No. 26-A-_____

In the Supreme Court of the United States

JOSEPH SCOTT ST. JOHN; MATTHEW LILLEY; JOHN ANDREN

Applicants,

v.

NAPOLEON PATACSIL; MICHAEL CHILDS; NOE GAMBOA; GOOGLE LLC; XXVI HOLDINGS INC; ALPHABET INC.,

Respondents.

APPLICATION TO THE HONORABLE ELENA KAGAN FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

As Supreme Court Rules 13.5, 22, and 30 permit, Applicants Joseph S. St. John, Matthew Lilley, and John Andren respectfully request a 35-day extension of time, up to and including December 29, 2026, to file a petition for a writ of certiorari. Unless an extension is granted, the deadline for filing the petition for certiorari is November 24, 2026. This application is timely because it is being filed more than ten days before that date.

In support of this request, Applicants state as follows:

1. The U.S. Court of Appeals for the Ninth Circuit rendered its split decision in *Patacsil v. Google LLC*, 189 F.4th 850 (9th Cir. 2026) on August 26, 2026 (Exhibit 1). This Court has jurisdiction under 28 U.S.C. § 1254(1).

2. This case presents substantial and recurring questions concerning the limits Federal Rule of Civil Procedure 23(e) places on the use of *cy pres* payments in class-action settlements, and whether a settlement can release claims of class members without providing the class members any marginal benefit beyond what non-class members receive. The settlement releases damages claims belonging to a class of an estimated 247.7 million Google users and creates a $62 million settlement fund. After an $18.6 million attorney-fee award and other administrative deductions, approximately $42.64 million will be distributed to twenty-one nonprofit organizations, including organizations where class counsel sits on the board and *alma*

maters of the attorneys. Several of the organizations have expressed plans to use the money for controversial political causes repugnant to a substantial portion of class members; others have indicated an intention to distribute money on the basis of race. Absent class members receive no monetary payment and have no opportunity to submit claims for compensation. The questions presented have previously drawn this Court's attention. *Frank v. Gaos*, 586 U.S. 485 (2019); *see also Marek v. Lane*, 571 U.S. 1003 (2013) (Roberts, C.J., respecting denial of certiorari).

3. In *Frank*, this Court granted review of a settlement approval of a similarly-sized class of Google users and a $6 million fund for *cy pres*. The Court did not reach the question of *cy pres* because of unresolved jurisdictional standing issues, and vacated the Ninth Circuit's affirmance and remanded for resolution of the Article III standing question. On remand, the district court found standing, and the parties, to avoid controversy over *cy pres*, negotiated a new settlement that successfully distributed $16 million to the class. *In re Google Referrer Header Privacy Litig.*, No. 5:10-cv-04809-EJD, 2023 WL 6812545 (N.D. Cal. Oct. 16, 2023).

4. Nevertheless, in this case before the same district court judge with the same defendant and a similarly sized class, a split panel of the Ninth Circuit affirmed a district court's holding that a fund twice as large as one previously successfully distributed was "non-distributable," making *cy pres* an acceptable first-choice resolution. Judge Forrest dissented from such a broad definition of "non-distributable" "where there has been no attempt at distribution and there is no obvious reason to think that distribution would be ineffectual."

5. The Ninth Circuit's decision deepens a circuit split on the propriety of *cy pres*, and the definition of "distributable," with every other circuit holding *cy pres* to be disfavored. *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013); *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468 (5th Cir. 2011); *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014); *In re BankAmerica Corp.*, 775 F.3d 1060 (8th Cir. 2015). *Pearson*, in particular, forbids considering *cy pres* to be a class benefit. 772 F.3d at 784 ($1.13 million in *cy pres* could "feasibly be awarded" to 4.72 million-member class).

6. The Ninth Circuit has previously created a circuit split, applicable to this case, on the propriety of *cy pres* distributions where there is a "significant prior affiliation" between a *cy pres* beneficiary and any party, counsel, or the court. *Compare In re Google Inc. Street View Elec. Comm. Litig.*, 21 F.4th 1102, 1119-20 (9th Cir. 2021) *with In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 934 F.3d 316, 331 (3d Cir. 2019).

7. The dissent in this case is not unique. Ninth Circuit judges have repeatedly criticized the Circuit's idiosyncratic views of *cy pres* and the resulting injustices caused by its jurisprudence. *Google Street View*, 21 F.4th at 1122-25 (Bade, J., concurring); *Lane v. Facebook*, 696 F.3d 811, 826 (9th Cir. 2012) (Kleinfeld, J., dissenting), 709 F.3d 791, 793 (9th Cir. 2013) (Smith, J., dissenting from denial of rehearing en banc).

8. Counsel who drafted the Ninth Circuit briefing for Applicants, Anna St. John, has since been confirmed by Congress as a federal judge for the Eastern District

of Louisiana. Ms. St. John was also president and general counsel of the public interest law firm for Applicants, Hamilton Lincoln Law Institute. Current counsel of record for Applicants, Theodore H. Frank, has taken over those duties from Ms. St. John, as well as her docket of cases. Mr. Frank has been diligently preparing a petition addressing the important issues in this case, but he and his firm (which will be down to three attorneys as of November 16, 2026) has had substantial briefing and administrative obligations between August 26 and November 24, 2026, including a Seventh Circuit appellate brief in *Campbell v. Sirius XM Radio, Inc.*, No. 26-2779, due October 16, 2026; a Seventh Circuit response to a motion to dismiss in *Campbell* due November 5, 2026; a Second Circuit appellate brief in *Kurtz v. Kimberly-Clark Corp.*, No. 26-946, due November 6, 2026; briefing in *Todd v. Ashley Furniture Industries, LLC*, No. 3:24-cv-0615-wmc (W.D. Wisc.) due September 16, 2026; a hearing in *Todd* on September 24, 2026; briefs in *Faoro v. Jewish Voice for Peace Inc.*, No. 1:25-cv-00289 (D.D.C.) due October 28, 2026 (as the result of an October 7 order), November 18, 2026 (as the result of a November 4 motion), November 18, 2026 (as the result of a second November 4 motion), and November 20, 2026 (as the result of a November 6 motion); and various state regulatory and federal tax filings due November 15, 2026. In addition, Mr. Frank required exploratory surgery September 10, 2026, because of complications from his November 2024 heart transplant, and has suffered other complications from various changes in his post-transplant medication over the last six months.

9. Applicants therefore respectfully submit that a brief 35-day extension is warranted to permit Applicants to prepare a petition that will best aid the Court in considering the important and complex issues raised by this exceptionally significant case.

November 9, 2026

Respectfully submitted,

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