No. 21-1535

In the Supreme Court of the United States

DAVID LOWERY

Petitioner,

v.

BENJAMIN JOFFE, ET AL.,

Respondents.

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

BRIEF OF THE ATTORNEYS GENERAL OF ARIZONA, ALABAMA, ALASKA, ARKANSAS, FLORIDA, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, TEXAS, UTAH, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici are their respective States' chief law enforcement or chief legal officers and hold authority to file briefs on behalf of their offices.[1]

Amici's interest arises from two responsibilities. *First*, as chief law enforcement or legal officers, amici have an overarching responsibility to protect their States' consumers. *Second*, amici have a responsibility to protect consumer class members under CAFA, which prescribes a role for state Attorneys General in the class action settlement approval process. *See* 28 U.S.C. § 1715; *see also* S. REP. 109-14, 2005 U.S.C.C.A.N. 3, 6 (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 34 ("notifying appropriate state and federal officials ... will provide a check against inequitable settlements"; "Notice will also deter collusion between class counsel and defendants 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

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[1] Pursuant to Rule 37.6, amici certify that no parties' counsel authored this brief and only amici or their offices made a monetary contribution to the brief's preparation or submission. Counsel of record for all parties received notice of amici's intent to file at least ten days prior to this brief's due date and have given written consent.

[2] *See* Brief of Eight Attorneys General as *Amici Curiae* in Support of the Petition for Rehearing and Rehearing *En Banc*, *In re Google Inc. Street View Elec. Commc'ns Litig.*, No. 20-15616,

continuation of broader ongoing efforts by state Attorneys General to protect consumers from class action settlement abuse—efforts which have produced meaningful settlement improvements for class members.

SUMMARY OF ARGUMENT

Certiorari is warranted because the questions presented relate to a concerning example of an important, pressing issue—growing use of *cy pres* to resolve class actions. The settlement here, approved by the district court and affirmed by the Ninth Circuit, creates a $13 million fund. Yet none of that fund will reach the class members whose claims are extinguished by the settlement. Instead, over $9 million will go to third-party organizations that are not part of the underlying litigation, while the remaining funds are sent to class counsel and class representatives.

This Court has already recognized the need to address questions concerning the use of such *cy pres* arrangements and the resulting confusion in the lower courts. *See Frank v. Gaos*, 139 S. Ct. 1041, 1043 (2019) (certiorari granted "to review whether … *cy pres* settlements satisfy the requirement that class settlements be 'fair, reasonable, and adequate.'"); *see also Marek v. Lane*, 134 S. Ct. 8 (2013) (Roberts, C.J.,

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Dkt. 84 (9th Cir. Jan. 20, 2022); Brief of Thirteen Attorneys General as *Amici Curiae* in Support of Objector-Appellant and Reversal, *In re Google Inc. Street View Elec. Commc'ns Litig.*, 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, *In re Google Inc. Street View Elec. Commc'ns Litig.*, No. 3:10-md-02184-CRB, Dkt. 189-1 (N.D. Cal. Jan. 20, 2020).

statement respecting denial of certiorari). Yet these questions remain unanswered.

The Ninth Circuit's approach to *cy pres* here places consumers at risk by amplifying a circuit split and condoning a class action arrangement that allows class counsel and defendants to reach a mutually beneficial settlement to the detriment of class members, who receive none of the settlement fund that changes hands. Given the nature of nationwide class action litigation and the ability of class counsel to forum shop cases, even one circuit applying an under-protective standard to *cy pres* settlement arrangements will detrimentally affect consumers across the nation and undercut any efforts (by amici or others) to protect consumers from class action settlement abuse.

The petition presents an ideal vehicle for the Court to address the important questions presented and provide its first guidance on the appropriate uses of *cy pres* settlement arrangements. The Court should take this opportunity, grant certiorari, and provide needed guidance on the analysis courts should use in weighing when (if ever) *cy pres* may be judicially approved.

ARGUMENT

I. This Court And Others Have Repeatedly Recognized The Importance Of The Questions Presented Here.

The questions presented in the petition are not new to the Court and deserve the Court's renewed attention. In *Marek v. Lane*, the petitioners asked the Court to consider questions regarding the use of *cy pres* in class action settlements. *See* 134 S. Ct. at 8.

While the Court did not grant that petition, Chief Justice Roberts noted in a statement respecting denial of certiorari that there are "fundamental concerns" surrounding the use of *cy pres* in class action settlements, "including when, if ever, such relief should be considered" and "how to assess its fairness as a general matter[.]" *Id.* at 9.

Just a few years later, when a petition presenting a *cy pres*-only class action settlement—functionally similar to the one here—came before the Court, this Court responded by "grant[ing] certiorari to review whether such *cy pres* settlements satisfy the requirement that class settlements be 'fair, reasonable, and adequate.'" *Frank*, 139 S. Ct. at 1043. But ultimately that grant did not lead to the Court's resolution of these important questions. Without reaching the merits, the Court remanded the case for consideration of the plaintiffs' standing in light of this Court's decision in *Spokeo*. *Id.* at 1046. Justice Thomas, however, dissented, noting that he would have reached the merits and reversed. *Id.* (Thomas, J., dissenting). In his view, the "*cy pres*-only arrangement" in that case "failed several requirements of Rule 23," and "because the class members … received no settlement fund, no meaningful injunctive relief, and no other benefit whatsoever in exchange for the settlement of their claims," he would have held "that the class action should not have been certified, and the settlement should not have been approved." *Id.* at 1047–48 (Thomas, J., dissenting).

This Court's recognition of these important questions falls on the heels of the courts of appeals also grappling with the same questions. *See In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1063

(8th Cir. 2015) (noting that the use of *cy pres* in class action settlements has "'been controversial in the courts of appeals'"). "The opportunities for abuse have been repeatedly noted" by courts throughout the country. *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 480 (5th Cir. 2011) (Jones, J., concurring) (collecting authorities); *see also In re: Google Inc. Cookie Placement Consumer Priv. Litig.*, 934 F.3d 316, 327 (3d Cir. 2019) ("[M]any federal courts, the media, academia, and even the Chief Justice of the United States view *cy pres* awards with skepticism."). In this case, Judge Bade recognized in concurrence the many concerns surrounding the use of *cy pres* in the class action settlement context, including

> 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 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.

App. 37a–38a (citations omitted). Judge Bade further "question[ed] whether *cy pres* awards are inherently unfair when the class receives no meaningful relief in

exchange for their claims … and whether such awards can be justified given the serious ethical, procedural, and constitutional problems that others have identified." App. 41a.

As the use of *cy pres* settlements continues to grow, the importance of these questions also grows. As a 2010 empirical analysis noted, federal courts have been granting *cy pres* awards to third party charities in increasing frequency. Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 653–56 (2010). That analysis showed that in the three decades prior, "the number of class action cy pres awards in the dataset ha[d] increased, especially after 2000." *Id.* at 653. Prior to 2000, *cy pres* arrangements in class action settlements came at a paltry rate—approximately one per year. *Id.* Yet even a few years later that number jumped to about eight per year. *Id.*; *see also* Natalie Rodriguez, *Era of Mammoth Cases Tests Remedy of Last Resort*, Law360 (May 1, 2017) ("A Lexis Advance search for 'cy pres' or 'fluid recovery' … yielded ... decisions in 266 cases since 2000, the majority of which arose in the last decade."). And there has been an increase in the proportion of funds going to *cy pres*. As the Redish study found, "cy pres awards generally make up a non-trivial portion of total compensatory damages awarded, and in some cases comprise the entire compensatory award." Redish at 658–59.

Without this Court stepping in now and once again granting certiorari to provide guidance, the lower courts will continue to face uncertainty and class members will continue to be at risk amidst the growing use of *cy pres* arrangements.

II. The Questions Presented Affect Consumer Interests In Class Action Settlements Across The Nation And Warrant The Court's Attention.

This petition presents questions that get to the core of some of the "fundamental concerns" that increasingly affect consumers in class action settlements across the Nation. *See Marek*, 134 S. Ct. at 8 (Roberts, C.J., statement respecting denial of certiorari). And those concerns are amplified by a split of authority which could cause class counsel to look for forums with less stringent standards for *cy pres* arrangements.

A. *Cy Pres* Diverts Compensation From The Class Members To Whom It Belongs, Who Are Already Disadvantaged In The Class Action Settlement Context.

Directing settlement funds to class members wherever feasible is important. Class actions are largely resolved through settlement. *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1285 (2002) ("most class action suits settle"; collecting supporting sources as to same). And since class members extinguish their claims in exchange for settlement funds, those "settlement funds are the property of the class[.]" *In re BankAmerica*, 775 F.3d at 1064; *see also Klier*, 658 F.3d at 474 ("[S]ettlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members."); American Law Institute, Principles of the Law of Aggregate Litigation § 3.07, cmt. b (2010) ("funds generated through the aggregate prosecution

of divisible claims are presumptively the property of the class members").

Yet in dividing settlement funds, the interests of class members and other participants can diverge. *See, e.g.*, *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013) ("interests of class members and class counsel nearly always diverge"); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 175 (3d Cir. 2013) ("'class actions are rife with potential conflicts of interest between class counsel and class members'"). Class counsel has an incentive to obtain a large fee, causing potential conflicts with the class. And defendants rarely help. "[A] defendant who has settled a class action lawsuit is ultimately indifferent to how a single lump-sum payment is apportioned between the plaintiff's attorney and the class." William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 Tul. L. Rev. 813, 820 (2003). The fee and class award "represent a package deal," *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996), with a defendant "'interested only in the bottom line: how much the settlement will cost him.'" *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 712 (7th Cir. 2015); *see also In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 820 (3d Cir. 1995) ("[A]llocation ... is of little or no interest to the defense.").

Cy pres arrangements can present a particularly stark illustration of this divergence. *Cy pres* represents a "conflict of interest between class counsel and their clients because the inclusion of a *cy pres* distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class." *In re Baby Prods.*, 708 F.3d at 173; *see*

also Lane v. Facebook, Inc., 696 F.3d 811, 834 (9th Cir. 2012) (Kleinfeld, J. dissenting) (noting "incentive for collusion" in *cy pres* class settlements; "the larger the *cy pres* award, the easier it is to justify a larger attorneys' fees award."). And defendants may now actually prefer *cy pres* because of the additional "public relations benefit." *Id.*; *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").

B. *Cy Pres*-Only Arrangements Are The Most Concerning Type of *Cy Pres* Settlements.

While *cy pres* inherently threatens class members' interests, *cy pres*-only arrangements, like the one here, are the most concerning because the class receives no payment, even as millions of dollars (here, $13 million) change hands in the settlement, and class members' claims are extinguished.

A settlement cannot be in the class's best interest or fair, reasonable, and adequate under Rule 23 where it generates millions of distributable settlement dollars (and releases millions of claims), yet the class languishes with no direct compensation. *Cf. In re Baby Prods.*, 708 F.3d at 174 (requiring direct benefit to class and appropriate balance between class and *cy pres* payments). This type of arrangement is precisely why courts are tasked with policing the "inherent tensions among class representation, defendant's interests in minimizing the cost of the total settlement package, and class counsel's interest in fees[.]" *Staton v. Boeing Co.*, 327 F.3d 938, 972 n.22 (9th Cir. 2003).

And we know that when courts push parties to direct proposed *cy pres* to class members, consumer-positive outcomes often follow. For example, in *Fraley v. Facebook, Inc.*, the court rejected a *cy pres*-only settlement, leading counsel to craft a claims-made settlement for the nearly 150 million member class that distributed approximately $20 million amongst claiming class members, resulting in $15 per claimant. 966 F. Supp. 2d 939, 940, 943 (N.D. Cal. 2013). In another example, on remand from the Seventh Circuit in *Pearson v. NBTY, Inc.*, the parties renegotiated the original *cy pres* arrangement to give class members approximately $4 million more in cash. No.11-07972, Dkt. 213-1 ¶¶7–8 (N.D. Ill. May 14, 2015). And these are just two examples of the improved consumer outcomes that can follow when courts reject dubious *cy pres* arrangements. *See also* Pet. at 31–32.

C. Absent The Court's Guidance, Lower Courts Are Divided In Weighing *Cy Pres* Settlements.

Further exacerbating this already present risk to consumers is the divergence in the courts of appeals on the most foundational *cy pres* question—how to measure when use of *cy pres* in the class action settlement context is permissible. As the petition well details, the courts of appeals are applying varying standards on the appropriateness of *cy pres* awards. *See* Pet. 17–21. And this divergence will likely result in significant harm to consumers nationwide. *See, e.g.*, Pet. 33–36. Because class actions are often national in scope, there is significant risk that class counsel will forum shop cases into a circuit—such as the Ninth Circuit—that takes a less rigorous approach to the review of proposed *cy pres* settlement

arrangements. *See* Jeremy Kidd & Chas Whitehead, *Saving Class Members from Counsel*, 58 San Diego L. Rev. 579, 603 (2021) ("Although there has been a broader trend of increased use of *cy pres*, a disproportionate share appears to be filed in California federal courts."). This will undermine the protections usually afforded by our system of divided appellate jurisdiction—by choosing a forum favorable to their own interests (rather than their class clients' interest), class counsel will be able to obtain favorable review of *cy pres* arrangements that present inherent conflicts, even as they lock in class members from across the Nation, including those residing in circuits with substantially more robust protections for class members.

If left unchecked, the conflicting approaches taken by the circuits toward this issue will result in continuing harm to consumers nationwide.

III. This Petition Presents An Ideal Vehicle For The Court To Provide Needed Guidance On When (If Ever) *Cy Pres* Class Action Settlement Arrangements Are Acceptable.

As it stands, the settlement here establishes a $13 million settlement fund, yet class members will see none of that. That fund will be diverted away from class members: over $9 million goes to select *cy pres* recipients, nearly $4 million to class counsel, and $91,500 to class representatives.

The petition here offers the Court an opportunity to answer important questions that have percolated through the courts of appeals and have garnered this Court's attention more than once. And unlike in *Frank v. Gaos*, the standing questions were resolved by the district court.

Without the Court's intervention, the *cy pres*-only settlement at issue in this case will harm class members, and the Ninth Circuit's opinion will provide precedent for future parties to follow the same course and increase the risk of harm to consumers by providing a more favorable forum for *cy pres* arrangements. The Court should grant the petition now to address these important and recurring questions.

CONCLUSION

The petition for certiorari should be granted.

July 7, 2022

Respectfully submitted,

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