No. 17-961

In the Supreme Court of the United States

THEODORE H. FRANK, *et al.*,
Petitioners,
v.

PALOMA GAOS, Individually and
on Behalf of All Others Similarly Situated, *et al.*,
Respondents.

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

BRIEF OF *AMICI CURIAE* DAVID LOWREY, RAYMOND J. PEPPERELL, BLAKE MORGAN, AND GUY FORSYTH IN SUPPORT OF PETITIONERS

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Amici curiae David Lowery, Raymond J. Pepperell, Blake Morgan, and Guy Forsyth are professional recording and performing artists, label owners, and leaders of organizations who support strong and fair protection of intellectual property and privacy rights as well as fair compensation for violation of those rights.

In addition to their creative activities, amici are also regular commentators on public policy or professors. For example, Mr. Lowery, the founder of the musical groups Cracker and Camper Van Beethoven, is a lecturer at the University of Georgia Terry College of Business, has testified before the U.S. House of Representatives Subcommittee on the Courts, Intellectual Property and the Internet, and is a frequent commentator on copyright policy and artist rights in a variety of outlets, including his blog at TheTrichordist.com. *See The Scope of Fair Use: Hearing before the Subcomm. on the Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (Jan. 28, 2014). Mr. Pepperell (known as "East Bay Ray") is a well-known songwriter and guitarist for the American Punk band Dead Kennedys and a music producer. Mr. Morgan is an artist, songwriter, label owner, and the leader of the I

[1] Pursuant to Rule 37.3(a), all parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than amici made a monetary contribution to fund the preparation and submission of this brief.

Respect Music campaign,[2] which focuses on supporting fair payment for use and play of artists' music across all mediums and platforms. Mr. Forsyth is an Austin, Texas-based American blues and rock singer and songwriter, as well as an entrepreneur with his own record label.

Amici respectfully submit this brief to alert the Court to the fact that *cy pres* awards can, at times, harm rather than benefit members of a class. For example, in this settlement and others involving Google and Facebook, defendants and class counsel have agreed to direct *cy pres* awards to organizations that lobby with defendants against the copyright interests of those class members who are in the artist community. Roger Parloff, *Google and Facebook's New Tactic in the Tech Wars*, Fortune (July 30, 2012) (noting criticism in *Google Buzz* case that *cy pres* awards were steered to organizations otherwise paid by Google to lobby or consult for the company); Kenneth P. Vogel, *Google Critic Ousted From Think Tank Funded by the Tech Giant*, N.Y. Times (Aug. 30, 2017).

SUMMARY OF ARGUMENT

For over thirty years, courts have been directed to conduct a "rigorous analysis" to ensure that the contours of Rule 23 are satisfied when managing class action lawsuits. *See, e.g.*, *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982). But when it comes to approving or selecting *cy pres* recipients, this mandate has largely fallen on deaf ears. Far too often, courts rubberstamp class counsels' and the defendant's

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[2] *See* https://irespectmusic.org.

selection of *cy pres* recipients after conducting nothing more than a cursory review.

This lack of diligent court oversight deprives class members of the opportunity to obtain the benefit of a "next best" distribution. It also results in funds being distributed to organizations with interests adverse to portions of the harmed class as well as organizations that are friendly with and will advance the interests of the defendant.

When funds are distributed to interest groups antagonistic to a portion of the class, those class members have not been adequately represented as required by Rule 23. *See* Rule 23(a)(4) (providing that class members may sue as representatives on behalf of all class members if they will "fairly and adequately" protect the interests of the class). Nor are class members adequately represented—or compensated for their claims—when funds are distributed to organizations that lobby in support of the defendant's interests. Instead, class counsel and class representatives have advanced their own interests and the defendant's interests, at the expense of a broad swath of the class who are releasing their claims.

Amici are particularly focused on the harm resulting from *cy pres* awards to institutions that are directly or indirectly using *cy pres* funds to engage in activities that are contrary to artists' (and class members') rights.

In order to avoid such perverse results, amici respectfully request that courts be required to conduct a rigorous analysis of any *cy pres* recipient that is consistent with Rule 23, including an analysis of any

conflicts between the proposed recipients (including the recipients' broader activities) and the interests of class members.

ARGUMENT

Distributing funds to groups that have close relationships with the defendant and are hostile to the interests of portions of the class constitutes a violation of these class members' due process rights and is impermissible under Rule 23(a) and (e). *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620, 625-27 (1997) ("The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent," and is of heightened importance in the settlement context.); Rule 23(e) (requiring court approval to settle a certified class action only after conducting a hearing and upon "finding that it is fair, reasonable, and adequate" if it would bind other class members).

Here, as frequently occurs, the court did not conduct a rigorous analysis of the proposed *cy pres* awardees.[3] Google and class counsel agreed on the recipients of the *cy pres* awards. Pet. App. 5, 84, 92. The court did not require that the parties disclose how the six *cy pres*

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[3] Courts often rubber stamp proposed *cy pres* recipients with little to no analysis. *See, e.g.*, *In re Vitamin C Antitrust Litig.*, No. 1:06-cv-00988-BMC-JO, ECF No. 60 at 2 (E.D.N.Y. May 29, 2014); *In re Publ'n Paper Antitrust Litig.*, No. 3:04-MD-1631 (SRU), 2009 U.S. Dist. LEXIS 66654 (D. Conn. July 30, 2009). Indeed, some courts have explicitly held that they should defer to the selection of class counsel and representatives. *Sewell v. Bovis Lend Lease, Inc.*, No. 09-CV-6548 (SHS)(RLE), 2013 U.S. Dist. LEXIS 47526, at *8 (S.D.N.Y. Mar. 29, 2013).

recipients were chosen or which of the other 34 applicants either side rejected. Instead, with little to no meaningful analysis, the court (and the Ninth Circuit) allowed a *cy pres* award that reflects a clear and present conflict-of-interest based on prior relationships between class counsel and/or the defendant and *cy pres* recipients. Order, *In re Google Referrer Header Privacy Litigation*, No. 5:10-cv-4809-EJD (N.D. Cal. Mar. 31, 2015) (appended to Petition for Writ of Cert. at 31-61).

I. Google is the Party that Benefits by Directing Funds to *Cy Pres* Recipients that Support Its Aggressive Anti-Copyright Protection Turf War

In this settlement, like in many others, the defendant is the one that gets the largest benefit from the *cy pres* distribution. Indeed, publicly available information regarding Google's *cy pres* practices supports the conclusion that Google seeds and funds some of its most loyal academic and nonprofit allies by payments through *cy pres* awards in class action cases. Those recipients, in turn, have formally and informally supported or taken up Google's causes in cases and controversies unrelated to the class action case that awarded the *cy pres* funds.

One of those causes is Google's assault on copyright law. Google needs and uses a massive amount of digital content to drive users to its suite of products. Google then serves advertising to all these users and in turn famously scrapes their personal data into endless segments. Jeff Gould, *The Natural History of Gmail Data Mining*, Medium.com (June 24, 2014). One of the biggest impediments to Google's ability to sell

advertising around that scraped and curated content is copyright protection.

Google has engaged in a massive campaign to sway court opinions against support of artist rights and fair compensation for protected works. And it spends a lot of time and money in an effort to shape public opinion about its commercial goals and activities in addition to the vast sums it spends on lobbying for favorable laws. *See Google Academics, Inc.*, Google Transparency Project.org, http://www.googletransparencyproject.org/articles/google-academics-inc (last visited July 13, 2018); Emily Brill, *Emily Brill Investigates Jonathan Zittrain, star Harvard Law Prof*, The Daily Beast (July 5, 2010) (noting that Harvard's influential Berkman Center for Internet & Society and its associated professors, including Zittrain, often take positions supporting Google and against protection and better control of intellectual property rights); Felix Richter, *Google is the biggest lobbying spender in Tech*, Statistica (July 24, 2017). Google's shadow campaign efforts at influencing public opinion became such an issue in a recent litigation copyright and patent litigation against Oracle that Judge Alsup required Google to disclose its financial support for certain nonprofit organizations such as the Berkman Center for the Internet & Society, the EFF, Public Knowledge, and others. Google's Response to Order to Supplement, *Oracle Am. Inc. v. Google, Inc.*, No. 3:10-cv-03561 (N. D. Cal. Aug. 24, 2012).

The touchstone of a shadow campaign—like Google's campaign against protection and recognition of artists intellectual property and remuneration rights—is identifying a credible third-party source to

make its message resonate more deeply with the recipient. Central Intelligence Agency, *A Look Back … Marlene Dietrick, Singing for a Cause*, CIA.gov (Oct. 23, 2008). As we have seen in recent times, the Internet (and social media) are an effective weapon for manipulating public messaging. Of course, a major challenge to sustaining these "cyberturf" operations is funding them in a way that does not reveal the true source of their funding, and gives the funder plausible deniability. *See generally* Sharyl Attkinson, *The Smear: How Shady Political Operatives and Fake News Control What You See, How You Think, and How You Vote* (2017).

Rubber-stamped *cy pres* awards are a gift to Google as it allows the company to secretly funnel money to a nonprofit (which is not reported as a corporate donation), obtain a charitable giving tax deduction for that portion of the class action settlement, and seed the public messaging landscape with reliable allies who support its anti-intellectual property protection campaigns.

As but one example, the EFF is a consistent recipient of corporate contributions and *cy pres* awards in class actions against Google and other big tech companies who share its hostile position towards intellectual property rights protection for artists. *See* Consumer Watchdog Report, *How Google's Backing of Backpage Protects Child Sex Trafficking*, at 18-20 Consumerwatchdog.org (May 17, 2017); Google's Response to Order to Supplement, *supra*, at 8-10 (stating Google has contributed to EFF and Public Knowledge for years, and has a Google Fellow at the Center for Democracy and Technology). The EFF is also a consistent and vocal

opponent of amici's interests on the legal battlefield, where those interests are contrary to Google's.

In fact, in a recent copyright infringement suit BMG filed against Cox Communications seeking to hold it contributorily liable for infringement of BMG's copyrights by Cox's Internet service subscribers, the district court refused EFF's motion to appear as an amicus on behalf of Cox and detailed its concerns regarding their cozy relationship:

> The problem isn't that you went to EFF and solicited their input... It's that you didn't disclose it. And you are close enough to this action as lead counsel where there is absolutely no question that you should have encouraged Public Knowledge or Electronic Frontier Foundation from identifying – Just a footnote...
>
> And that is, in my belief, disappointing and deceptive. Amicus are obviously friends of the court. And I think with that, there comes an obligation to tell the Court of relationships they have with a party to an action. You chose not to do it. And I think it's really unfortunate.
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> ***
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> We try things here honestly. And our duty of candor to the Court is a whole lot higher than your estimation of it.

Hearing on Motions Transcript, *BMG Rights Mgm't LLC et al. v. Cox Comms., Inc. et al.*, No. 1:14-cv-1611 (E.D.V.A. Oct. 23, 2015) (Judge O'Grady statement). In denying EFF's motion, the court focused on the fact that Cox's counsel in that case served on the EFF

advisory board and collaborated with EFF in drafting the brief, while neither Cox's counsel nor EFF disclosed either fact to the court before BMG's counsel raised these issues.

Nowhere is that proxy fight more obvious than in the struggle to protect copyright and receive adequate royalties for use of artists copyrighted works. *See, e.g.*, Rory Carroll, *Google battles legal fallout of copyright ruling on anti-Islamic film*, The Guardian (Mar. 8, 2014). Regular *cy pres* recipients the Berkman Center, the Center for Democracy and Technology, and Stanford's Center for Internet and Society are also consistent opponents of artist rights and supporters of Google's interests.[4] Consumer Watchdog Report, *supra*

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[4] If one includes the Facebook "Sponsored Stories" class action suit, some of these groups received similar *cy pres* awards from Facebook's settlement. *Fraley v. Facebook, Inc.*, 966 F. Supp.2d 939, 946 n.7 (N.D. Cal. 2013) (reflecting in percentage form the agreement to send what was ultimately calculated to be $300,000 to the Berkman Center, and $500,000 each to EFF, Stanford, and the Center for Democracy and Technology, among other *cy pres* recipients). Similarly, Amazon used a *cy pres* fund to make a grant to the Canadian Internet Policy and Public Interest Clinic ("CIPPIC"), which later received a grant from Pamela Samuelson and Robert Glushko, now called the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic. CIPPIC's external advisory board includes a representative of Creative Commons (which received a $1.5 million grant from Google), the executive director of *cy pres* recipient the EFF (which received $1 million in *cy pres* funds from the Google Buzz lawsuit alone), Professor Lawrence Lessig (formerly of *cy pres* recipient the Berkman Center), and Professor Samuelson. Professors Samuelson and Glushko also operate the Samuelson Law, Technology and Public Policy Clinic, which itself received a $200,000 *cy pres* grant from the Google Buzz class action settlement.

(noting Google gave at least $4.75 million to the Center for Democracy and Technology, the organization's associate director is an ex-Google employee, and its Advisory Counsel includes Google employees, law firms, and other academics that Google supports financially); Alana Goodman, *Consumer Watchdog Took Millions From Google, Quiet on Privacy Concerns*, The Washington Free Beacon (May 3, 2016) (reporting consumer watchdog group the Center for Democracy and Technology collected millions from Google while staying quiet on the company's controversial data mining practices).

From the vantage point of amici, *cy pres* awards are a well-known loophole used to fund Google's wide-ranging assault on the interests of copyright and professional recording artists' and musicians'. The *cy pres* process, which is simply rubber stamped by trial courts undertaking little to no analysis of the intended recipients, allows Google to pay academics and nonprofits who support its causes instead of class members, avoid liability and damage payments to the public, and get a tax break for payments made to non-class members through use of the *cy pres* distribution vehicle. Class members get nothing or virtually nothing to compensate them for the harm that is the subject of the class action.

Artists such as amici watch in powerless amazement as the lower courts allow millions in *cy pres* awards to be funneled to Google's academic and nonprofit influencers through dubious class action settlements such as the one which occurred in the Google Buzz case. *In re Google Buzz Privacy Litig.*, 2011 WL 7460099 (N.D. Cal. Jun. 2, 2011) (awarding

$500,000 to the Berkley Center for Law and Technology, the Berkman Center, and Stanford; $1 million to the EFF; and, at the judge's election, $500,000 to an ethics center at the University where the trial judge taught as a lecturer). They then see nonprofits like the EFF support a long string of copyright cases that attack copyright protections and copyright holders, from *Grokster* to *Limewire* to the *Lenz* case. *See* Cases, *MGM v. Grokster*, available at EFF.org (touting EFF's defense of the company behind the notorious Morpheus Grokster peer-to-peer file sharing software system that allows users to swap pirated copyright-protected works); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 549 U.S. 913 (2005); Greg Sandoval, *Did EFF lawyer cross line in* LimeWire *case?*, cnet (May 18, 2010); *Arista Records LLC v. Lime Group LLC*, 715 F. Supp. 2d 481 (S.D.N.Y. 2010); Greg Sandoval, *Strange turn in dancing baby vs. Prince case*, cnet (Feb. 14, 2011) (reporting on Ms. Lenz's public statements about EFF's pro bono support of her case against copyright holder UMG, including "EFF is pretty well salivating over getting their teeth into UMG yet again"); *Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015). After receiving several rounds of Google money, a Harvard Law School Professor associated with the Berkman Center took on the defense of a notorious copyright infringer, pro bono. *See* Order, *Sony BMG Music Entertainment v. Joel Tenenbaum*, No. 07-cv-11446-NG (D. Mass. June 16, 2009).

At least one prominent copyright commentator and well-known professor—who supports organizations including Berkman, Stanford, and Creative Commons—publicly opposes amici's copyright interests

at every turn. His most recent efforts include arguing in favor of amending a bill in the Senate in a manner that would fail to respect the rights of artists who performed on recordings prior to 1972. Robert Levine, *As Music Modernization Act Enters Senate, Anti-Copyright Activists Come Out of the Woodwork*, Billboard (May 24, 2018). Amici believe that same professor is collaborating on that effort to block legislation that would protect artist rights with Public Knowledge, another nonprofit Google acknowledged funding in its disclosure in the *Oracle* copyright case.

Google's *cy pres* awards should not be treated as providing value for the class. To the contrary, Google is the real beneficiary of the money that flows to its partners through this flawed settlement distribution mechanism.

II. The Class Has Not Been Adequately Represented and At Least a Portion of the Class is Harmed by *Cy Pres* Awards to Google's Allies in the War on Copyright Protection

Amici and other artists are members of the class harmed by Google's activities that led to the current class action lawsuit for violation of their privacy rights. But Google has been allowed to earmark funds that should be distributed to members of this class, including amici and other artists, to Google's allies in its war on reasonable copyright protections and payment for use of copyrighted works.

By directing class funds to organizations that will directly or indirectly use the funds to advance interests antagonistic to portions of the class, class counsel and class representatives have not adequately represented

this portion of the class, as required by Rule 23(a)(4). This portion of the class is actually harmed by the distribution. Ultimately, the interests of amici and other class members with copyright interests that are adverse to Google's would be better served if the settlement funds were thrown away or burned rather than given to the *cy pres* recipients approved by the trial court.

Further, even class members without copyright interests are shortchanged when Google is allowed to direct class funds to its support organizations. When the district court evaluated the fairness of the settlement, it gave Google credit for the full amount of the settlement fund. Pet. App. 45. However, by approving *cy pres* recipients that will advance Google's interests, the district court functionally returned a portion of the funds back to Google. Indeed, since Google is the party that is likely to receive the largest benefit from the distribution, this Court should view the distribution as returning the majority of the settlement funds back to Google. Under such circumstances, the district court should not have given Google the full value of the settlement fund while conducting the Rule 23(e) fairness analysis. Instead, the district court should have heavily discounted the value of the settlement fund to the class.

To prevent such perverse results, courts should be required to conduct a rigorous analysis of the *cy pres* recipients. This includes an analysis of the full spectrum of the recipient's interests to identify any conflicts that recipient might have with the interests of class members as well as any possibility that the funds will be used to advance the defendant's interests. And

to the extent that the funds will directly or indirectly be used to advance the defendant's interests, courts should proportionately discount the value of the settlement fund prior to conducting any fairness analysis. Otherwise, class members will continue to be shortchanged and in some cases directly harmed by *cy pres* distributions.

Google's *cy pres* practice simply compounds the ennui of learned helplessness that artists feel in dealing with the company. As the critically acclaimed artist Zoë Keating wrote of her encounter with Google's YouTube subsidiary regarding the overreaching requirements of YouTube's take-it-or-leave it commercial license,

> I don't think they [Google] are evil. I think they, like other tech companies, are just idealistic in a way that works best for them....The people who work at Google, Facebook, etc., can't imagine how everything they make is not, like, totally awesome. If it's not awesome for you it's because you just don't understand it yet and you'll come around.

Zoë Keating, *What Should I Do About YouTube?*, Tumblr, zoekeating.tumblr.com/post/108898194009/what-should-i-do-about-youtube (last visited July 13, 2018).

Professor Jonathan Taplin also accurately captured Google's predatory approach to artists:

> Google has basic "digital fingerprinting" technology that could scrub both YouTube and its search results of illegal versions. But instead of safeguarding the work of artists, Google

> wields this tool as a bludgeon. Creators can either enter into a licensing agreement with YouTube at very low royalty rates, or get left at the mercy of pirates. What looks like protection for copyright holders is more of a protection racket benefiting Google.

Jonathan Taplin, *Do You Love Music? Silicon Valley Doesn't*, NY Times (May 20, 2016); *see also* Irving Azoff, *Dear YouTube, An Open Letter from Irving Azoff*, Recode (May 9, 2016) (artists' manager pleading with Google to allow Taylor Swift to opt out of YouTube content sharing policy).

Amici believe one of Google's strategies to overcome resistance to its commercial goals from the artist community is by persuading creators that resistance is futile—like O'Brien and Winston Smith, they must not only refuse to believe what they know to be true, they must truly believe that which they once knew not to be true. One of Google's "go to" methods for accomplishing their commercial goals is through messaging by its nonprofit allies through lawsuit warfare, lobbying, public messaging, or social media. Public Citizen's Congress Watch, *Mission Creep-y, Google Is Quietly Becoming One of the Nation's Most Powerful Political Forces While Expanding Its Information-Collection Empire*, at Citizen.org (2014) (Appendixes A-C list known Google trade associations, third party groups Google supports, and organizations that participate in the Google Policy Fellowship Program). As a search of the available public records and the information provided herein demonstrates, a number of those nonprofits are often supported directly by Google through dubious *cy pres* awards.

CONCLUSION

Allowing *cy pres* awards to continue along their current path means that the courts are complicit in allowing Google to fund its network of academics, think tank partners, and friendly nonprofits at the expense of class members.

The Court has questioned the propriety of such *cy pres* awards in the past. Amici respectfully request that the Court fashion guidance regarding the process by which trial courts managing class action litigations and the associated settlements to stop the practices that Google, and other class action defendants, have used so effectively for their own benefit to the detriment of class members like amici.

Respectfully submitted,

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