cy pres*." Pet. 17. But his petition distorts both the Ninth Circuit's decision and the decisions of other circuits. There is no split, and the Ninth Circuit's ruling is fully aligned with every other circuit that has ruled on the propriety of *cy pres* class settlements.

A. The decision below rests entirely on the infeasibility of a direct distribution to class members.

The decision below stands for a limited proposition —that *cy pres* relief is permissible where there is no "viable way for a claims administrator to verify *any* claimant's entitlement to settlement funds." App. 18a. Aware that the court below ruled narrowly, petitioner says the Ninth Circuit has blessed *cy pres* relief in *other* cases where it may have been feasible to distribute *cy pres* funds directly to class members. Pet. 17-18 (citing *Lane* v. *Facebook, Inc*., 696 F.3d 811 (9th Cir. 2012); *In re Google Referrer Header Privacy Litigation*, 869 F.3d 737 (9th Cir. 2017); and *In re EasySaver Rewards Litigation*, 906 F.3d 747 (9th Cir. 2018)). But this case does not present that question—and Petitioner's authorities all predate this Court's consideration of the *cy pres* issue in *Gaos*.

The explicit premise of the decision below is that "it was not feasible to distribute funds directly to class members given the class size and the technical challenges to verifying class members' claims." App. 2a. That conclusion was based on the parties' and the district court's experience with jurisdictional discovery, which "took three years of intensive investigation and analysis to verify the claims of eighteen named plaintiffs." App. 19a. As the Ninth Circuit explained, each class member's claim requires "meaningful forensic verification," which would be "prohibitively costly and time-consuming." App. 20a. And since potential claimants do not possess the data needed "to determine with any degree of probability whether they are class members," allowing them to self-identify by submitting declarations "would be pure speculation." *Ibid*.

Petitioner has never challenged these factual findings; nor could he. "'A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.'" *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996) (quoting *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949)). The undisputed record here—which was both the reason that the parties adopted a *cy pres* settlement framework and the reason it was approved by both courts below—disposes of his assertions that this case is "functionally identical" to *Gaos* (Pet. i), and that the court below made no "inquiry about whether *cy pres* is distributable to some class members" (Pet. 21). It also forecloses any suggestion that the decision below conflicts with decisions of circuits that purportedly take another "view of feasibility" (Pet. 18). In short, the petition rests on a string of demonstrably false factual premises.

B. Every circuit recognizes infeasibility as grounds for upholding *cy pres settlements.*

The Ninth Circuit's holding is fully aligned with how other circuits have addressed these issues. No circuit has categorically barred *cy pres* settlements or adopted a legal standard for evaluating them that diverges from the standard applied below.

To begin with, every decision that Petitioner cites as "categorically reject[ing] the Ninth Circuit's test" (Pet. 18) involved a *cy pres* distribution of *residual* funds—where, by definition, there had been a previous distribution to class members, such that class members could be identified and "distribution to the

class was clearly feasible." *E.g.*, *BankAmerica*, 775 F.3d at 1064; accord *Klier*, 658 F.3d at 478 ("it was feasible to allocate the funds"); *Pearson*, 772 F.3d at 784 (funds could "feasibly be awarded" to "class members"); *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 169-170 (3d Cir. 2013) (reversing award to "cy pres recipients in lieu of fully compensating class members"). Even in that context, moreover, the courts reject the absolute bar on *cy pres* settlements that Petitioner urges.

Most importantly, the courts uniformly agree that *cy pres* awards are lawful "'when it is not feasible to make further distributions to class members'"—either because the amounts involved are "too small to make individual distributions economically viable" (*e.g.*, *BankAmerica*, 775 F.3d at 1064, 1065 (8th Cir.) (quoting *Klier*, 658 F.3d at 475 (5th Cir.)), or because "class members cannot be identified" (*e.g.*, *In re Pharm. Indus. Average Wholesale Price Litig.,* 588 F.3d 24, 33-34 (1st Cir. 2009)); accord *Masters* v. *Wilhelmina Model Agency, Inc.,* 473 F.3d 423, 436 (2d Cir. 2007) (asking whether "it would be onerous or impossible to locate class members" or "each class member's recovery would be so small as to make an individual distribution economically impracticable"); *Pearson*, 772 F.3d at 784 (7th Cir.); *Baby Prods*., 708 F.3d at 173 (3d Cir).

Petitioner's cases follow the same pattern. Start with *Pearson* (Pet. 18-19), where the Seventh Circuit reversed a settlement designating $2 million for class counsel (69% of the settlement's value) and $1.13 million for a *cy pres* award, compared with "$865,284"—"7 cents apiece"—distributed to a multi-million-member class. 772 F.3d at 781, 783-784. Most of the class was known: records showed that 4.72 million class

members bought pills from the defendant, which "could have mailed $3 checks to all 4.72 million." *Id.* at 783. For the rest, a "sworn statement" sufficed. *Ibid.* Here, by contrast, the factual premise of the decision below is that it is "not feasible to distribute funds directly to class members"; they lack the information needed "to 'self-identify'"; and there is "no alternative way for claimants to determine with any degree of probability whether they are class members" that is not "prohibitively costly and time-consuming." App. 2a, 19a-20a & n.6.

On these facts, the present case would have come out the same way in the Seventh Circuit, which explained that *cy pres* recipients may "receive money intended to compensate victims" where "it's infeasible to provide that compensation to the victims[]." *Pearson*, 772 F.3d at 784; see *ibid.* ("[a] *cy pres* award is supposed to be limited to money that can't feasibly be awarded to * * * class members"). The difference between this case and *Pearson* is simply that infeasibility "*ha*[*d*] *not been demonstrated*" there. *Ibid.* (emphasis added).

Fifth Circuit precedent is the same. In *Klier* (Pet. 19), the settlement allowed a subclass whose members were exposed to the defendant's arsenic, but without becoming ill, to opt for medical monitoring rather than compensation (which other subclasses received). The demand for medical monitoring later waned, however, leaving $830,000 left over, and the district court disbursed it to *cy pres* recipients. 658 F.3d at 472-473.

The Fifth Circuit reversed, explaining that *cy pres* distribution "is permissible 'only when it is not feasible to make further distributions to class members.'" *Id.* at 475 (quoting Am. Law Inst. (ALI), *Principles of*

the Law of Aggregate Litigation § 3.07 cmt. a (2010)). While it was "not feasible" to allocate more funds to the medical monitoring subclass (Subclass B), "it *was* feasible to allocate the funds to Subclass A," "the most seriously injured class members," and one that had received a prior distribution. *Id.* at 477, 471 (emphasis added); see *id.* at 478 & n.28 (the decision fits "comfortably" within "prior decisions" of "sister circuits"). That is "not feasible" here. App. 2a, 19a-20a.

The Eighth Circuit "agree[s] with the Fifth Circuit." *BankAmerica*, 775 F.3d at 1064. In *BankAmerica* (Pet. 19), the court reversed a settlement distributing to *cy pres* recipients $2.4 million left over after two distributions from a $490 million global securities settlement. As the court explained, *cy pres* relief is permissible if "the amounts involved are too small to make [further] individual distributions economically viable." 775 F.3d at 1065 (quoting ALI, *Principles of the Law of Aggregate Litigation* § 3.07(a) (2010)). But the residual $2.4 million could have been distributed to the class at an administrative cost of "$27,000." *Id.* at 1064. Thus, "further distribution to the class was clearly feasible," and *cy pres* distribution was invalid. *Ibid.*

This standard accords with the Ninth Circuit's approach here. And any suggestion that the Eighth Circuit takes a harder line was rebuffed in a recent ruling upholding a residual *cy pres* award and explaining "that unclaimed funds may only be distributed *cy pres* where existing class-member claimants have been fully compensated and further distribution to remaining class members is not feasible." *Jones* v. *Monsanto Co.*, 38 F.4th 693, 698-699 (8th Cir. 2022) (citing *BankAmerica*, 775 F.3d at 1064).

Petitioner also asserts (at 20) a conflict with *In re Baby Products Antitrust Litigation*, yet another case involving *cy pres* distribution of *residual* funds. 708 F.3d at 173. Like the Fifth and Eighth Circuits, the Third Circuit "agree[d] with the [ALI] that *cy pres* distributions are most appropriate where further individual distributions are economically infeasible," but "decline[d] to hold that cy pres distributions are only appropriate" when further distributions are infeasible." *Id.* at 169 (invalidating a settlement for allocating funds to "cy pres recipients in lieu of fully compensating class members"). A more recent Third Circuit precedent expressly rejected petitioner's view that "*cy pres*-only settlements are unfair *per se* under Rule 23(e)(2)." *In re: Google Inc. Cookie Placement Consumer Priv. Litig.*, 934 F.3d 316, 326 (3d Cir. 2019).

Nor is Petitioner aided by Judge Bade's concurrence, which expressed "some general concerns" about *cy pres*. App. 36a; see Pet. 14-15. Judge Bade authored the court of appeals' unanimous opinion, and her concurrence does not suggest that this settlement should have been rejected, let alone that Ninth Circuit precedent is out-of-step with that of other circuits. See App. 36a (Bade, J., concurring). Her opinion for the court in fact said the opposite. App. 17a.

In short, the legal standard that the Ninth Circuit used to evaluate and uphold the settlement here is no different from the standard applied in the other circuit court decisions that Petitioner cites. The difference is just that this case involves a set of "technical challenges to identifying class members" that has no analog in those cases. App. 18a. There is no circuit in which the *cy pres* settlement here would have been invalidated. This Court's review is not needed to create uniformity or to bring an outlier circuit in line.

II. This case is a poor vehicle for addressing *cy pres* settlements.

This Court previously granted certiorari to consider the permissibility of *cy pres* awards, and was unable to resolve the issues because of "substantial questions" about the plaintiffs' standing. *Gaos*, 139 S. Ct. at 1043-1044. This case, however, is an even worse vehicle for addressing any questions about *cy pres* class settlements, and developments since *Gaos* have only diminished any need for review.

A. The decision here rests on uncontested and unique facts demonstrating infeasibility.

As discussed, Petitioner's broadside attack on *cy pres* awards ignores the unique facts and circumstances of this case. The alternative to *cy pres* here was a claims process in which claimants from a class estimated to include 60 million people—the precise number is impossible to know—would attempt to show that their payload data were collected by Google's Street View vehicles between January 2007 and May 2010. But as the courts below found (and Petitioner does not dispute), that process would have been administratively infeasible, "prohibitively costly," and "time-consuming." App. 20a; see also App. 6a, 46a, 71a-72a.

The nature of that burden was demonstrated by "the three-year forensic investigation" preceding the settlement, in which the parties worked with a special master to determine whether the 18 named plaintiffs had their own payload data collected. App. 2a. Making that showing was a threshold requirement for Article III standing, class membership, and any right to recover under the Wiretap Act. And the jurisdictional

discovery process for the named plaintiffs alone required an "intensive" effort costing nearly $1 million. App. 19a.

It thus became clear that setting up a settlement claims process for potential class members would have "requir[ed] a lengthy process, akin to the Special Master's process." App. 72a. Moreover, it would have required potential claimants to have "possession of the Wi-Fi router [that they] used between 2007 and 2010"—something many class members no longer possess. *Ibid.* Four new Wi-Fi standards have been released since 2010, making it unlikely that anyone still uses their obsolete router. See Kaveh Pahlavan & Prashant Krishnamurthy, *Evolution and Impact of Wi-Fi Technology and Applications: A Historical Perspective*, 28 Int'l J. of Wireless Info. Networks 3, 8 (2021). And "every year that passes makes it increasingly likely" that class members "dispose of the Wi-Fi routers" they used more than a decade ago. App. 68a.

It was only against this unusual backdrop that the parties and both courts below determined that it was infeasible to establish a process to identify class members eligible to recover as part of a settlement. Very few, if any, class actions involve such a record, and it makes the settlement here especially fact-bound and unlikely to recur.

B. None of the *cy pres* abuses cited by Petitioner occurred here.

This case is also a poor vehicle for review of *cy pres* awards because none of Petitioner's concerns about abuse of *cy pres* are implicated here. Indeed, the bulk of the petition concerns alleged abuses in *other* cases.

Petitioner complains that "*cy pres* can facilitate an early settlement" under which "class attorneys are rewarded for selling their putative clients down the river." Pet. 27. But this case was litigated through "vigorous and capable advocacy" *for nearly a decade (*App. 53a*)*—including through an early interlocutory appeal and intensive discovery into the named plaintiffs' standing, with jurisdictional discovery overseen by the special master. App. 5a-6a. It settled only after "years of litigation and five months of settlement negotiations," and only after the special master process revealed the difficulty of ascertaining the standing of even a few named plaintiffs—which confirmed that many more years of litigation lay ahead. App. 67a.

Petitioner similarly complains about "the appearance of impropriety for district court judges." Pet. 28. But this case involves no suggestion that the district court had any connection to any of the *cy pres* recipients. Nor is there any concern that Google steered *cy pres* payments to favored charities. See App. 28a, 79a. Under the settlement's agreement's express terms, Google played no role in the selection of the *cy pres* recipients (App. 97a), many of which have criticized Google or filed *amicus* briefs adverse to the company (see C.A. Google Ans. Br. 42-43). Given that these charities are "some of the most effective advocates for internet privacy in the country" (see App. 74a), it should come as little surprise that a few of them previously received *cy pres* payments or donations from Google. But in no sense did this settlement amount to a give-away to Google's preferred charities.

Nor does this case illustrate the danger of plaintiff-driven "forum shopping" (Pet. 33): it was assigned to a district court in the Ninth Circuit by the Judicial Panel on Multidistrict Litigation. App. 5a. And in any

event, as discussed above, the circuits all apply the same standard in reviewing *cy pres* awards. This settlement would not have received a more skeptical review in any other circuit.

C. There are serious questions about Petitioner's class membership and standing.

Questions concerning Petitioner's class membership and Article III standing present yet more obstacles to the Court's review. To be a member of the class, Lowery must have "used a wireless network device from which Acquired Payload Data was obtained." App. 92a. But as his own affidavit confirms, he lacks personal knowledge that Google obtained his payload data. See D. Ct. Dkt. 188-1 at 2 (stating "[o]n information and belief" that "Google surreptitiously collected, decoded, and stored data from my WiFi connection, including payload data").

If Google did not obtain Petitioner's payload data during the class period—something he cannot know without the type of investigation that took the special master below three years to complete for the named plaintiffs—he is not a "class member" with the right to object to the settlement. Fed. R. Civ. P. 23(e)(5)(A) ("Any class member may object * * * ").

Nor would Petitioner have the injury-in-fact required to support the Article III standing required to seek review in the court of appeals and this Court. See *Gaos*, 139 S. Ct. at 1046. In contrast to the named Plaintiffs, whose claims of standing were subjected to the Special Master's "extensive forensic analysis" (App. 19a n.6), Petitioner did not even try to prove his standing or offer up his router or its network infor-

mation. Instead, he came forward with merely an "information and belief" assertion that Google intercepted his data. D. Ct. Dkt. 188-1 at 2.

At a minimum, the "quantum of proof necessary to establish class membership for the purpose of objecting to a settlement" is an open question that this Court would have to resolve before considering the merits, which would further complicate any review of the questions presented (see *Feder* v. *Electronic Data Systems Corp.*, 248 F. App'x. 579, 581 (5th Cir. 2007)).

D. Cy pres-only settlements are now extremely rare.

Even apart from the unique circumstances here, full *cy pres* settlements are "exceedingly rare"—there have been "likely fewer than 20, ever." Br. for Professor W. Rubenstein as *Amicus Curiae* in Support of Respondents 6, *Frank* v. *Gaos*, 139 S. Ct. 1041 (2019) (No. 17-961). One "extensive review of several thousand class action cases" revealed only "18 cases in which a federal court has *ever* approved full *cy pres* settlements." *Id.* at 12; *id.* at 1a-2a (listing cases).

Further, *cy pres*-only settlements have grown rarer over the past decade, as members of this Court have registered concerns about undue reliance on *cy pres*. See *Marek* v. *Lane*, 571 U.S. at 1005 (2013) (Roberts, C.J., statement respecting denial of certiorari); *Gaos*, 139 S. Ct. at 1048 (Thomas, J. dissenting) (opining that a "*cy pres*-only" settlement whereby the class "received no settlement fund, no meaningful injunctive relief, and no other benefit whatsoever" should not have been approved). These concerns have been noted by the bench, bar, and other commentators. See, *e.g.*, App. 36a, App. 74a-75a; Katherine Cienkus, Note, *Privacy Class Action Settlement Trends: Industry*

Practice or Improper Incentives?, Rev. of Litig., Spring 2021, at 1, 19 ("Since 2012, no privacy settlement in the data set achieved entirely *cy pres* relief for the class").

Moreover, many cases that might previously have led to *cy pres* settlements have instead been dismissed based on *Gaos* (139 S. Ct. at 1046) and *Spokeo, Inc.* v. *Robins*, 578 U.S. 330 (2016), which clarified that Article III requires federal courts to weed out putative class actions seeking statutory damages in the absence of actual harm. See, *e.g.*, *Trichell* v. *Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1005 (11th Cir. 2020) (no Article III standing for violation of Fair Debt Collection Practices Act); *Kamal* v. *J. Crew Grp., Inc.*, 918 F.3d 102, 117 (3d Cir. 2019) (no Article III standing for violation of the Fair and Accurate Credit Transactions Act of 2003).

All of this confirms that the concerns about *cy pres* settlements expressed by members of this Court have been heeded. That such a settlement was used and approved here—along with meaningful injunctive relief—simply reflects the undisputed, unusual circumstances of this case, in which identifying individual class members (especially after the passage of so much time) was "not feasible." App. 2a, 20a. In sum, Petitioner is mistaken that "the urgency of guidance from this Court is undiminished" since *Gaos*. Pet. 16. Empirical data confirm the Ninth Circuit's observation that settlements such as this are the "exception, not the rule." App. 15a.

III. The decision below is correct.

Review is also unwarranted because the Ninth Circuit's decision is correct. The district court did not abuse its discretion in approving a *cy pres* settlement

tailored to the unique circumstances of this case. App. 2a.

A. Petitioner offers no credible method for distributing funds to class members.

Lowery does not challenge—and has no basis to challenge—the district court's factual "finding," affirmed by the court below, "that it was not feasible to distribute funds directly to class members." App. 2a; see App. 17a-19a (affirming the district court's finding); see also App. 69a-76a. Nor does he dispute that replicating the process used by the special master to assess the named plaintiffs' claims "would be prohibitively costly and time-consuming." App. 20a. Such a process would have resulted in nearly all settlement funds going to claims administrators rather than individual class members. See D. Ct. Dkt. 186 at 23 (stating that plaintiffs' half of the Special Master's fees was "$487,476.05"); D. Ct. Dkt. 121-1 at 3 (ordering that the fees be split "50/50").

Lowery's cure-all is self-identification. Pet. 9 (class members "could self-identify as he did"). That might be feasible in other cases—say, where members of the class can swear that they purchased a particular product, or bought a particular stock, during the class period. *E.g.*, *Pearson*, 772 F.3d at 786 ("consumers who have purchased Rexall's glucosamine pills"); *Baby Prods.*, 708 F.3d at 170 n.4 (purchasers of "certain baby products"); *Easysaver Rewards*, 906 F.3d at 753 (consumers "enrolled in the rewards program"); *BankAmerica*, 775 F.3d at 1062 ("shareholders"). But it could not work here. Lowery does not (and cannot) dispute that "'[t]he only evidence' of class membership" is "not in the class member's possession' or readily accessible to the claims administrator." App. 20a. That

means "self-identification would be pure speculation" —it would amount to giving away money to people who simply have no way of knowing whether they are class members or have standing to recover. *Ibid.* That is not a feasible alternative in a case like this. *Cf. TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2204-2205 (2021) ("Every class member must have Article III standing in order to recover individual damages."); *Drazen* v. *Pinto*, 41 F.4th 1354 (11th Cir. 2022) (applying the same principle to settlement classes).

B. The settlement is "fair, reasonable, and adequate."

Nor is there any reason to doubt the conclusions of the courts below that the settlement's award of *cy pres* and injunctive relief, viewed in context and as a whole, was "fair, reasonable, and adequate." App. 23a-26a; see also App. 66a-80a.

As the Ninth Circuit explained, "class members do benefit—albeit indirectly—from a defendant's payment of funds to an appropriate third party." App. 22a. The class here benefits from payments to "independent organizations with a track record of addressing consumer privacy concerns, who will commit to use the funds to promote the protection of Internet privacy." App. 78a. Those recipients are required to use the funds to benefit the class as a whole and are vetted to ensure that they can do so effectively. App. 78a-80a, 97a. Where, as here, a *cy pres* award possesses the required nexus to the class, and individual distributions are not feasible, such an award "particularly 'benefit[s] the plaintiff class'" and "necessarily prioritizes class members' interests, even if it also provides a diffuse benefit to society at large." App. 22a-23a.

Moreover, beyond the indirect benefit of the *cy pres* distributions, the class here benefits from the settlement's injunctive relief. App. 14a n.3, 23a-26a, 61a, 76a-78a. That relief overlapped in part with the 2013 Assurance of Voluntary Compliance—after all, collected data can only be deleted once. But it also "extend[ed] Google's obligations beyond those in the [Assurance of Voluntary Compliance]." App. 25a. In addition, Google made several improvements to its user education programs that it would not have made but for the settlement. See D. Ct. Dkt. 210 at 20. As a result, the injunction provided additional non-monetary benefits to the class. The district court did not abuse its discretion in concluding that these benefits are fair, reasonable and adequate "[c]onsidering the unique challenges plaintiffs would have faced in proving their claims." App. 24a.

C. *Cy pres* awards do not violate the First Amendment.

The Ninth Circuit was also correct to hold that *cy pres* awards do not violate the First Amendment. App. 26a-28a. Even assuming that the approval of settlements is state action—which is far from obvious and was assumed rather than decided by the court below —class members who object to the chosen *cy pres* recipients are not compelled to subsidize objectionable speech; they "can simply opt out of the class." App. 27a. Just as the ability to opt out satisfies due process, see *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985), it resolves any possible First Amendment objection to the use of *cy pres* in this context.

Janus v. *State, County, and Municipal Employees*, 138 S. Ct. 2448 (2018) (Pet. 29-30), does not help Low-

ery. That case involved money "taken" from employees' paychecks to support speech activities that the employees deemed objectionable. 138 S. Ct. at 2486. Opting out of those "agency fees" was not allowed.

Here, by contrast, "regardless of the *cy pres* provisions, [the money] could not feasibly be paid" to the class members (App. 27a), "so [it] cannot be money 'taken' from any member of the class" in the first place (*Monsanto*, 38 F.4th at 700 (quoting *Janus*, 138 S. Ct. at 2486)). And, of course, any objector can simply opt out. In short, a *cy pres* distribution pursuant to a settlement agreement "neither constitutes speech by any individual class member nor infringes on their First Amendment rights." *Ibid.*

IV. The second question presented does not independently warrant review.

Petitioner also urges the Court to take up a second question—whether a class may be certified under Rule 23 if its members cannot be ascertained without a "difficult and expensive" individualized inquiry. Pet. i. As the court of appeals found, he expressly disavowed any "standalone ascertainability argument" below (App. 21a), rendering suspect his attempt to revive the argument in this Court. But in any event, his four paragraphs of supporting argument (Pet. 21-22) do not make a convincing case that the second question independently warrants review.

Most importantly, none of Petitioner's allegedly conflicting decisions involved class *settlements*—all

arose from contested class certification decisions regarding *liability* classes.[2] But "settlement is relevant to class certification" (*Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 619 (1997)), and Petitioner's own case confirms that "[s]ettlement classes raise different certification issues than litigation classes." *Carrera* v. *Bayer Corp.*, 727 F.3d 300, 308 (3d Cir. 2013); see also *In re Mexico Money Transfer Litig.*, 267 F.3d 743, 747 (7th Cir. 2001). Tellingly, he does not cite any case in which a court applied an ascertainability requirement to reject class certification in the settlement context. Accordingly, the circuit split that Petitioner alleges in support of his second question presented is not directly implicated here, and certiorari should be denied on both questions presented.

If, however, the Court takes up the first question, it should also review the second. Doing so would enable the Court to consider the full interplay between the Rule 23 standards for class certification and the circumstances when *cy pres* class action settlements may satisfy that rule. As the decision below illustrates, there is a connection between cases in which it

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[2] *Marcus* v. *BMW of North Am. LLC*, 687 F.3d 583, 590 (3d Cir. 2012) (Rule 23(f) review of a contested "class certification order"); *Mullins* v. *Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015) ("interlocutory review" of denial of class certification "under [Rule] 23(f)"); *Adashunas* v. *Negley*, 626 F.2d 600, 603 (7th Cir. 1980) ("interlocutory" review of "denial of [class] certification"); *In re Aqua Dots Prods. Liability Litig.*, 654 F.3d 748, 750 (2011) (contested "interlocutory appeal under [Rule] 23(f)"). The decision that petitioner cites as taking an "intermediate approach" (Pet. 23) likewise involved a contested appeal from "the denial of class certification." *Cherry* v. *Dometic Corp.*, 986 F.3d 1296, 1299 (11th Cir. 2021).

is "not feasible" to determine broadly who is a member of the putative class (App. 2a) and the parties' reliance on *cy pres* mechanisms to settle. Class actions with serious impediments to identifying absent class members may call for more unusual settlement structures. Alternatively, a more stringent requirement for class certification in the liability context may obviate the need for *cy pres* settlements in some cases.

This case illustrates the interplay between the two issues. Google faced as many as 60 million class members, each of whom asserted, among other things, a statutory damages claim of $10,000. Holding this settlement impermissible, combined with the infeasibility of any distribution to class members, would force Google to expend huge sums litigating a "bet-the-company" case against an amorphous set of people who cannot readily be identified and whose true size and composition may be impossible to determine, facing a potentially ruinous damages award. Rule 23 could not require that bizarre and unfair result.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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AUGUST 2022