No. 20-15616

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE: GOOGLE LLC STREET VIEW ELECTRONIC COMMUNICATIONS LITIGATION

BENJAMIN JOFFE, ET AL.,
Plaintiffs-Appellees,
v.
DAVID LOWERY,
Objector-Appellant,
v.
GOOGLE, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California, No. 3:10-md-02184

BRIEF OF EIGHT ATTORNEYS GENERAL AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR REHEARING AND REHEARING *EN BANC*

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January 20, 2022

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INTEREST OF AMICI CURIAE

The Attorneys General of Arizona, Alabama, Alaska, Arkansas, Indiana, Kansas, Louisiana, and North Dakota are their respective States' chief law enforcement or legal officers.[1] Their interest here arises from two responsibilities: (1) an overarching responsibility to protect their States' consumers, and (2) a responsibility to protect consumer class members under CAFA, which grants a role for state Attorneys General in the class action settlement approval process. *See* 28 U.S.C. § 1715; *see also* S. Rep. No. 109-14, 2005 U.S.C.C.A.N. 3, 5 (requirement "that notice of class action settlements be sent to appropriate state and federal officials" exists "so that they may voice concerns if they believe that the class action settlement is not in the best interest of their citizens"); *id.* at 35 ("notifying appropriate state and federal officials ... will provide a check against inequitable settlements"; "Notice will also deter collusion between class counsel and defendants

[1] The Attorneys General certify that no parties' counsel authored this brief, and no person or party other than named amici or their offices made a monetary contribution to the brief's preparation or submission. The Attorneys General submit this brief as amici curiae only, taking no position on the merits of the underlying claims, and without prejudice to any State's ability to enforce or otherwise investigate claims related to this dispute. Counsel for all parties have consented to the procedural filing of this brief.

to craft settlements that do not benefit the injured parties."). This brief furthers each of these interests.

This brief is also a continuation of State Attorneys General involvement in this case.[2] And it is a continuation of broader ongoing efforts by State Attorneys General to protect consumers from class action settlement abuse, which have produced meaningful settlement improvements for class members.[3]

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[2] Brief of Thirteen Attorneys General as *Amici Curiae* in Support of Objector-Appellant and Reversal, No. 20-15616, Dkt. 21 (9th Cir. Aug. 19, 2020); State Attorneys General *Amicus Curiae* Brief Urging Rejection of Proposed *Cy Pres*-Only Class Action Settlement, No. 3:10-md-02184-CRB, Dkt. 189-1 (N.D. Cal. Jan. 20, 2020).

[3] *See, e.g.*, *Cowen v. Lenny & Larry's, Inc.*, No. 17-cv-01530, Dkts. 94, 110, 117 (N.D. Ill.) (involvement of government officials, including State Attorneys General, produced revised settlement that increased class' cash recovery from $350,000 to ~$900,000); *Allen v. Similasan Corp.*, No. 12-cv-376, Dkts. 219, 223, 257, 261 (S.D. Cal.) (after State Attorney General coalition filed amicus and district court rejected initial settlement, revised deal was reached, increasing class' cash recovery from $0 to ~$700,000); *Unknown Plaintiff Identified as Jane V., et al., v. Motel 6 Operating LP*, No. 18-cv-0242, Dkts. 50, 52, 58 (D. Ariz.) (after Arizona Attorney General raised concerns regarding distribution of settlement funds to class members, parties amended settlement agreement to increase minimum class member recovery from $50 to $75 and to remove class-wide caps).

SUMMARY OF ARGUMENT

As Judge Bade aptly concurred here, "it is time we reconsider the practice of *cy pres* awards." Concurrence at 45. The use of *cy pres* in the class action settlement context, and especially *cy pres*-only settlements, has long been criticized by courts across the country, even garnering attention twice from the Supreme Court. These types of settlements, which actively divert settlement funds away from consumers, raise a host of concerns that harm consumers already disadvantaged during the class action settlement process.

Cy pres-only settlements such as the one here—containing no meaningful injunctive relief and providing no direct benefit to absent class members in exchange for the release of their claims—cannot comport with Rule 23 and its requirement that class action settlements be fair, reasonable, and adequate.[4] A tenuous, illusory benefit from a third-party distribution should not be blessed as satisfying the need for a direct benefit to the class, much less as serving the interests of the class or being fair, reasonable, and adequate.

The Court should grant rehearing *en banc* to review this case, which raises a number of important questions concerning *cy pres*-only settlements.

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[4] The panel considered the injunctive relief here to be "modest," at 30, but given that the relief is almost entirely duplicative of relief already obtained by 39 state attorneys general in 2013, it can hardly be considered to provide any meaningful benefit to class members here for the sake of a Rule 23 fairness determination.

ARGUMENT

I. The Court's Affirmance Of The *Cy Pres*-Only Settlement Here Implicates Exceptionally Important Questions That Warrant Rehearing.

A. The Use Of *Cy Pres* In Class Action Settlements, And In Particular *Cy Pres*-Only Settlements, Has Been Repeatedly Criticized.

The use of *cy pres* in class action settlements, especially in *cy pres*-only settlements, has been widely contested in courts across the country. The issue has "'been controversial in the courts of appeals,'" *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1063 (8th Cir. 2015), and has twice garnered attention from the Supreme Court.[5] That is not a surprise, given the many troubling aspects of the use of *cy pres* in class action settlements.

As Judge Bade detailed in concurrence here, the concerns arising from the use of *cy pres* in class action settlements are numerous:

> Such concerns … include: conflicts of interest between class counsel and absent class members; incentives for collusion between defendants and class counsel; the role of the court and the parties in shaping a *cy pres* remedy and the potential appearance of impropriety; the use of Rule 23 of the Federal Rules of Civil Procedure, "a wholly

[5] *See Frank v. Gaos*, 139 S. Ct. 1041, 1043 (2019) (Court "granted certiorari to review whether [*cy pres*-only] settlements satisfy the requirement that class settlements be 'fair, reasonable, and adequate,'" but remanded to address a question of standing without reaching *cy pres* question); *Marek v. Lane*, 571 U.S. 1003 (2013) (Roberts, C.J., statement respecting denial of certiorari) (recognizing need to address "fundamental concerns" surrounding use of *cy pres*).

> procedural device," to shape substantive rights, arguably in violation of Article III, the Rules Enabling Act, and the separation of powers doctrine; "whether a *cy pres* award can ever be used as a substitute for actual damages"; the propriety of importing a doctrine originating in trust law into the context of class action litigation; and whether class action litigation is superior to other methods of adjudication if parties must resort to *cy pres* relief.

Concurrence at 40–42 (citations and footnote omitted). Justice Roberts has also recognized the unresolved "fundamental concerns" surrounding the use *cy pres* in this context "including when, if ever, such relief should be considered[.]" *Marek*, 571 U.S. at 1003 (Roberts, C.J., statement respecting denial of certiorari).

Additionally, "[t]he opportunities for abuse have been repeatedly noted." *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 480 (5th Cir. 2011) (Jones, J., concurring). Circuit judges have explained that "[w]hatever the superficial appeal of *cy pres* in the class action context may have been, the reality of the practice has undermined it." *Id.* at 481 (Jones, J., concurring). For example, some defendants may now actually prefer *cy pres* because of the additional "public relations benefit." *Lane v. Facebook, Inc.*, 696 F.3d 811, 834 (9th Cir. 2012) (Kleinfeld, J. dissenting); *see also S.E.C. v. Bear, Stearns & Co., Inc.*, 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009) (*cy pres* may "actually benefit[] the defendant rather than the plaintiffs," as "defendants reap goodwill from the donation of monies to a good cause").

In an effort to protect absent class members, State Attorneys General have continually weighed in on the dangers of these types of settlements.[6] In this case in particular, a similar group of State Attorneys General filed amicus briefs in the district court and before the panel in this Court to raise concerns with the proposed *cy pres*-only settlement. *See supra* 2 n.2.

B. The *Cy Pres*-Only Settlement Here Cannot Pass Muster Under Rule 23.

The settlement in this case contains no meaningful injunctive relief, and thus can only stand on the $13 million cash fund—none of which is being sent to class members. Without any direct benefit to class members, a *cy pres*-only class action, such as this one, categorically fails and cannot be certified or approved under Rule 23.

It is critical that any class action settlement under Rule 23(b)(3) include a direct benefit to the class.[7] *See Klier,* 658 F.3d at 475 ("very best use" of settlement

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[6] *See, e.g.*, Brief of the Attorneys General of Arizona, et al. as *Amici Curiae* in Support of Petitioners, Frank v. Gaos, No. 17-961 (U.S. July 16, 2018); Brief of the Attorneys General of Arizona, et al. as *Amici Curiae* in Support of Petitioners, Frank v. Gaos, No. 17-961 (U.S. Feb. 7, 2018); Amended Brief of Thirteen State Attorneys General as *Amici Curiae* in Support of Objector-Appellant and Reversal, In re: Google Inc. Cookie Placement Consumer Privacy Litig., No. 17-1480 (3d Cir. July 10, 2017).

[7] Rule 23(b)(3) class actions present different considerations than those under (b)(1) and (b)(2). Rule 23(b)(3) actions are focused specifically on "individualized

funds is "benefitting the class members directly"). Without a direct class benefit, a class action is being certified and approved under Rule 23 solely to aggregate claims for purposes of extinguishing them. This turns Rule 23 on its head. Rule 23 is to be "applied with the interests of absent class members in close view," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997), and "is meant to provide a vehicle to compensate class members," *In re Thornburg Mortg., Inc. Sec. Litig.*, 885 F. Supp. 2d 1097, 1105 (D.N.M. 2012).

A tenuous, illusory benefit from a third-party distribution should not be blessed as satisfying the need for a direct benefit to the class, much less as serving the interests of the class; being fair, reasonable, and adequate; or being a superior method of adjudication under Rule 23. It is not clear that *cy pres*-only settlements even confer a direct benefit on the class. As courts have well noted, any "indirect benefit" received by the class from *cy pres* "is at best attenuated and at worse illusory." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013).

Indeed, Justice Thomas recently expressed his view that a similarly-structured *cy pres*-only settlement should not have been approved. *See Frank v. Gaos*, 139 S. Ct. 1041, 1047–48 (2019) (Thomas, J., dissenting). He reasoned that because the

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monetary claims," whereas under (b)(1) or (b)(2), "individual adjudications [are] impossible or unworkable" or "the relief sought must perforce affect the entire class at once." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361–62 (2011).

class members in that case "received no settlement fund, no meaningful injunctive relief, and no other benefit whatsoever in exchange for the settlement of their claims, … the class action should not have been certified, and the settlement should not have been approved." *Id.* at 1048. He further explained that "*cy pres* payments are not a form of relief to the absent class members and should not be treated as such[.]" *Id.* at 1047. And Judge Bade, in concurrence here, shared similar concerns about "the theory of indirect benefit" to class members. Concurrence at 42; *id.* at 44 ("I am … not convinced that *cy pres* awards to uninjured third parties should qualify as an indirect benefit to injured class members[.]").

A settlement where absent class members receive no part of the settlement fund, no meaningful injunctive relief, and no other direct benefit in exchange for the release of their claims cannot be a valid Rule 23(b)(3) resolution; it would certify absent class members' claims solely to extinguish those claims without a direct settlement benefit. This type of settlement would "arguably benefit opt-outs more than class members because opt-outs reap any positive externalities of the settlement provisions while retaining the value of the claims that the settlement extinguished for class members." Concurrence at 43–44 (footnote omitted).

CONCLUSION

Because this case raises questions of exceptional importance, the Court should grant the petition for rehearing *en banc*.

January 20, 2022

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Certificate of Compliance

9th Cir. Case Number(s): 20-15616

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Signature: ***/s/ Kate B. Sawyer*** **Date: 1/20/22**

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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