No. 21-1535

In the Supreme Court of the United States

DAVID LOWERY,

Petitioner,

v.

BENJAMIN JOFFE, *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The decision below perpetuates Ninth Circuit law that a court can approve a *cy pres* settlement that wipes out a class's claims and gives them nothing even when it is possible to compensate *some* class members. App.17a–18a. Meanwhile, class counsel get millions, as a percentage of settlement amounts propped up with distributions to nonprofits affiliated with class counsel or already being funded by the defendant. One can understand why class counsel and Google would defend a given settlement—one is handsomely compensated both directly and indirectly, and the other avoids liability risk at nuisance cost. But one cannot justify such settlements as "fair, reasonable, and adequate" to class members. Fed. R. Civ. P. 23(e)(2). And courts are now diverting hundreds of millions of dollars from class recovery to lawyers' favorite nonprofits. Pet.35.

Seeking to avoid this Court's review, Respondents mischaracterize the issue as one of fact. But the question presented by this case, on which the courts of appeal are split, addresses when as a matter of law a district court may approve a settlement containing a *cy pres* award. Yes, every circuit purports to base their standard on "feasibility"—but they split on what "feasibility" means.

The Ninth Circuit uniquely holds that settlement funds are non-distributable to class members, and therefore appropriate for *cy pres* distribution, where each class member's individual recovery would have been "*de minimis*"—that is, simply divide the funds by the number of class members. App.17a–20a. This is so even when it is "technically feasible" to distribute money to some class

members. *In re EasySaver Rewards Litig.*, 906 F.3d 747, 761–62 (9th Cir. 2018); Pet.17–18. Under that rule, enterprising class counsel can almost always generate a lucrative *cy pres* settlement, and divert some amount of funds from class compensation to a favored third party—tens of millions in several recent cases within the circuit. Pet.35.

Google suggests that class members require a verification mini-trial to make claims, precluding feasibility. App.18a. But this assumes the answer. Whether settling parties can require mini-trials of class members before making claims *is* a legal issue that splits the circuits. It is the parties' decision to throttle class recovery by arbitrarily asserting that class membership is not ascertainable. Both the Third and Seventh Circuits reject *cy pres* residuals in settlements where settling parties demanded "needlessly elaborate documentation." *Pearson v. NBTY, Inc.*, 772 F.3d 778, 783 (7th Cir. 2014); *accord In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 175 (3d Cir. 2013). The district court did not demand "needlessly elaborate documentation" from Lowery to prove his class membership, and the respondents admittedly chose not to contest those factual contentions. The respondents' strategic forfeiture in 2020 does not bootstrap a vehicle problem in October Term 2022.

Rule 23(e)(2)(C)(ii) requires courts to consider the "effectiveness" of a distribution method for a settlement to be approved. Neither the Ninth Circuit nor respondents mention the word "effectiveness." The decision here would affirm the throttling tactics rejected in *Pearson* and *Baby Products*. The Ninth does not require class

counsel to prioritize class recovery. App.16a–20a. *Contra Baby Prods.*, 708 F.3d at 175–76.

And respondents fail to identify a single appellate court willing to certify a class where plaintiffs self-servingly stipulate that no one can ascertain who the class members are.

Respondents fare no better with their attempt to downplay the importance of the question presented. They do not dispute that the Ninth Circuit's *cy pres* precedents are permitting class counsel to divert hundreds of millions of dollars to often politicized nonprofits—sometimes in under-the-radar unreported orders on motions made without class notice. Pet.35. No database will expose the eight figures *Volkswagen* class counsel diverted from clients. Respondents ignore that Google alone has *three* all-*cy pres* settlements pending.

Thus, this case is an ideal vehicle. Respondents assert (Def.Br.21) that this settlement, unlike others containing *cy pres* awards, does not commit certain "abuses" but that is both debatable—the *cy pres* recipients include a co-counsel of class counsel, several groups already funded by Google, and nonprofits that take political positions Lowery opposes (but that support Google)—and no defense of the Ninth Circuit's standard. (Google's brief does not mention the Third Circuit and ALI "significant prior affiliation" standard that the Ninth expressly rejected. App.28a–31a.)

Contrary to Google's assertions (Br.19), Judge Bade's concurrence criticizes Ninth Circuit law that calls *cy pres* an "indirect benefit" and permits approval of a settlement

like the one here that "arguably benefit[s] opt-outs more than class members." App.39a–42a (citing *Gaos* dissent and other cases). "[I]t is time" to consider the Ninth Circuit's *cy pres* practices. App.42a. The Court should grant the petition and provide the guidance the lower courts urgently need.

I. The decision below perpetuates a conflict among the lower courts.

A. Courts conflict on *cy pres*.

Notwithstanding respondents' diversions, this settlement unquestionably fails the "significant prior affiliation" standard that the Third Circuit applies. *In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 934 F.3d 316, 330–31. Plaintiffs misstate the record (Br.20–21) when they assert that the Ninth Circuit applied the *Google Cookie* test. No. The Ninth reasoned that because *Lane v. Facebook* affirmed a settlement that facially flunked the "significant prior affiliation" standard, that "out-of-circuit" test is too "expansive" and could not "preclude[] the district court from approving the *cy pres* recipients here." App.28a–31a; Pet.20–21.

Respondents elide another circuit split by relying on the word "feasibility"; this ignores that Lowery's petition identified material differences in how courts define "feasibility." Pet.18–20. Indeed, Google accidentally confirms this circuit split (Br.18) when it discusses *Klier*'s finding of feasibility because *some* class members could receive payment. The decision below expressly rejects Lowery's

argument for out-of-circuit precedent and bases "feasibility" on whether every single class member can receive *pro rata* distribution. App.17a–18a. The Ninth Circuit test would reach the opposite result as *Klier*—as it did in *EasySaver*.

Jones v. Monsanto means that the Ninth Circuit no longer stands alone, and thus shows that the circuit split is even more fractured than when Lowery filed the petition. *Jones* permitted a sizable residual *cy pres* several times larger than the $2 million *BankAmerica* rejected in a much larger settlement, despite 97% of the *Jones* class receiving nothing. 38 F.4th 693 (8th Cir. 2022). *Jones*, like Google (Br.28–29), rejects a *Janus* argument because the class putatively has no rights in the settlement fund. 38 F.4th at 700. *Klier* disagrees: "the settlement funds are the property of the class." 658 F.3d at 475; *accord In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064 (8th Cir. 2015); *see also Jones*, 2022 WL 3365924 (8th Aug. 16, 2022) (denying rehearing en banc by 6-5 vote). Google's and *Jones*'s argument's premise presents another circuit split. The opinion below contradicts *Janus* and *Klier*. Pet.29–31; Pet.20–21. Plaintiffs do not mention *Janus*. The First Amendment problems remain.

Hughes v. Kore of Indiana Enterprises, Inc., which predates *Pearson*, is irrelevant. 731 F.3d 672 (7th Cir. 2013). *Kore*, an unopposed appeal, involved a conceded $10,000 statutory maximum liability, and had no Rule 23(e) issues before it. Here, Google, with a market value literally a million times larger than Kore, is obtaining the class's release: Rule 23(e) standards apply. Escheat is superior to using *cy pres* to handle legitimately

frictional low-five-digit amounts where administrative distribution costs would exceed the fund, but $10,000 raises different legal issues than $13 million.

Google protests (Br.2) that the court adopted its assertion that class members required a verification mini-trial to make claims. App.18a. But this begs the legal question. Whether settlements can require mini-trials of class members before they make small-dollar claims *is* a legal issue and a circuit split. It is the parties' arbitrary decision to throttle class recovery by asserting that class membership is not ascertainable. Class counsel fulfilling its fiduciary duty to prioritize class recovery would argue that there is no need for an audit of every single individual $5 claim precisely *because* it would be so burdensome. Fed. R. Civ. P. 26(b)(1); Fed. R. Evid. 403. The eighteen self-identified class representative respondents batted 1.000 in the intensive special-master audit; the parties did not strike a single audited class representative. But as *Pearson* noted, unless courts insist otherwise, class counsel will seek to maximize attorney fees by undermining the class's interests when negotiating the claims process. *Pearson*, 772 F.3d at 783. The Ninth endorses that perverse incentive by permitting class counsel to divert class funds to a former co-counsel and call it *cy pres*.

It is just as much "pure speculation" (App.20a) to rely on self-identification without paper documentation in a consumer case (are you *sure* you bought Wesson oil nine years ago?), but such settlements are common. Both the Third and Seventh Circuits rejected *cy pres* residuals in consumer class settlements where the settling parties demanded "needlessly elaborate documentation." *Pearson*,

772 F.3d at 783; *accord Baby Prods.*, 708 F.3d at 175. In both cases (and *BankAmerica*, 775 F.3d at 1064), appellate courts overturned the same sort of district-court findings adopting settling parties' self-serving representations that the Ninth Circuit affirms without scrutiny.

Rule 23(e)(2)(C)(ii) requires courts to consider the "effectiveness" of a distribution method for a settlement to be approved. It abrogates that rule if the settling parties may advance classes that they assert are "prohibitively costly and time-consuming" (App. 19a) to identify. *Compare BankAmerica*, 775 F.3d at 1064 (rejecting "difficult and costly" finding). Neither the Ninth Circuit nor either of respondents' briefs mention the word "effectiveness." The decision below would shrug at the *Pearson* and *Baby Products* settling parties' throttling tactics and affirm. In the Ninth Circuit, *cy pres* can be a first resort, rather than just a last resort; it does not require class counsel to prioritize direct class recovery. App.16a–20a. *Contra Baby Prods.*, 708 F.3d at 175–76; *Pearson*, 772 F.3d at 784.

The parties and the Ninth Circuit cannot have it both ways. One cannot simultaneously assert a claims process is infeasible because self-identification by affidavit is impossible but also that the class satisfies Rule 23(b)(3). The respondents identify no other appellate court that has squared that circle. Indeed, *Mullins v. Direct Digital LLC* endorsed class certification over ascertainability concerns *because* self-identification by affidavit was presumptively reasonable: if not, the plaintiff must have a "plan to identify class members." 795 F.3d 654, 672 (7th Cir. 2015). Failure to do so "may well cause the plaintiff to flunk the superiority requirement of Rule 23(b)(3)."

Id.; *see also* App.144a–147a. And this leads to the second question presented.

B. The Ninth Circuit alone permits certification of a class that supposedly cannot ascertain itself.

Some circuits allow class certification if the class members can identify themselves as class members, even if the defendant cannot. *E.g.*, *Mullins*, 795 F.3d 654; *Rikos v. P&G*, 799 F.3d 497, 525 (6th Cir. 2015). Others require that the defendant be able to do so or at least that plaintiffs propose a feasible third-party process for ascertaining the class. *E.g.*, *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013); *EQT Prod. Co. v. Adair*, 764 F.3d 347 (4th Cir. 2014).

But below, the Ninth Circuit adopted an unprecedented rule allowing certification when, on the settling parties' account no one (not even the putative class members themselves) can independently ascertain class membership, because *cy pres* could still "provide meaningful relief" to an unidentified, unselfconscious class. App. 22a. Previous ascertainability petitions did not have this stark conflict. This outlier rule raises "grav[e]" questions "under the Constitution and Rule 23." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997).

Both respondents assert that Lowery disavowed a "standalone ascertainability argument" below, but ascertainability is part of the (b)(3) superiority framework. *Compare Cherry v. Dometic Corp.*, 986 F.3d 1296, 1303–04 (11th Cir. 2021). He preserved the issue and the Ninth

Circuit passed upon it. App.21a–22a. Lowery is "not limited to the precise argument [he] made below." *Egbert v. Boule*, 142 S. Ct. 1793, 1806 n.3 (2022) (cleaned up). An argument is not forfeited "if it is inherent in the parties' positions throughout the case." *Nuveen Mun. Trust v. WithumSmith Brown, P.C.*, 692 F.3d 283, 301 (3d Cir. 2012); *cf. also R.A.V. v. St. Paul*, 505 U.S. 377, 381 n.3 (1992).

Respondents contradict *Amchem* when they incorrectly suggest (Google Br. 29–30; Pl. Br. 32–33) that ascertainability concerns fall away when certifying settlement classes. Except for trial-management concerns, the standards for certification "demand undiluted, even heightened, attention in the settlement context." *Amchem*, 521 U.S. at 620. Indeed *Amchem* affirmed a decision rejecting certification for lack of superiority, because the settling parties proposed to bind a class of unaware members. *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 633–34 (3d Cir. 1996) (Becker, J.).

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The Court's review is necessary to resolve these well-documented conflicts in authority.

II. This is case is an ideal vehicle to address a continuing problem that will grow after the Ninth Circuit disregarded this Court's warning in *Gaos*.

Expecting that lower courts would take the hint from the Court's skepticism during the *Gaos* argument, com-
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menting practitioners and analysts unanimously cautioned about the shaky legal ground for *cy pres*. *E.g.*, Alan W. Hersh & Stephen L. Saxl, *Cy Pres Survives, but for How Long?*, GREENBERGTRAURIG (Apr. 15, 2019). Despite the Court's signal, some aggressive settling parties continue to divert hundreds of millions of dollars from class members to often political beneficiaries. *E.g.*, *Jones*, 38 F.4th 693; Pet.35 (citing cases). After the Ninth Circuit's reaffirmation of the vacated *Google Referrer* and the Eighth Circuit's rejection of the *Klier* standard it once adopted, the dam will burst if the Court denies review.

Google's assertions (Br.25) that *cy pres* is "rare" and parties have "heeded" the Court's concerns are ironic: Google sure isn't heeding anything. (Neither are the Eighth and Ninth Circuits.) Google *alone* has three all-*cy pres* settlements pending. After losing in *Google Cookie*, Google is now trying all-*cy pres* again. Pl.Br.22 n.7. Google kept the settlement here under seal for a year until after the Court decided *Gaos*, helping the Rubenstein amicus argue the rarity of *cy pres*. Google seems to be repeating this tactic in the *Gaos* remand itself, announcing settlement *in October 2021*, but not yet publicly filing what is likely another all-*cy pres* settlement. Lowery Pet. iv–v. Google's gamesmanship suggests it understands its argument contradicts reality and it must obscure the latter and its shameful *cy pres* settlements.

Plaintiffs' list (Br.22–23) omits other all-*cy pres* settlements. *E.g.*, *Hyland v. Navient Corp.*, 2020 WL 6554826 (S.D.N.Y. Oct. 9, 2020). And the claim that *cy pres* is rare is at tension with Plaintiffs' assertion (Br.27) that *cy pres*

is important for deterrence—though how Google is deterred by repeatedly paying *cy pres* to organizations it already supports and who support Google remains an open question.

More importantly, while the question presented is about the "more egregious" case of all-*cy pres* settlements, the problems of *cy pres* are also ever-present in residual cases. D. Brooks Smith, *Class Action and Aggregate Litigation: A Comparative International Analysis*, 124 PENN ST. L. REV. 303, 337 (2020). The principles on which the Ninth Circuit splits from other courts—what is "feasible"? do settlement proceeds belong to class counsel or the class? is Rule 23(e)(2)(C)(ii) surplusage, or must class counsel prioritize direct class recovery without elaborate documentation? can *cy pres* beneficiaries be entities with political positions or have significant affiliations with the parties?—apply equally in cases like *EasySaver* and *Jones* as here. *E.g.*, *Pearson*; *Baby Prods.* An all-*cy pres* settlement differs only in that it also implicates Rule 23(b)(3) certification. Of course, the Court may reformulate the questions presented if it wishes. *E.g.*, *The Court's slight rewrite in voting rights case*, NAT. L. J. (Nov. 9, 2012).

Plaintiffs are incorrect when claiming (Br.29) that Lowery did not challenge the "proposed use of the money." App.133a. Money is fungible, even when donors earmark it. Either the proposed use is something the recipient would have done anyway (the economic effect is then a general-fund donation), or the *cy pres* wealth-transfer funds something MIT didn't think was worth dipping into its $3.7 billion budget for. And in the latter deadweight-

loss scenario, *cy pres* funds overhead, freeing other money to work against Lowery's interests.

Google asserts (Br.23) "serious questions" about Lowery's standing, but the only basis for those questions are speculative factual contentions that it forfeited below. *E.g.*, *Workman v. United Parcel Serv., Inc.*, 234 F.3d 998, 1000 (7th Cir. 2000). Lowery met the burden of production to prove class membership the same way class representatives receiving an incentive award did—through self-identification. Google made a tactical decision not to futilely contest Lowery's self-identification below because, once Google failed, it would have refuted the legal fiction that class members could not self-identify when making claims. (It is telling that the special-master audit did not disqualify the standing of *any* of the eighteen self-identifying respondents who submitted to it.)

There is no circuit split on the "quantum of proof" (Br.24) Lowery needed to appeal. *Feder v. Electronic Data Systems* affirmed a district court's factual finding that the appellant was not a class member. 248 Fed. Appx. 579 (5th Cir. 2007). Google sought no such finding here, and the district court recognized Lowery's class membership—which Lowery supported with more public record evidence than any of the class representatives did. Having tactically forfeited factual issues below, Google cannot wait until appeal to pretend to dispute a factual issue about Lowery's class membership. Any other result would preclude Court review of judgments in diversity jurisdiction, because a respondent's brief in opposition

could assert a similarly baseless claim that a party's citizenship precludes complete diversity and demand discovery. *Workman* rejects this.

There is no question of Plaintiffs' standing as in *Gaos*. Unlike *Perryman v. Romero*, No. 18-1074, 139 S. Ct. 2744 (2019), where bankruptcy precluded review, Google is solvent.

Review is warranted.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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