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

BRIEF IN OPPOSITION FOR INDIVIDUAL RESPONDENTS

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August 22, 2022

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in approving a class-action settlement involving widespread privacy violations that included injunctive relief and provided *cy pres* distributions of a $13 million settlement fund to organizations focused on internet privacy, where the court found that a claims process would be infeasible because the estimated 60 million class members cannot know whether Google intercepted their communications and validating claims would require them to possess decade-old Wi-Fi network information.

2. Whether, notwithstanding petitioner's abandonment of the issue below and contrary to the growing consensus of the courts of appeals, Federal Rule of Civil Procedure 23 implicitly requires plaintiffs to identify an administratively feasible way to identify class members as a prerequisite to approval of a class-action settlement.

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INTRODUCTION

After almost a decade of litigation—including an interlocutory appeal to the Ninth Circuit and a "three-year forensic investigation to confirm the standing" of the named plaintiffs (App. 2a)—the parties reached a settlement on behalf of the roughly 60 million individuals whose communications over Wi-Fi networks Google covertly intercepted using its Street View vehicles. The settlement included injunctive relief and a $13 million settlement fund. The injunctive relief extended, for up to five years, terms that 39 attorneys general had required Google to agree to, and it compelled Google to provide user privacy information that it otherwise would not have.

Considering the vast number of class members affected by Google's indiscriminate practice of surveilling into private homes and businesses, the fact that those members could not self-certify that Google had in fact intercepted their data a decade earlier, and the immense difficulty of verifying claims of class membership, the parties agreed to a *cy pres* distribution of the settlement fund to independent organizations with a track record of promoting the privacy of internet users. The district court and the Ninth Circuit engaged in a searching review. Both found this to be the unusual case in which it is appropriate to approve a *cy pres*-only distribution of the settlement fund.

That decision does not warrant review. There is no conflict on the *cy pres* question. Every court of appeals to consider the issue has recognized that, when distributing payments to individual class members is infeasible, the federal rules permit approval of a settlement that benefits class members through monetary distributions to *cy pres* recipients. Because of the unique challenges of proving class membership and

distributing funds here, each of these courts of appeals would have approved this settlement. Petitioner's purported circuit split reflects no more than courts applying the same legal standard to different facts.

The question is also of negligible importance today. Settlements distributing all monetary relief to *cy pres* recipients declined sharply after the Chief Justice expressed concern about them in *Marek v. Lane*, 571 U.S. 1003, 1006 (2013) (Roberts, C.J., respecting the denial of certiorari), and have become nearly non-existent since the Court granted certiorari in *Frank v. Gaos*, 139 S. Ct. 1041 (2019). Although petitioner complains (at 3-4) of an "explosion" of recent *cy pres* settlements, he does not cite a single settlement with a *cy pres*-only monetary distribution. Instead, every case petitioner cites involved direct monetary payments to class members and then the distribution of any residual amounts through *cy pres* awards. Residual *cy pres* distributions present different issues that this case does not raise and cannot resolve.

This case is also a poor vehicle to consider the propriety of settlements that include *cy pres*-only monetary distributions. There are unique challenges for claimants—including petitioner—to establish class membership. And the settlement raises none of petitioner's concerns. The class received significant relief: both injunctive relief extending concessions Google made in response to public scrutiny into its surveillance of homes, and awards to *cy pres* recipients that submitted detailed plans to use the funds to promote internet privacy. Those *cy pres* recipients are national organizations with a history of promoting internet privacy, not ones that class counsel or the parties personally favor. The settlement also is no windfall for class counsel, who after nearly a decade of litigation sought and received a fee award that is substantially less

than their lodestar. Finally, class members had the opportunity to opt out, eliminating any possible First Amendment concern.

The ascertainability question petitioner separately raises here also does not warrant the Court's plenary review. Petitioner expressly disavowed this question below and, therefore, the Ninth Circuit did not address it. In recent years, the Court has repeatedly denied certiorari in cases where, unlike here, this question was presented and decided. And developments since the last petition the Court denied show that any conflict is shallow and appears likely to resolve on its own. While petitioner relies on Third Circuit cases involving class-certification motions, that court has repeatedly reversed district courts that over-read its precedents in the way petitioner does, applies its rule differently when reviewing class-action settlements, and may be poised to join the other circuits, as many judges on that court have urged.

STATEMENT

A. Factual Background

1. In May 2007, Google deployed a fleet of vehicles outfitted with multi-directional cameras and sophisticated software to cities around the world. Consol. Class Action Compl. ¶ 55, ECF #54 ("Compl.").[1] The vehicles, Google said, would take photographs for Street View—a new online mapping service offering panoramic, street-level images. *Id.* ¶¶ 54-55.

But those vehicles had an additional, secret purpose: they intercepted and stored communications sent across nearby, unencrypted Wi-Fi networks, including

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[1] Except where otherwise noted, references to "ECF #__" are to the docket for No. 3:10-md-02184 in the Northern District of California.

those operated in people's homes. *Id.* ¶¶ 60-65. Google surreptitiously captured not only network identifying information, but also "payload data"—including emails, passwords, web addresses, and audio and video files—traveling over these networks when the Street View vehicles drove by. *Id.* ¶¶ 4, 66. Over more than three years, Google captured and stored around three billion frames of data in the United States, including roughly 300 million frames of payload data. App. 46a.

2. Google's secret surveillance ended in October 2010, following inquiries from German regulators that spawned worldwide investigations. Compl. ¶¶ 69, 75, 77. Domestic investigations resulted in a March 2013 Assurance of Voluntary Compliance ("AVC") between Google and 38 States and the District of Columbia. C.A.App. 167-79. Under the AVC, Google paid a $7 million fine and agreed to destroy the payload data it had acquired and to stop collecting additional data through Street View. C.A.App. 171-73. The AVC also required Google to maintain internal privacy programs for 10 years and to implement a public service campaign to educate consumers on Wi-Fi security. C.A.App. 169-72.

B. Procedural History

1. The individual respondents, on behalf of themselves and other unencrypted Wi-Fi network users whose transmissions Google intercepted, sued Google in federal courts around the country. The Judicial Panel on Multidistrict Litigation consolidated the cases in the Northern District of California, where Google is headquartered. *See* 8/17/10 Transfer Order, ECF #1. Respondents then filed a consolidated complaint, asserting violations of the federal Wiretap Act, 18 U.S.C. § 2511, and various state statutes. *See* Compl.

Google moved to dismiss for failure to state a claim. The district court denied the motion with respect to the Wiretap Act claims. *See* 6/29/11 Order, ECF #82. Recognizing that those claims presented issues "of first impression," the court authorized an interlocutory appeal under 28 U.S.C. § 1292(b). 7/18/11 Order, ECF #90. The Ninth Circuit accepted jurisdiction over the appeal and affirmed. *See Joffe v. Google, Inc.*, 746 F.3d 920 (9th Cir. 2013), *cert. denied*, 573 U.S. 947 (2014).

2. On remand, Google challenged the individual respondents' Article III standing. *See* Jt. Case Mgmt. Stmt. at 4-5, 10, ECF #107. Judge Breyer authorized "limited discovery on the issue of standing," 2/7/14 Minute Order, ECF #108, and appointed a special master "to search the Street View Data to determine whether any Plaintiff's communications were acquired by Google," 9/19/14 Order at 2, ECF #121-1. It took three years.

Eighteen named plaintiffs provided "personal information and forensic evidence of their wireless network equipment" from 2007 to 2010. Decl. of Jeffrey L. Kodroff et al. in Support of Pls.' Mot. for Final Approval of Settlement ¶ 19, ECF #186 ("Kodroff Decl."). Over the course of three years, the special master used this information to run "complex technical searches" of a database containing the Street View data for evidence that Google had captured the plaintiffs' network identifying information and payload data. App. 46a. The special master's report was filed under seal in December 2017. *See* Kodroff Decl. ¶ 19, ECF #186.

3. Google did not move to dismiss for lack of standing at the end of that process. Instead, after months of negotiations "with the assistance of an experienced and respected mediator," the parties reached a

settlement agreement. App. 67a-68a. The settlement class includes only those people whose payload data Google's Street View vehicles in the United States acquired from unencrypted wireless networks from January 1, 2007 through May 15, 2010. App. 91a-93a. The settlement provides injunctive relief, requiring Google to maintain educational websites on Wi-Fi security and to adhere to the terms of the AVC—which was set to expire in March 2023—for five years beyond final approval of the settlement. App. 98a-99a. Google also agreed to establish a $13 million settlement fund. App. 96a. The fund would cover administrative costs, service awards for the named plaintiffs, attorneys' fees and expenses, and payments to "independent organizations with a track record of addressing consumer privacy concerns" that "commit to use the funds to promote the protection of Internet privacy." App. 97a.

Respondents proposed eight *cy pres* recipients: the ACLU Foundation, the Center for Digital Democracy, the Center on Privacy & Technology at Georgetown Law, Consumer Reports, MIT's Internet Policy Research Initiative, Public Knowledge, the Rose Foundation for Communities and the Environment, and the World Privacy Forum. *See* Mot. for Prelim. Approval of Settlement at 6, ECF #166. Respondents also disclosed that class counsel's firms had been co-counsel with the ACLU, or its state-based affiliates, in several unrelated civil-rights cases. *Id.* at 6 n.12.

Each organization submitted a detailed proposal specifying how it would use the *cy pres* award to promote internet privacy. *See* 10/9/19 Order ¶ 13, ECF #178. For example, MIT's Internet Policy Research Initiative proposed developing a privacy education program for computer scientists, engineers, and software developers—the types of professionals who

developed the Street View software that included the capability to capture payload data surreptitiously—which MIT would make available to universities worldwide. *See* Decl. of Jeffrey L. Kodroff in Support of Pls.' Mot. for Prelim. Approval of Settlement, Ex. D, ECF #166-1 ("Kodroff Decl."). A ninth organization, the Electronic Privacy Information Center ("EPIC"), petitioned the district court for *cy pres* funding, detailing its opposition to the Street View data collection and proposing its own plan to use the funds to "advocate for consumers" before regulatory agencies and the courts and publish resources like the *Privacy Law Sourcebook*. Request for Designation of a *Cy Pres* Distribution at 8, ECF #169-2.[2]

The court-approved notice campaign included internet advertising that generated "more than 560 million impressions" to potential class members and reached "an estimated . . . 70%" of the target audience of potential class members. Decl. of Linda V. Young Regarding Compliance with the Court's Orders Approving the Form and Manner of Class Notice ¶¶ 5, 10, 14, ECF #184-1. Of these individuals, only one opted out, and two filed written objections, including petitioner. App. 80a. Petitioner provided a declaration in which he stated that he sent payload data over an unencrypted Wi-Fi network between 2007 and 2010; that Google Maps has Street View pictures of the location where that network operated (including from April 2009); and that "[o]n information and belief" Google had captured his payload data from this Wi-Fi network. C.A.App. 138 (¶ 3).

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[2] After the parties notified the district court of their settlement, *see* Stipulation and Proposed Order at 2, ECF #145, but before they moved for preliminary approval, the court stayed the case pending this Court's decision in *Gaos*. App. 46a-47a.

4. After a fairness hearing, the district court approved the settlement. The court started with respondents' Article III standing. App. 45a-51a. The court first detailed the special master's three-year process to determine that named plaintiffs' payload data was in the database. App. 46a. Then, applying *Gaos* and *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), Judge Breyer found that the Wiretap Act claims alleged a concrete and particularized injury-in-fact sufficient to confer standing because the harm "at issue here—having one's electronic communication intentionally intercepted—bears a close relationship to a traditional violation of the right to privacy." App. 49a. Google's "invasions of privacy" thus provides the class members with "standing under Article III." App. 51a.

Next, the court found that the class satisfied the requirements in Federal Rules of Civil Procedure 23(a) and 23(b)(3). App. 51a-58a. In finding Rule 23(a)(4) satisfied, the court observed that class counsel had advanced the class's interests through "vigorous and capable advocacy." App. 53a. The court specifically dismissed petitioner's charge that class counsel failed to adequately represent the class by negotiating a settlement that included *cy pres* relief. App. 53a-54a. That argument "assume[d], wrongly, that the *cy pres* settlement is not a benefit to the class" and "that the attorneys' fees in this case are some kind of windfall for Class Counsel, who are seeking a negative lodestar multiplier after spending nearly a decade on this case." App. 54a.

Applying Rule 23(b)(3), the court found that a class action was superior to other methods of adjudication "because the proposed class likely includes sixty million people." App. 55a. Furthermore, the fact that

"individual claims for damages would likely be capped at $10,000, and might be zero," would deter individual suits. App. 55a-56a. It rejected petitioner's contention that the class did not satisfy Rule 23(b)(3) because it is infeasible to distribute funds to individual class members. The settlement included "injunctive relief as well as a meaningful settlement fund" of $13 million, which the court noted petitioner had conceded was adequate. App. 56a & n.5. And "[t]he difficulty that any one individual would have in demonstrating membership in the class, requiring a process akin to the three-year process undertaken by the Special Master," was "all the more reason that class treatment is superior to an individual lawsuit." App. 58a.

The court then "carefully considered" the request for attorneys' fees. App. 59a. It declined to award fees based on the gross settlement as class counsel had proposed, but concluded that an award of 25% of the net settlement was reasonable given the case's duration, complexity, and risk. App. 59a-62a, 85a-86a. The court noted the "uncertain[ty] whether Google's conduct violated the [Wiretap Act]," the possibility of "no statutory damages at all" even if plaintiffs prevailed, and "the technical challenges involved in demonstrating that any one individual class member's privacy was violated." App. 62a. The court also found the fee award "reasonable under the lodestar approach," observing that it reflected a "negative lodestar multiplier." App. 62a-63a.[3]

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[3] Class counsel requested a fee equal to 59% of the nearly $5.5 million lodestar value through October 31, 2019. App. 63a. The $3,000,125 the court ultimately awarded, App. 85a-86a, reflects a negative multiplier of 0.55. That multiplier has declined over the following nearly three years as class counsel's lodestar has increased through further proceedings in the district court,

The court approved service awards of $5,000 for the 18 named plaintiffs who "undertook additional burdens by providing evidence and personal information to the Special Master for the jurisdictional discovery." App. 65a.

The court also found the settlement was "fair, reasonable, and adequate" under Rule 23(e)(2). Class counsel had "vigorously represented the class," and the settlement was negotiated at arm's length "after years of litigation and five months of settlement negotiations" with help from "an experienced and respected mediator." App. 66a-68a. The settlement also provided adequate relief based on the "costs, risks and delay of trial and appeal." App. 68a. The court noted that the case was risky because it was unclear "whether, even if Plaintiffs won, the Court would award statutory damages." *Id.* In addition, the litigation had been proceeding for almost a decade and "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." *Id.*

The court further concluded that *cy pres* relief was appropriate because making payments to class members was infeasible. Distributing the settlement fund across the estimated 60-million-person class would provide only "$0.22 per class member even absent *any* attorneys' fees, expenses, or even mailing costs." App. 69a. It also would be "unusually difficult and expensive to identify class members," requiring them "to have retained possession of the Wi-Fi router they used between 2007 and 2010" and a claims

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litigation of the Ninth Circuit appeal, and preparation of this opposition.

administrator to search "the intercepted data" through a process akin to "the painstaking, three-year process that the Special Master undertook." App. 69a, 71a-72a.

The court rejected petitioner's argument that class members could self-identify through allegations like those in petitioner's declaration. Judge Breyer explained that, "unlike 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 that information "is not in the class member's possession." App. 71a-72a. The court also "agree[d]" with respondents that, even if "a self-identifying claim process would work" and a tiny fraction of class members self-identified, a settlement that has no monetary benefit "to 99% of the class[] is not so obviously superior to a *cy pres*-only settlement that the Court must reject this settlement as unfair." App. 72a; *see* App. 73a ("Class Counsel have an obligation to the class as a whole—not just to the 1% of the class that is able to file a claim.").

By contrast, the court explained, the *cy pres* awards "serve the compensatory and deterrent goals of the Wiretap Act better than any available alternative method of redress." App. 78a. The court found that awards to the proposed recipients—"some of the most effective advocates for internet privacy in the country"—would "likely yield actual improvements to internet privacy." App. 74a. The court also found "no relationship between proposed recipients and Class Counsel, Google, or the Court that undermine[d] the fairness of the Settlement." App. 79a. It accordingly distributed the settlement fund equally among nine *cy pres*

recipients: the eight that respondents had proposed and EPIC. App. 79a-80a.

The court further found the settlement provided "meaningful[]" injunctive relief, including that it extended Google's obligations under the AVC by at least two years and required Google to make "meaningful changes" to its educational websites that "it would not have made without the settlement." App. 77a.

Finally, the court dismissed petitioner's First Amendment challenge. The settlement was not state action and, in any event, "class members had the opportunity to exclude themselves." App. 76a n.10.

5. The Ninth Circuit affirmed. It first rejected petitioner's argument that *cy pres*-only monetary distributions are categorically improper. That argument is "incompatible with [circuit] precedents," which "recognize[] that *cy pres* awards are an acceptable solution when settlement funds are not distributable." App. 16a. "[O]ther circuits," the court noted, "have generally taken a similar approach to . . . approving *cy pres* settlements." App. 17a.

The court of appeals upheld the district court's finding that it would not be feasible to distribute funds directly to class members. "[E]ven assuming that the subset of class members who claim payments would be small enough that the settlement fund could provide meaningful value to every claimant," there was no "viable way for a claims administrator to verify *any* claimant's entitlement to settlement funds." App. 18a. The court of appeals agreed with the district court that "self-identification would be pure speculation" because "'[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. 19a-20a (quoting

App. 72a) (brackets in original). The court explained that petitioner did not "suggest any means of third-party claims verification besides 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. The court rejected petitioner's contention that the district court had allowed the class representatives to self-identify as class members, noting that their "claims were supported not just by their self-identification, but also by the special master's extensive forensic analysis." App. 19a n.6.

The court of appeals next addressed petitioner's Rule 23(b)(3) arguments.[4] It rejected petitioner's argument that, if it is infeasible to identify absent class members at the time of certification, class litigation is not superior to alternative methods of resolving the controversy because a *cy pres* settlement could not provide meaningful relief. App. 21a-22a. That argument ignored that "class members do benefit . . . from a defendant's payment of funds to an appropriate third party." App. 22a. The court thus held that "the infeasibility of distributing settlement funds directly to class members does not preclude class certification." App. 23a.

The court of appeals likewise affirmed the district court's finding that the settlement was adequate. *Id.* In particular, the court noted that the settlement's injunctive relief went "beyond Google's AVC requirements," by extending the time that Google must comply with the AVC and obligating "Google to post additional educational material online that the AVC

[4] The Ninth Circuit noted that petitioner "maintains that he is not making 'a stand-alone ascertainability argument of the sort'" he now raises here. App. 21a.

did not require." App. 23a-24a. Given "the unique challenges plaintiffs would have faced in proving their claims," this relief, "together with the indirect benefits conferred by the *cy pres* provisions," satisfied Rule 23(e)(2)(C). App. 24a.

Turning to petitioner's argument that *cy pres* awards violate the First Amendment, the court of appeals held that the settlement "does not compel class members to subsidize third-party speech because any class member . . . can simply opt out of the class," thereby "disassociat[ing] himself from the subsidization of the *cy pres* recipients' speech." App. 26a-28a.

The court of appeals further found "unconvincing" petitioner's argument that the district court abused its discretion in approving the *cy pres* recipients because some had received *cy pres* awards in other settlements involving Google and class counsel's firms had litigated unrelated cases alongside the ACLU. App. 28a-29a.

Finally, the court of appeals approved the attorneys' fee award, which petitioner does not challenge here. App. 31a-34a.

Judge Bade concurred. Despite "some general concerns about *cy pres* awards," App. 36a, she agreed that the "district court correctly applied [the] circuit's law and did not err in certifying the class for settlement purposes or approving the proposed settlement agreement," App. 35a.

The Ninth Circuit denied rehearing and rehearing *en banc*. App. 87a.

REASONS FOR DENYING THE PETITION

I. THE *CY PRES* QUESTION PRESENTED DOES NOT WARRANT REVIEW

A. There Is No Circuit Conflict

1. Every court of appeals to consider the issue has said that *cy pres*-only monetary distributions—that is, when all the monetary relief the settlement provides is distributed to charitable organizations to further the interests of the class—are permissible in some cases. *See* 4 William B. Rubenstein, *Newberg on Class Actions* § 12:26 (6th ed. 2022) (collecting cases). And courts in every regional circuit have also approved residual *cy pres* distributions—distributions that occur when there is unclaimed money in the settlement fund after payments to class members and further distributions are inappropriate. *See id.* § 12:32 (collecting cases).

The courts of appeals that have addressed *cy pres* awards all apply the same legal standard for evaluating them, permitting *cy pres* when distributing the settlement fund to class members is infeasible:

- **First Circuit:** *In re Pharmaceutical Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 34 (1st Cir. 2009) (holding *cy pres* is appropriate "when it is economically infeasible to distribute money to class members," such as "when class members cannot be identified, when the class changes constantly, or when class members' individual damages—although substantial in the aggregate—are too small to justify the expense of sending recovery to individuals").
- **Second Circuit:** *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (recognizing *cy pres* is appropriate when "direct

distribution to individual class members is not economically feasible," but rejecting *cy pres* award because, in that case, there was no evidence "it would be onerous or impossible to locate class members" or that payments would be "economically impracticable").

- **Third Circuit:** *In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 934 F.3d 316, 328 (3d Cir. 2019) (explaining *cy pres* is "most appropriate where further individual distributions are economically infeasible," but "declin[ing] to prohibit *cy pres* distributions in other situations, including where even an initial distribution to some class members would be infeasible").
- **Fifth Circuit:** *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 & n.15 (5th Cir. 2011) (noting *cy pres* is appropriate "when it is not feasible" to distribute funds individually).
- **Seventh Circuit:** *Hughes v. Kore of Indiana Enter., Inc.*, 731 F.3d 672, 675 (7th Cir. 2013) (observing *cy pres* may be "the best solution" when individualized distributions "would provide no meaningful relief").
- **Eighth Circuit:** *Jones v. Monsanto Co.*, 38 F.4th 693, 698-99 (8th Cir. 2022) (holding remaining funds were "appropriately distributed *cy pres*" when "notice to the class was sufficient" and the initial round of payments "fully compensated" claimants), *reh'g en banc denied*, No. 21-2292 (8th Cir. Aug. 16, 2022).
- **D.C. Circuit:** *Democratic Cent. Comm. of D.C. v. Washington Metro. Area Transit Comm'n*, 84 F.3d 451, 455 (D.C. Cir. 1996) (per curiam)

(explaining *cy pres* is permissible "when the plaintiffs cannot be compensated individually").[5]

The Ninth Circuit applies the same standard as its sister circuits, permitting *cy pres* distributions "where the settlement fund is non-distributable because the proof of individual claims would be burdensome or distribution of damages costly." App. 15a; *accord Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990).

2. Far from serving as a rubber stamp as petitioner asserts (at 35), courts in the Ninth Circuit scrutinize *cy pres* settlements carefully. For example, district courts have rejected settlements with *cy pres*-only monetary distributions due to concerns over the adequacy of the settlement fund, *see Fraley v. Facebook, Inc.*, 2012 WL 5838198, at *2-3 (N.D. Cal. Aug. 17, 2012), or the breadth of the proposed release, *see Zepeda v. PayPal, Inc.*, 2014 WL 718509, at *6 (N.D. Cal. Feb. 24, 2014).

Courts in the Ninth Circuit have also rebuffed *cy pres* proposals after finding that "the settlement [wa]s distributable to the class members." *Hofmann v. Dutch LLC*, 317 F.R.D. 566, 578 (S.D. Cal. 2016); *see also*, *e.g.*, *Camberis v. Ocwen Loan Servicing LLC*, 2018 WL 6068999, at *2 (N.D. Cal. Nov. 20, 2018) (denying residual *cy pres* award because "distribution of the remaining funds to class members is practicable"); *In re Hydroxycut Mktg. & Sales Pracs. Litig.*,

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[5] The Tenth and Eleventh Circuits have adopted the same standard in unpublished decisions. *See Allred v. ReconTrust Co., N.A.*, 787 F. App'x 994, 996-97 (10th Cir. 2019); *Nelson v. Mead Johnson & Johnson Co.*, 484 F. App'x 429, 435 (11th Cir. 2012) (per curiam).

2013 WL 6086933, at *4 (S.D. Cal. Nov. 19, 2013) (finding *cy pres* award improper because there was no evidence "it would be infeasible to make additional distributions"); *In re Groupon, Inc., Mktg. & Sales Pracs. Litig.*, 2012 WL 13175871, at *9 (S.D. Cal. Sept. 28, 2012) (rejecting settlement because "the *cy pres* award first should be used to pay class members' claims"). And the Ninth Circuit has not hesitated to reject settlements where there is an insufficient nexus between the *cy pres* recipient and the interests of the class*, see*, *e.g.*, *Koby v. ARS Nat'l Servs., Inc.*, 846 F.3d 1071, 1080 (9th Cir. 2017), or an inappropriate fee award, *see*, *e.g.*, *In re Easysaver Rewards Litig.*, 906 F.3d 747, 754 (9th Cir. 2018).

The decisions below engaged in the same searching review. The district court noted that it "would not find a *cy pres*-only settlement fair, reasonable, and adequate in many circumstances." App. 61a n.6. The court approved the *cy pres*-only monetary distribution here only after finding the fund was non-distributable because it would be "unusually difficult and expensive to identify class members." App. 69a. The Ninth Circuit reached the same conclusion, holding that, although such settlements are "the exception, not the rule," "meaningful forensic verification of claims would be prohibitively costly and time-consuming" such that "it was not feasible to verify class members' claims as would be necessary to distribute funds directly to class members." App. 15a, 20a. Indeed, before the court of appeals, "Lowery d[id] not identify a viable way for a claims administrator to verify *any* claimant's entitlement to settlement funds," App. 18a, and he does not do so here.

3. Rather than reveal a conflict, the cases that petitioner cites (at 18-20) reflect the application of

common legal standards to different facts—including that each of the cases involved a residual *cy pres* distribution. Those courts of appeals would have approved this settlement. Likewise, courts in the Ninth Circuit would have rejected the *cy pres* settlements in the cases petitioner cites.

Like the Ninth Circuit, the Seventh Circuit recognized in *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014), that *cy pres* distributions of the settlement fund are permissible "if it's infeasible to provide that compensation to the victims." *Id.* at 784. That was not the case in *Pearson*, where, after initial distributions to class members who submitted claims, the settlement distributed $1.13 million to a *cy pres* recipient even though the 4.72 million known class members could have feasibly been mailed additional amounts. *See id.* at 780, 784. That *cy pres* settlement would have met the same fate in the Ninth Circuit. *See Amador v. Baca*, 2019 WL 13104946, at *5 (C.D. Cal. Sept. 23, 2019) (rejecting settlement that distributed $3 million *cy pres* "in advance of claim filing by class members").

In *BankAmerica Corp. Securities Litigation*, 775 F.3d 1060 (8th Cir. 2015), the Eighth Circuit observed that "many of [its] sister circuits," including the Ninth Circuit, "severely restrict[]" the use of *cy pres*. *Id.* at 1063. There, it was "clearly feasible" to distribute the $2.4 million residual fund to class members who had cashed settlement checks, *id.* at 1064, and the proposed *cy pres* recipient, a Missouri legal aid organization, was "totally unrelated" to the securities-fraud claims asserted on behalf of a nationwide class, *id.* at 1067. Courts in the Ninth Circuit have rejected *cy pres* awards on identical grounds. *See*, *e.g.*, *Hofmann*, 317 F.R.D. at 577-78 (rejecting *cy pres* award because

"the settlement is distributable to the class members" and "no connection exists between the recipients' missions and the absent class members' interests").

In *In re Baby Products Antitrust Litigation*, 708 F.3d 163 (3d Cir. 2013), the Third Circuit expressly "join[ed] other courts of appeals in holding that a district court does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component." *Id.* at 172 (citing *Lane*, 696 F.3d at 819-20). On the facts before it, however, the Third Circuit reversed because the district court "was apparently unaware" that the $18.5 million remaining in the settlement fund would be distributed to *cy pres* beneficiaries rather than directly to class members. *Id.* at 170. The Ninth Circuit has similarly vacated "unacceptably vague and possibly misleading" *cy pres* settlements. *Dennis v. Kellogg Co.*, 697 F.3d 858, 867 (9th Cir. 2012).

Petitioner also cites *Klier*, but that case did not involve a *cy pres* settlement. Instead, the Fifth Circuit rejected a district court's *sua sponte* decision to distribute the residual fund to *cy pres* recipients, which conflicted with the settlement agreement's terms. *See* 658 F.3d at 471. But the Fifth Circuit noted that, where settling parties do agree, *cy pres* is appropriate "when it is not feasible" to distribute the settlement fund to class members. *Id.* at 475.

4. Petitioner also errs in claiming (at 20) that the Third and Ninth Circuits disagree on the standard for evaluating proposed *cy pres* recipients. In the Third Circuit, district courts "must review the selected *cy pres* recipients to determine whether they have a significant prior affiliation with any party, counsel, or the court" and reject a recipient if any relationship

"raise[s] substantial questions . . . whether the selection of the recipient was made on the merits." *Google Cookie*, 934 F.3d at 331 (ellipsis in original). The Ninth Circuit has likewise instructed district courts to "examine any claimed relationship between the *cy pres* recipient and the parties or their counsel" and reject the recipient if the relationship "raises a significant question about whether the recipients were selected on the merits." *In re Google Referrer Header Priv. Litig.*, 869 F.3d 737, 744, 746 (9th Cir. 2017), *vacated and remanded on other grounds sub nom. Frank v. Gaos*, 139 S. Ct. 1041 (2019).

Here, class counsel disclosed that their firms had litigated unrelated civil-rights cases with the ACLU and its state-based affiliates. And Google disclosed that it had made donations to four of the recipients. *See* Decl. of Brian M. Willen Regarding Mot. for Prelim. Settlement Approval ¶ 7, ECF #171. After closely "scrutiniz[ing]" the settlement, the district court found "no relationship . . . undermine[d] the fairness of the Settlement to Class Members." App. 79a. The Ninth Circuit agreed. *See* App. 28a (rejecting petitioner's challenge as "unconvincing"). Petitioner's conclusory assertion (at 21) that "the *cy pres* beneficiaries were intertwined with Google and class counsel's interests" casts no doubt on the lower courts' findings.

B. The Case Raises No Important Recurring Question Because *Cy Pres*-Only Monetary Distributions Occur Rarely

1. The question presented is of minimal importance because *cy pres*-only monetary distributions are exceedingly rare today. In 2013, the Court denied certiorari in *Marek v. Lane*, which involved a *cy pres*-only monetary distribution. 571 U.S. 1003. In a statement respecting the denial of certiorari, the Chief

Justice cited data from 1974 through 2008 and expressed concern that *cy pres* remedies "are a growing feature of class action settlements." *Id.* at 1006.

Litigants and lower courts took notice. Subsequent empirical research, set out by Professor Rubenstein of Harvard Law School in an *amicus* brief in *Gaos*, found just six settlements with *cy pres*-only monetary distributions between 2013 and 2017. *See* Brief of Professor William B. Rubenstein as *Amicus Curiae* in Support of Respondents at 13, No. 17-961 (U.S. Sept. 5, 2018), 2018 WL 4293386. Another survey, which petitioner cites (at 24), similarly found that *Lane* "mark[ed] a turning point for *cy pres*," after which its use "dwindle[d]." Natalie Rodriguez, *Era of Mammoth Cases Tests Remedy of Last Resort*, Law 360 (May 2, 2017).[6]

Cy pres-only monetary distributions have become rarer still since *Gaos*. We are aware of just two other approved settlements with *cy pres*-only monetary distributions in the more than four years since the Court granted certiorari in *Gaos*.[7] Both arose under

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[6] The State *amici* cite (at 11) an article purporting to find "a broader trend of increased use of *cy pres*," but the authors merely reported the count of hits from a basic Westlaw search—they did not analyze any case or settlement, or distinguish *cy pres*-only monetary distributions from residual *cy pres* distributions. *See* Jeremy Kidd & Chas Whitehead, *Saving Class Members from Counsel*, 58 San Diego L. Rev. 579, 603 n.173 (2021).

[7] Following the Third Circuit's rejection of a settlement with a *cy pres*-only monetary distribution, the parties in *Google Cookie* have proposed a revised settlement that also provides for a *cy pres*-only monetary distribution. Counsel of record for petitioner here has objected to that settlement. *See* Objection of Theodore H. Frank, *In re Google Inc. Cookie Placement Consumer Priv. Litig.*, No. 1:12-md-02358-ER, ECF #207 (D. Del. July 6, 2022). The district court has not yet scheduled the fairness hearing to determine whether to approve the revised settlement. *See* Order, *Google Cookie*, ECF #205 (D. Del. Feb. 24, 2022).

the Fair Debt Collection Practices Act ("FDCPA"), which limits statutory damages in class actions to 1% of the defendant's net worth. *See* 15 U.S.C. § 1692k(a)(2); *see also Dunbar v. Symmetry Mgmt. Corp.*, 2021 WL 4935787, at *3 (M.D. Fla. Feb. 26, 2021); Settlement Order and Final Judgment, *Morrison v. Clear Mgmt. Sols.*, No. 1:17-cv-00051-CW, ECF #79 (D. Utah June 5, 2020) (granting Motion for Final Approval of Class Action Settlement, ECF #73 (D. Utah May 1, 2020)).[8]

2. Petitioner fails to identify a single other instance. Instead, what he claims (at 3-4) is an "explosion" of "settlements featuring *cy pres* awards" are all settlements involving direct monetary relief along with residual *cy pres* awards. *See* Pet. 31-32, 35.

Such residual *cy pres* awards occur when unclaimed settlement funds remain following distributions of money to individual class members. *See* 4 *Newberg* § 12:32. In those cases, courts ask whether it is feasible to make additional *pro rata* distributions to class members, *see*, *e.g.*, *BankAmerica*, 775 F.3d at 1065, and whether class members who submitted claims and received payment have been "fully compensated," so the residual amount is "appropriately distributed *cy pres*," *Jones*, 38 F.4th at 698-99, because additional payments "would provide a windfall to class members," *Klier*, 658 F.3d at 475; *see also*, *e.g.*, *In re Lupron Mktg. & Sales Pracs. Litig.*, 677 F.3d 21, 35 (1st Cir. 2012) (same). These courts also ask whether further notice to generate additional class member claims on the residual amount is practicable given the notice

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[8] Even in the FDCPA context, *cy pres*-only monetary distributions are rare: since the Court granted certiorari in *Gaos*, district courts have approved class-action settlements in at least 40 FDCPA cases that provided monetary distributions to class members.

efforts to date. *See*, *e.g.*, *Jones*, 38 F.4th at 698 (concluding that "notice to the class was sufficient" and additional efforts were unnecessary prior to *cy pres* distribution).[9]

Cy pres-only monetary distributions, in contrast, arise in the rare case when it is clear at the time of settlement that providing direct monetary relief to class members is infeasible. *See* App. 20a ("If it were feasible to distribute the settlement fund to the class members, a *cy pres* settlement would not be employed."). The question for the court reviewing such a settlement is whether allocating the settlement fund to the proposed charities will benefit the class such that the settlement as a whole, including any injunctive relief it provides, is fair, reasonable, and adequate. *See* App. 23a. Cases involving *cy pres*-only monetary distributions thus present substantially different questions from those involving only residual *cy pres*. This case presents the former questions and would not allow the Court to address petitioner's arguments against residual *cy pres* distributions.

C. This Case Is a Poor Vehicle for Considering Limitations on *Cy Pres*-Only Monetary Distributions

Finally, this case is a poor vehicle for reviewing the courts of appeals' consistent and well-settled standards for evaluating settlements that propose *cy pres*-only monetary distributions. Processing claims for individual distributions to the estimated 60 million people whose privacy Google invaded would be

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[9] The objector to the residual *cy pres* distribution that the Eighth Circuit recently approved in *Jones* is one of the counsel for petitioner here. *See* 38 F.4th at 695.

uniquely challenging. Contrary to petitioner's argument (at 19, 26), the courts below did not unreasonably "bypass a claims process with self-identification" or require unnecessary "elaborate documentation" for proving class membership. Those courts rightly held that self-certification "would be pure speculation." App. 20a. This is the rare case in which "no member of the class" can know whether the defendant invaded their privacy because the evidence of the intrusion "is the intercepted data, and that evidence is not in the class member's possession." App. 71a-72a; *see* App. 19a-20a.

Instead, to prove their membership in the class, claimants would have to provide the same kind of information about the Wi-Fi networks they operated between 2007 and 2010 as the named plaintiffs, so the claims processor could search for them in the data Google intercepted. That process will be even harder today. Virtually all Wi-Fi routers from 2007 to 2010 were using the Wi-Fi 3 standard (or an older one). Four new Wi-Fi standards—Wi-Fi 4, 5, 6, and 6E—have been released since then, along with mesh systems that eliminate Wi-Fi dead spots.[10] And consumer and business devices such as laptops, smartphones, and tablets have all been updated to take advantage of the higher speeds and better coverage that these innovations enable. Few, if any, people still use (or even have) their 12-15-year-old routers that contain the network information necessary to verify their membership in the class.

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[10] *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); Glenn Fleishman, *Wireless Mesh Networks: Everything You Need To Know*, PCWorld (May 5, 2020), https://perma.cc/K4PN-TSL7.

That appears to be the case for petitioner, who attests that he used an unencrypted Wi-Fi network between 2007 and 2010 and that Google Maps has Street View pictures of that location from that time. C.A.App. 138 (¶ 3). But he does not state that he retains that router or its network information and, instead, offers only "information and belief" that Google intercepted his data. *Id.* The courts below reasonably concluded that such assertions were not sufficient to establish class membership. In contrast, as the Ninth Circuit observed, "the named plaintiffs' claims were supported not just by their self-identification, but also by the special master's extensive forensic analysis." App. 19a n.6. Accordingly, petitioner may ultimately be unable to substantiate that Google acquired his payload data, which is necessary for him to be a class member. If he is not a class member, he lacks the injury-in-fact necessary to have Article III standing to object to the settlement. *See* 4 *Newberg* § 13:22 ("[c]ourts regularly find that nonclass members have no standing to object to a proposed settlement") (citing cases).[11]

This case also raises none of petitioner's concerns. *See* Pet. 26-31. *First*, this is not a *cy pres*-only settlement: the class received meaningful injunctive relief from the settlement agreement. The settlement agreement extends the terms of the AVC—which would otherwise expire in 2023—for five years beyond final approval of the agreement. Thus, Google must continue its "Privacy Program" requiring "regular employee training" about protecting user privacy.

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[11] Although respondents did not challenge petitioner's claim to be a class member below, the "question of [Article III] standing is not subject to waiver." *United States v. Hays*, 515 U.S. 737, 742 (1995).

C.A.App. 169-70. The settlement agreement also requires Google to "host and maintain educational webpages" on wireless security, App. 82a, which Google would not have otherwise created, *see* App. 77a. This relief also prevents Google from again using its Street View vehicles to intercept private communications, and both lower courts found it to be a meaningful component of the settlement. *See* App. 23a-24a, 77a. In contrast, the settlement in *Gaos* did not bar Google from continuing the allegedly tortious conduct. *See Gaos* App. 82a (No. 17-961) (U.S. Jan. 3, 2018).

Second, the *cy pres* awards here benefit the class by deterring Google and other companies from similar wrongdoing. The awards deter misconduct by "prevent[ing] the wrongdoer from holding on to its ill-gotten gains." Brian T. Fitzpatrick, *Why Class Actions Are Something* both *Liberals* and *Conservatives Can Love*, 73 Vand. L. Rev. 1147, 1150 (2020). They will also serve to deter future misconduct by Google and others by funding "some of the most effective advocates for internet privacy in the country." App. 74a. Each has "a track record of addressing consumer privacy concerns," App. 78a, and submitted a detailed proposal outlining how it would use those funds to advance internet privacy through consumer education, policy change, and litigation, *see* Kodroff Decl., Exs. B-I, ECF #166-1. Requiring Google to fund these projects will "likely yield actual improvements to internet privacy," which in turn will advance the class members' interests in internet privacy and make it harder for companies like Google to invade internet users' privacy. App. 74a; *see* App. 26a.

These *cy pres* awards are thus "a form of *indirect* compensation" to class members. Fitzpatrick, 73 Vand.

L. Rev. at 1150-51. Petitioner does not mention any of the specific proposals each recipient submitted detailing how it would use the money to strengthen internet privacy or dispute the utility of those proposals to advancing class members' privacy interests. *See* Mot. for Prelim. Approval of Settlement at 6-9, ECF #166.

Third, this case raises no concerns about the conduct of either class counsel or the district court judge. The court observed that class counsel had advanced the class members' interests through "vigorous and capable advocacy," App. 53a, and petitioner does not argue otherwise. In approving the fee award, which petitioner does not challenge here, the court explained that "this case required skill and expertise, which Class Counsel amply demonstrated over nearly ten years of work." App. 61a. Class counsel did not use *cy pres* to "facilitate an early settlement with a profitable fee award and less resistance from defendants." Pet. 27. Instead, they negotiated a *cy pres*-only monetary distribution after nearly a decade of litigation and received a fee award far less than their lodestar.

Additionally, despite petitioner's insinuation (at 26), this settlement is not "heavily tilted toward attorneys' fees." After careful consideration, the district court concluded that 25% of the net—rather than gross—settlement was a reasonable award under the circumstances. App. 59a-62a, 85a-86a. At the time, the award reflected a negative lodestar multiplier of 0.55. That multiplier has declined as this litigation continues.

Nor has petitioner shown that the parties or their counsel here chose *cy pres* recipients to promote "their own personal political or charitable preferences." Pet. 28. Each recipient has a longstanding commitment to

internet privacy and submitted a specific proposal for using the *cy pres* award to advance that goal. Google had no role in selecting any recipients, and the only pre-existing relationship petitioner identifies is that certain class counsel firms had been co-counsel with the ACLU—or a state affiliate—in unrelated civil-rights cases. *See* Mot. for Prelim. Approval of Settlement at 6 n.12, ECF #166. No court of appeals has held that such an attenuated relationship is grounds for disqualifying a proposed *cy pres* recipient.[12]

Finally, this *cy pres* award raises no First Amendment concerns. Even assuming that approving a settlement between private parties constitutes government action implicating the First Amendment —a question the court of appeals did not decide, App. 26a-27a—no court has accepted petitioner's assertion (at 29) that a *cy pres* award in an opt-out class is compelled speech. By opting out, petitioner would "have disassociated himself from the subsidization of the *cy pres* recipients' speech," eliminating any conceivable First Amendment concern and retaining his individual claim against Google (assuming he has one). App. 28a.[13] Petitioner also does not argue here that he disagrees with any *cy pres* recipient's proposed use of the money.

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[12] Petitioner notes a concern (at 28-29) that district court judges may pick charities they favor to receive *cy pres* awards but offers no evidence that Judge Breyer did so here.

[13] *See also Jones*, 38 F.4th at 700 (rejecting First Amendment claim in the context of a residual *cy pres* distribution because such funds "cannot be money 'taken' from any member of the class").

II. THE ASCERTAINABILITY QUESTION PRESENTED DOES NOT WARRANT REVIEW

A. This Case Does Not Properly Present the Issue for Review

Petitioner did not raise the ascertainability question below, and the Ninth Circuit did not decide it. Instead, petitioner recognized that the Ninth Circuit's earlier decision in *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir.), *cert. denied*, 138 S. Ct. 313 (2017), "declined to impose a separate administrability requirement," Appellant's C.A. Br. 37, and he did not preserve the issue for further review. Indeed, in his reply brief, petitioner expressly disavowed "a stand-alone ascertainability argument of the sort repudiated by *Briseno*." Appellant's C.A. Reply Br. 22 n.14. The Ninth Circuit accordingly did not pass on the ascertainability question that petitioner presents in his petition.

This Court has repeatedly declined to review this issue, even when it was raised and decided below. In 2016, this Court denied two petitions for a writ of certiorari presenting this question. *See Procter & Gamble Co. v. Rikos*, 577 U.S. 1241 (2016); *Direct Digital, LLC v. Mullins*, 577 U.S. 1138 (2016). In 2017, this Court denied a petition for certiorari from a Ninth Circuit decision that explicitly rejected the Third Circuit's administrative-feasibility requirement. *See ConAgra Brands, Inc. v. Briseno*, 138 S. Ct. 313 (2017). And in 2019, this Court again denied a petition raising this issue. *See Apache Corp. v. Rhea*, 140 S. Ct. 906 (2020). The Court should deny this petition too.

B. Any Conflict over Ascertainability Is Being Resolved in the Courts of Appeals

Shortly before the Court denied certiorari in *Briseno*, the Second Circuit joined the "growing consensus" that there is no stand-alone "administrative feasibility requirement." *In re Petrobras Sec.*, 862 F.3d 250, 265 (2d Cir. 2017). That consensus includes the Sixth, Seventh, Eighth, and Ninth Circuits. *See Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657-58 (7th Cir. 2015)[14]; *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016); *Briseno*, 844 F.3d at 1127. And since this Court last declined to address the issue in *Apache*, the Eleventh Circuit joined the consensus, rejecting earlier unpublished decisions and holding that "administrative feasibility cannot be a precondition for certification." *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1302 (11th Cir. 2021) (Pryor, J.).

Petitioner cites (at 21) the Third Circuit's decisions in *Marcus v. BMW of North America, LLC*, 687 F.3d 583 (3d Cir. 2012), and *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013). But Third Circuit judges immediately expressed concern about those decisions. In his dissent from the denial of rehearing *en banc*

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[14] Petitioner's suggestion (at 22) that the Seventh Circuit has adopted an "intermediate" position cannot be squared with *Mullins*, which explicitly rejected any "requirement that plaintiffs prove at the certification stage that there is a 'reliable and administratively feasible' way to identify all who fall within the class definition." 795 F.3d at 657-58. The earlier Seventh Circuit case that petitioner cites, *In re Aqua Dots Products Liability Litigation*, 654 F.3d 748 (7th Cir. 2011), had nothing to do with ascertainability. Instead, it found only that the defendant's pre-existing recall program was superior to class litigation. *See id.* at 751-52.

in *Carrera*, Judge Ambro—who authored *Marcus*—explained that the circuit's new administrative-feasibility requirement would result in "the curtailment of well-intentioned class actions with many members yet all with claims too minimal to be asserted individually." *Carrera v. Bayer Corp.*, 2014 WL 3887938, at *2-3 (3d Cir. May 2, 2014). Other Third Circuit judges have also urged "retreat from" *Marcus* and *Carrera*. *See Byrd v. Aaron's Inc.*, 784 F.3d 154, 177 (3d Cir. 2015) (Rendell, J., concurring); *see also*, *e.g.*, *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 443 (3d Cir. 2017) (Fuentes, J., concurring) (encouraging the Third Circuit to "reject[] this additional requirement").

The Third Circuit has also repeatedly reversed district courts that applied a "too exacting" ascertainability standard in denying class certification. *Hargrove v. Sleepy's LLC*, 974 F.3d 467, 470 (3d Cir. 2020); *see also*, *e.g.*, *City Select*, 867 F.3d at 441-42 (same). The Third Circuit recently granted interlocutory appeal in a case applying *Carrera* to refuse to certify a litigation class on ascertainability grounds. *See In re Niaspan Antitrust Litig.*, No. 21-2895 (3d Cir.), *reviewing In re Niaspan Antitrust Litig.*, 555 F. Supp. 3d 155, 168 (E.D. Pa. 2021). Given that the Third Circuit is narrowing its position and may reconsider it in *Niaspan*, there is no reason for the Court to weigh in now.

That is especially true because petitioner neither endorses the Third Circuit's ascertainability rule nor argues that this class would fail under that rule. Nor could petitioner. The Third Circuit recognized in announcing its ascertainability rule that "[s]ettlement classes raise different certification issues than litigation classes." *Carrera*, 727 F.3d at 308 n.4. And that

court has reversed a district court decision denying certification of a class-action settlement on ascertainability grounds, explaining that "the settlement agreement removed" any "concern that the method of determining whether someone is in the class be administratively feasible." *In re Comcast Corp. Set-Top Cable Television Box Antitrust Litig.*, 656 F. App'x 8, 8-9 (3d Cir. 2016) (cleaned up). The absence of any argument from petitioner that the choice of legal rule is outcome-determinative is yet another reason to deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 22, 2022