No. 17-961

IN THE
Supreme Court of the United States

THEODORE H. FRANK and MELISSA ANN HOLYOAK,
Petitioners,

v.

PALOMA GAOS,
on behalf of herself and all others
similarly situated, et al.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C.[1] EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values.

EPIC and several consumer privacy organizations twice urged the district court to reject this Settlement. We stated that the relief to class members contained "obvious deficiencies." Letter from Consumer Privacy Organizations to Hon. J. Davila (Aug. 27, 2014) (docketed in *In re Google Referrer Header Privacy Litig.*, No. 10-4809);[2] Letter from Consumer Privacy Organizations to Hon. J. Davila (Aug. 22, 2013) (docketed in, *In re Google Referrer Header Privacy Litig.*, No. 10-4809).[3]

EPIC seeks to ensure that settlements in privacy class actions advance the interests of the underlying claims, protect the interests of class members, and fulfill the core purposes of the *cy pres* doctrine. In addition to advising courts in several *cy pres* matters, EPIC has proposed objective criteria for courts to consider in evaluating potential *cy pres* awards. *See* Marc

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[1] Both parties consent to the filing of this brief. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

[2] https://epic.org/privacy/internet/ftc/google/CPO-ltr-Judge-Davila-re-Gaos.pdf.

[3] https://epic.org/privacy/google/EPIC-et-al-Ltr-Google-Referrer-Header.pdf.

Rotenberg & David Jacobs, *Enforcing Privacy Rights: Class Action Litigation and the Challenge of Cy Pres, in Enforcing Privacy Law, Governance and Technology Series* 307 (David Wrights & Paul De Her teds., 2016) (hereinafter *Enforcing Privacy Rights*).

EPIC has also filed numerous briefs before this Court, over the past 25 years, in cases concerning the protection of privacy. *See, e.g.*, Brief of *Amicus Curiae* EPIC et al., *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402) (Whether the Fourth Amendment Permits the Government to Obtain Six Months of Cell Phone Location Records Without a Warrant); Brief of *Amici Curiae* EPIC et. al, *Spokeo v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339) (arguing that the violation of a consumer's privacy rights under federal law constitutes an injury-in-fact sufficient to confer Article III standing); Brief of *Amici Curiae* EPIC et. al, *NASA v. Nelson*, 562 U.S. 134 (2011) (No. 09-530) (arguing that the Court should recognize the right to informational privacy); Brief of *Amicus Curiae* EPIC, *Reno v. Condon*, 528 U.S. 141 (2000) (No. 98-1464) (arguing that the Driver's Privacy Protection Act is constitutional and creates a baseline standard for driver privacy).

EPIC fully respects the concerns raised by Chief Justice Roberts in *Marek v. Lane*, 571 U.S. 1003 (2013), regarding *cy pres* only settlements and seeks, by means of this *amicus*, to answer the questions the Chief Justice posed.

SUMMARY OF THE ARGUMENT

Class action litigation is vital to ensure the protection of the public interest—particularly in the privacy field—and class action settlements should be fair to class members. A class action settlement should not permit the continuation of the business practice that provided the basis for the lawsuit. A class action settlement should result in a substantial change in business practice. A class action settlement should provide monetary relief to class members. If it is not possible to provide monetary relief to class members, then a *cy pres* award may be appropriate if the award advances the aims of the underlying litigation and is provided to organizations aligned with the interests of class members.

Unfortunately, lower courts have approved settlements that do not satisfy these criteria. As a consequence, companies have continued to engage in the practices that gave rise to the litigation and class members have received no relief. This has not served the interests of justice.

Chief Justice Roberts stated in *Marek v. Lane*, that the "Court has not previously addressed any of [the] issues" surrounding the fairness of class action settlements involving "*cy pres*" distributions. 571 U.S. 1003 (2013) (Roberts, C.J., statement respecting denial of cert.). Now the Court has the opportunity to address these issues. Given the growing public concern about data breaches, identity theft, and financial fraud it is vitally important that the Court preserve the enforcement mechanism that prevents the misuse of personal data and helps safeguard the American public. But that was not the outcome in the *Gaos* Settlement. The Court should reverse and remand to

ensure that the Settlement in this case, and in other similar cases, provides an actual benefit to class members.

ARGUMENT

Class action litigation is central to the protection of privacy in the United States. Data breaches impact millions of individuals, yet there is little incentive for any single person to pursue a legal action. And the risks to Americans in the misuse of their personal data by commercial firms is significant. As Justice Alito stated recently, "today, some of the greatest threats to individual privacy may come from powerful private companies that collect and sometimes misuse vast quantities of data about the lives of ordinary Americans." *Carpenter v. United States*, 138 S. Ct. 2206, 2261 (2018) (Alito, J., dissenting).

But to be effective, class action settlements should "stop business practices that harm consumers, compensate individuals for injuries suffered and deter future misconduct." *Enforcing Privacy Rights*, *supra*, at 307. Without these requirements, settlements provide little actual benefit to class members.

In *Marek v. Lane*, Chief Justice Roberts expressed "fundamental concerns" about the fairness of class action settlements that award *cy pres* funds but provide no monetary relief to class members and fail to enjoin the underlying conduct. *Marek v. Lane*, 571 U.S. 1003 (2013) (Roberts, C.J., statement respecting denial of cert.). He asked:

> [1] When, if ever, such relief should be considered; [2] how to assess its fairness as a general matter; [3] whether new

> entities may be established as part of such relief; [4] if not, how existing entities should be selected; [5] what the respective roles of the judge and parties are in shaping a *cy pres* remedy; [6] how closely the goals of any enlisted organization must correspond to the interests of the class; and so on.

Id. (bracketed numbers inserted).

The Settlement here presents many of the same concerns identified by Chief Justice Roberts in *Lane*. Similar to the settlement in *Lane*, the *Gaos* Settlement fails to provide funding for consumer privacy organizations that actually promote the interests of the class members. The *Gaos* Settlement also insulates Google from related claims. All class and subclass members who do not affirmatively request to be excluded will be barred from suing over the released claims.

In response to the questions posed by Chief Justice Roberts in *Lane*, *amici* EPIC states directly:

> 1. *Cy pres*-only settlements provide an actual benefit to class members, ensuring fairness, when the funds are distributed consistent with the purposes of the underlying litigation and advance the interests of class members. So, for example, a university or a social service agency may both be worthy of charitable support, but a *cy pres* award to either requires a showing that the mission of the organization is in fact aligned with the interests of the class members. The American

Law Institute provides clear guidance on this point;[4]

2. Fairness requires that a class action settlement results in a substantial change in business practice. As a matter of logic, a case that alleges unlawful conduct should not settle if the disputed conduct is permitted to continue;
3. New entities should be disfavored in the allocation of *cy pres* funds unless (a) the ALI requirement is satisfied and (b) courts are prepared to exercise ongoing oversight of such new entities to ensure that they advance the interests of class members;
4. When direct monetary relief is infeasible, distribution of *cy pres* should only be permitted when the settlement is otherwise fair to class members and would advance the underlying purpose of the litigation;
5. The court should make an independent determination, based on objective criteria, the purpose of the litigation, and the interests of the class members as to whether the *cy pres* distribution proposed by the parties is fair; and

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[4] "If, and only if, no recipient whose interests reasonably approximate those being pursued by the class can be identified after thorough investigation and analysis, a court may approve a recipient that does not reasonably approximate the interests being pursued by the class." *Principles of the Law of Aggregate Litigation* § 3.07 (Am. Law Inst. 2010) .

6. The *cy pres* doctrine requires that the proposed organizations are "as near as possible" to the interests of the class members. This is reflected also in the ALI standard.

The burden should be on the parties to demonstrate why it would not be possible to distribute *cy pres* funds most aligned with the interests of the class.

I. The lower court's failure to recognize three key deficiencies in the Settlement warrants remand.

The Settlement has three obvious deficiencies. First, the Settlement would permit Google to continue to disclose the Internet search histories of identifiable Internet users to third-parties, in violation of federal and state privacy law. Second, the Settlement provides no direct relief to class members. And third, the Settlement directs monetary proceeds, with one exception, to inappropriate *cy pres* recipients.

EPIC and consumer privacy organizations repeatedly objected to the Settlement in the district court because the proposed Settlement failed to produce any changes in Google's business practices. In 2013, EPIC and the consumer privacy organizations wrote to the court that it is "absurd to argue that a benefit is provided to the Class where the company makes no material change in its business practices and is allowed to continue the practice that provides the basis for the putative class action." Letter from Consumer Privacy Organizations to Hon. J. Davila, (Aug. 22, 2013) (docketed in, *In re Google Referrer Header Privacy Litig.*, No. 10-4809).[5] The groups urged

[5] https://epic.org/privacy/google/EPIC-et-al-Ltr-Google-Referrer-Header.pdf.

that "[o]n this basis alone, the proposed settlement should be rejected." *Id*. We wrote to the court again in 2014, asserting that, "[o]ur assessment has not changed one year later." Letter from Rotenberg, et al. to Hon. J. Davila, (Aug. 27, 2014) (docketed in, *Google Referrer Header*).[6] "The proposed settlement is bad for consumers and does nothing to change Google's business practices." *Id*. The consumer privacy organizations also wrote to the Federal Trade Commission urging it to intervene and block approval of the Settlement. Letter from Consumer Privacy Organizations to James A. Kohm, Assoc. Dir., Fed. Trade Comm'n., (Jul. 31, 2014).[7]

A. The Settlement resulted in no meaningful change to business practices.

The lower court left a key question unanswered: How do class members benefit from a settlement that offers no material change in business practices and allows the continuation of the practices that provided the basis for the lawsuit? The answer is simple. Class members do not benefit.

Under this Settlement, Google can continue to "intentionally, systematically and repeatedly divulg[e] its users' search queries to third parties" in violation of the Stored Communications Act, 18 U.S.C. § 2702, users' contract rights, and California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq*. Second Amended Complaint, *Gaos v. Google, Inc.*, 87 F. Supp. 3d 1122 (N.D. Cal. 2015) (No. 5:10-cv-04809). That was the allegation set out by class counsel, yet now counsel

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[6] https://epic.org/privacy/internet/ftc/google/CPO-ltr-Judge-Davila-re-Gaos.pdf.

[7] https://epic.org/privacy/internet/ftc/FTC-Gaos-7-14.pdf.

has agreed to a settlement that allows these practices to continue.

These business practices are hardly inconsequential. A search engine is an equally "pervasive and insistent part of daily life" as a cellphone. *Carpenter v. United States*, 138 S. Ct. 2206, 2210 (2018) (quoting *Riley v. California*, 134 S. Ct. 2743, 2484 (2014)). Google processes 3.5 billion searches per day and 1.2 trillion per year. Internet Live Stats, *Google Search Statistics* (2018).[8] An individual's Internet searches amassed over time, like cellphone location records, can reveal some of the most intimate details of the person's life—including their medical conditions, mental state, travel plans, fears and shopping habits. *See* Molly Wood, *Sweeping Away A Search History*, N.Y. Times (Apr. 2, 2014).[9]

Yet, under the proposed Settlement, Google will make no substantial changes to its business practices: "Google will not be required or requested to make any changes to its homepage www.google.com or to the practices or functionality of Google Search, Google Adwords, Google Analytics, or Google Web History." Pet. App. 40. In fact, the Settlement only requires a modification of Google's privacy policy, which still allows the company to continue the disputed practice. Pet. App. 82.

Privacy notices do not benefit the class members. They paper over an ongoing problem. And privacy notices have been widely recognized as

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[8] http://www.internetlivestats.com/google-search-statistics/.

[9] https://www.nytimes.com/2014/04/03/technology/personaltech/sweeping-away-a-search-history.html.

ineffective. "Researchers have found that typical privacy notices not only fail to help consumers make informed privacy decisions, but are largely ignored by them." Florian Schaub, Rebecca Balebako, & Lorrie Faith Cranor, *Designing Effective Privacy Notices and Controls*, 21 IEEE Int. Computing 70, 71 (2017). Users do not read privacy notices, and for good reason. Reading and understanding all relevant privacy policies would take an unreasonable amount of time, would require familiarity with legal and technological concepts, and would not be useful to the user because the terms are pre-determined by the companies and can be changed at any time. *Id.* at 2–3; *see also* Alexis Madrigal, *Reading the Privacy Policies You Encounter in a Year Would Take 76 Work Days*, The Atlantic (Mar. 1, 2012).[10] Privacy policies rarely say much about how data is disseminated, which was a central issue in this case. *See* Maria Temming, *Website Privacy Policies Don't Say Much About How They Share Your Data*, Sci. News (Apr. 27, 2018).[11]

Google's modification of the notice on its website provides no meaningful benefit to the class. Instead, the notice permits Google's unlawful privacy practices to continue.

B. The Settlement does not provide direct relief to class members.

The Settlement here provides no monetary or injunctive relief to the class. Courts have recognized

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[10] https://www.theatlantic.com/technology/archive/2012/03/reading-the-privacy-policies-you-encounter-in-a-year-would-take-76-work-days/253851/.

[11] https://www.sciencenews.org/article/website-privacy-policies-dont-say-much-about-how-they-share-your-data.

that the absence of relief to class members is a sufficient basis for invalidating a settlement. *See* Order Denying Mot. for Prelim. Approval of Settlement, *Fraley v. Facebook*, No. 11-01726, 2012 WL 5838198 (N.D. Ca. Aug. 17, 2012).

The Plaintiffs sued for violations of laws that provide for statutory damages, including the Stored Communications Act (SCA), 18 U.S.C. §§ 2701 *et seq.*, which provides for a minimum of $1,000 per violation. 18 U.S.C. § 2707(c). Given the availability of statutory damages, the failure to provide *any* monetary relief to class members raises a glaring red flag. Absent some alternative remedy, the lack of monetary or injunctive relief leaves class members in no better position than they were in prior to initiating the lawsuit. In fact, they are worse off. Class members can no longer individually sue as their claims are now barred and Google can continue the alleged misconduct with no threat to its practice. Such an arrangement is unfair, unreasonable, and inadequate for class members.

C. The parties did not appropriately select the *cy pres* recipients.

The Ninth Circuit has established clear and reasonable standards for *cy pres* allocations in class settlements, which "allows a court to distribute unclaimed or non-distributable portions of a class action settlement fund to the 'next best' class of beneficiaries." *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 1990). But there are important limitations, and a court should not simply approve any proposed *cy pres* recipient. To avoid the "many nascent dangers to the fairness of the distribution process," lower courts have required a "driving nexus between the plaintiff class and the *cy pres* beneficiaries." *Id.* at 1038. As explained

in *Nachshin*, courts have considered two guiding factors when approving *cy pres* funds: (1) the objectives of the underlying statute and (2) the interests of the silent class members. *Id.* at 1039; *see also Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990).

The *cy pres* recipients in this Settlement were not selected consistent with this standard. Under the first factor, the Settlement does not serve the objectives of underlying statute. The Plaintiffs alleged a violation of the SCA, which prohibits a provider of "an electronic communication service" from divulging "to any person or entity the contents of a communication" stored, carried, or maintained by the provider. 18 U.S.C. § 2702(a). This Settlement closely resembles that in *Lane v. Facebook*, in which Judge Smith found that the missions of the proposed *cy pres* beneficiaries did not align with the purposes of the underlying statutes. *Lane v. Facebook, Inc.*, 709 F.3d 791, 794 (9th Cir. 2013) (Smith, J., dissenting from denial of rehearing *en banc*). As Judge Smith explained, the purposes of the underlying statutes were to "prevent[] unauthorized access or disclosure of private information," whereas the mission of one charity was simply to "educate users, regulators[,] and enterprises' on how to protect Internet privacy 'through user control." *Id.*

The problems with the proposed *cy pres* beneficiaries here are almost identical to those in *Lane*. The SCA prevents unauthorized access and disclosure of private communications. 18 U.S.C. § 2701. Yet the *cy pres* recipients have stated that they will use the funds primarily for public education.

None of the *cy pres* recipients, save the World Privacy Forum, even mention consumer privacy

protection in their mission. In *Dennis v. Kellogg Co.*, the Ninth Circuit rejected a settlement because the *cy pres* recipients were "divorced from the concerns embodied in consumer protection laws" underlying the case. 697 F.3d 858, 866 (9th Cir. 2012). One such law—the Unfair Competition Law (UCL)—was "designed to preserve fair competition among business competitors and protect the public from nefarious and unscrupulous business practices." *Id.* (citing *Wells v. One2One Learning Found.*, 116 Cal.App.4th 515 (2004)). The parties to that settlement selected *cy pres* beneficiaries that sought to distribute funds to feed the indigent, which had "little or nothing to do with the purposes of the underlying lawsuit or the class of plaintiffs involved." *Id.* (citing *Nachshin*, 663 F.3d at 1039). Just as the objectives of the fair competition law in *Dennis* were not served by *cy pres* distributions to charities that fed the indigent, the objectives of the privacy statutes are not served by *cy pres* distributions to non-privacy organizations.

Regarding the second factor—the interests of the silent class members—*cy pres* funds must be used "for the aggregate, indirect, prospective benefit of the class." *Nachshin*, 663 F.3d at 1038. While the overarching standard is whether a proposed settlement is fair, reasonable, and adequate, "where *cy pres* is considered, it will be rejected when the proposed distribution fails to provide the 'next best' distribution." *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003) *overruled on other grounds by Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010); *Six Mexican Workers*, 904 F.2d at 1308; *see also Principles of the Law of Aggregate Litigation* § 3.07 (Am. Law Inst. 2010) [hereinafter *ALI Principles*] ("If, and only if, no recipient whose interests reasonably approximate those

being pursued by the class can be identified after thorough investigation and analysis, a court may approve a recipient that does not reasonably approximate the interests being pursued by the class.").

The *cy pres* distribution in this Settlement does not provide the "next best" alternative to class relief. Other than the World Privacy Forum, none of the listed organizations have taken on the mission of protecting consumer privacy. They are simply not aligned with the interests of class members. These organizations should be ineligible for a *cy pres* award.

This case is similar to *Nachshin*, where the Ninth Circuit rejected a proposed settlement arising from AOL's alleged misuse of data from users' outgoing emails. The proposed settlement agreement would have given a class of 66 million AOL subscribers zero monetary compensation, would have required minor notice changes and the creation of an opt-out on AOL's part (a substantial change in business practice not present in this case), and would have distributed $75,000 in *cy pres* payments. Class members "claimed they could not identify any charitable organization that would benefit the class or be specifically germane to the issues of the case." *Nachshin*, 663 F.3d at 1037. The district then selected three organizations as recipients: (1) the Legal Aid Foundation of Los Angeles, (2) the Federal Judicial Center Foundation, and (3) the Boys and Girls club of America. *Id*.

The Ninth Circuit found that the settlement was unfair because the groups were "geographically isolated and substantively unrelated charities." *Id.* at 1036. Focusing on the latter issue, the court noted several concerns with *cy pres* distributions that have little

or nothing to do with the purposes of the underlying lawsuit or the class of plaintiffs:

> When selection of *cy pres* beneficiaries is not tethered to the nature of the lawsuit and the interests of the silent class members, the selection process may answer to the whims and self-interests of the parties, their counsel, or the court. Moreover, the specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety.

Id. at 1039 (citing *Bear Stearns*, 626 F.Supp.2d at 415). The court held that because the action arose from the alleged online misdeeds of AOL, appropriate *cy pres* relief *must* include organizations that actively work against online misdeeds:

> It is clear that all members of the class share two things in common: (1) they use the Internet, and (2) their claims against AOL arise from a purportedly unlawful advertising campaign that exploited users' outgoing e-mail messages. The parties should not have trouble selecting beneficiaries from any number of nonprofit organizations that work to protect internet users from fraud, predation, and other form so online malfeasance. If a suitable *cy pres* beneficiary cannot be located, the district court should consider escheating the funds to the United States Treasury.

Id. at 1041.

Later, in *Lane v. Facebook*, six Ninth Circuit judges dissented from the denial of a petition for a rehearing *en banc*. *Lane v. Facebook, Inc.*, 709 F.3d 791 (9th Cir. 2013) (Smith, Kozinski, O'Scannlain, Bybee, Bea, and Ikuta, Js., dissenting). "Our precedent," they wrote, "holds that it is not enough to simply identify any link between the class claims and a cy pres distribution, such as whether both concern food (*Dennis*) or the Internet (*Lane*)." *Id.* at 794. The judges emphasized that "[i]nstead, an appropriate cy pres recipient must be dedicated to protecting consumers from the precise wrongful conduct about which plaintiffs complain." *Id.*

Here, class members alleged that Google unlawfully disclosed the contents of search queries to third parties. Pet. App. 33. Given the underlying claim, the interest of the class then is to protect against future privacy violations committed by Google. As in *Nachshin* and *Dennis*, the *cy pres* recipients may all pursue virtuous goals, but only one organization—World Privacy Forum (WPF)—has a mission to protect user privacy from corporate misconduct. It is therefore misleading for class counsel to present these organizations as recipients that will benefit the class and it was incorrect for the lower court to uphold this Settlement,

Class counsel also excluded other organizations aligned with the interests of class members—many of whom who have defended consumers against similar practices by the defendant in this case. For example, in 2008, well before this case was filed, 14 organizations wrote to Google CEO Eric Schmidt, urging him to comply with a California law to "conspicuously post its privacy policy on its Web site." Letter from Consumer Privacy Groups to Eric Schmidt, CEO, Google,

Inc. (June 3, 2008).[12] As the groups stated, "Google's reluctance to post a link to its privacy policy on its homepage is alarming. We urge you to comply with the California Online Privacy Protection Act and the widespread practice for commercial web sites as soon as possible." *Id*. And Google, responding to the work of these organizations, did subsequently post a link to the privacy policy as required by state law. *See* Google (2018).[13] But aside from WPF, none of the organizations that defended the privacy interests of users as against defendant Google were named in the *Gaos* Settlement.

The privacy risks arising from Google's referrer heading practices created the risk to Internet privacy and gave rise to this class action lawsuit. Therefore, organizations that advocate for change in business practices that better safeguard privacy are far more appropriate recipients of *cy pres* funds. Their mission, activities, and advocacy are closely aligned with the class members. But only one of the *cy pres* recipients here meets such standards. Thus, the *cy pres* distribution fails the Ninth Circuit's fair and reasonable "nexus" test articulated in *Nashchin* and should be rejected.

Moreover, the recipients have strong ties with the *defendant* Google, having routinely received funds by Google in the past. As the Ninth Circuit has stated, "it seems somewhat distasteful to allow a corporation to fulfill its legal and equitable obligations through tax-deductible donations to third parties." *Molski*, 318

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[12] *Available at* https://www.privacyrights.org/blog/consumer-and-privacy-groups-urge-google-post-link-its-privacy-policy-its-home-page.

[13] https://www.google.com.

F.3d at 954. Also, such schemes are a "paper tiger" in terms of deterrence. *Dennis*, 697 F.3d at 867-868. But the problems do not end there. There is also a disturbing amount of overlap between the *cy pres* recipients and the *alma maters* of class counsel.

Even the U.S. Federal Trade Commission has expressed increasing concern about class action settlements adverse to the interest of class members. Press Release, Fed. Trade Comm'n, *FTC Files Amicus Brief in U.S. District Court Opposing Proposed Class Action Settlement with Debt Buyer Midland Funding LLC* (May 23, 2011).[14] The Commission wrote as *amicus* in another matter that "[t]he disproportionate breadth of the Class Release and the significant advantages it provides Defendants, as compared to the *de minimis* benefits to the class, cast serious doubts as to the fairness, reasonableness, and adequacy of the proposed settlement." Brief of *Amicus Curiae* Fed. Trade Comm'n, *Vassalle v. Midland Funding*, No. 11-00096, 2014 WL 5162380 (N.D. Ohio Oct. 14, 2011), *aff'd sub nom*, *Pelzer v. Vassalle*, 655 Fed App'x 352 (6th Cir. 2016). That same argument applies equally here.

II. In *cy pres* matters, courts should ensure fairness, prevent collusion, and promote the interests of class members.

A *cy pres* only settlement in a class action requires a court to consider: (1) whether such relief is appropriate in the first instance; (2) whether a "nexus" exists between the recipient organizations and the interests of the class; and (3) the importance of judicial

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[14] https://www.ftc.gov/news-events/press-releases/2011/06/ftc-files-amicus-brief-us-district-court-opposing-proposed-class.

oversight in the selection process–particularly to address the risks of collusion between the parties. *See Marek v. Lane*, 571 U.S. 1003 (2013) (statement of C.J. Roberts respecting denial of cert.).

First, *cy pres* should only be awarded if the settlement is otherwise fair to class members and the chosen organizations would advance the purpose of the litigation. A settlement is fair to class members if it prohibits the underlying conduct that was the basis for the lawsuit and compensates class members directly. Second, the chosen organizations should have the burden of demonstrating that they are sufficiently aligned with the interests of the silent class members. This means that the organization's mission must not merely relate to litigation in the abstract, *see Dennis*, 697 F.3d 858; the organization should demonstrate that it has a track record of service aligned with the interests of the class and that it will use the funds to directly further the underlying interests at issue in the lawsuit. Third, *cy pres* requires vigilant judicial oversight to guard against the risks of collusion and ensure that judges are not rubber-stamping settlements that compensate attorneys while failing to benefit class members.

A. *Cy pres* is appropriate only when the settlement is otherwise fair to class members and it would advance the underlying purpose of the litigation.

Class action settlements should deter unlawful conduct and provide direct monetary relief to class members. *Cy pres* is appropriate only after those two objectives have been fulfilled. *Cy pres* relief may replace direct payments to class members only when, practically speaking, it would be impossible to

compensate class members directly. *See ALI Principles*, *supra*. But judges should never approve a *cy pres* award where class counsel has agreed to let the defendant continue the conduct that was the basis for the lawsuit. Not only does such a settlement harm consumers, but also it increases the risk of collusion between the defendant and class counsel. There is simply too much incentive for class counsel to bargain away the rights of consumers in pursuit of their own compensation.

Class actions serve a valuable role in protecting consumer privacy. Numerous privacy statutes provide a private right of action,[15] but because individual claims for monetary relief would be small under these statutes, class actions are the only effective way for individuals to vindicate their privacy rights. However, class action settlements can undermine rather than protect consumers' privacy rights if they allow the defendant to continue the challenged conduct. Unfortunately, this has been an all-too-often occurrence in consumer privacy settlements. In *Fraley v. Facebook*, for instance, Facebook was permitted to continue using the names and likenesses of minor users to endorse commercial messages in violation of the privacy laws of seven states. Similarly, in *Lane*, although Facebook had agreed to terminate the "Beacon" program itself, "nothing in the settlement would preclude Facebook from reinstituting the same program with a new name." *Lane*, 571 U.S. 1003.

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[15] *See*, *e.g.* the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510 *et. seq.*, the Stored Communications Act, 18 U.S.C. §§ 2701 *et. seq*. the Video Privacy Protection Act, 18 U.S.C. § 2710 and the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et. seq*.

More recently, EPIC objected to a settlement in which Google was permitted to continue to "place tracking cookies on the plaintiffs' web browsers in contravention of their browsers' cookie blockers and defendant Google's own public statements." Brief of *Amicus Curiae* EPIC, *In re Google Cookie Placement Consumer Privacy Litig.*, No. 12-2358, 2017 WL 446121 (D. Del. Feb. 2, 2017), *appeal docketed*, No. 17-1480 (3rd Cir., Mar. 7, 2017).[16] Despite substantial evidence of Google's wrongdoing, including a record fine by the FTC,[17] the only relief to the class members other than the proposed *cy pres* award was "Google's assurances that it took actions to expire or delete, by modifying the cookie deletion date contained in each cookie, all third-party Google cookies that exist in the browser filed for Safari browsers." *Id*.

Cy pres should also not replace direct payments to class members. Settlement funds should be provided directly to class members for two reasons: (1) that is the preferred outcome in law, and (2) the risk of collusion among repeat players is too great. *See Enforcing Privacy Rights*, *supra*. Neither the size of the class nor the substantive claims should preclude establishing a claims process for class members. In *Fraley*, the class consisted of 150 million members and yet

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[16] https://epic.org/amicus/class-action/google-cookie/EPIC-Amicus-In-re-Google-Cookie.pdf.

[17] Press Release, Fed. Trade Comm'n, Google Will Pay $22.5 Million to Settle FTC Charges it Misrepresented Privacy Assurances to Users of Apple's Safari Internet Browser: Privacy Settlement is the Largest FTC Penalty Ever for Violation of a Commission Order (Aug. 9, 2012), https://www.ftc.gov/news-events/press-releases/2012/08/google-will-pay-225-million-settle-ftc-charges-it-misrepresented.

the parties reached a settlement that would award "small cash payments to the relatively low percentage of class members who filed claims." *Fraley v. Facebook*, 966 F. Supp. 2d 939, 941 (N.D. Cal. 2013).

According to the American Law Institute, a court should only approve a *cy pres* only distribution if individual class members cannot be identified, individual distributions would not be economically viable, or "specific reasons exist that would make further distributions impossible or unfair." *ALI Principles*, *supra*. The administrative problems of identifying and compensating class members, however, should not hinder a settlement from deterring the unlawful conduct that was the basis for the litigation.

Some charitable organizations, recognizing the harm that collusive settlement pose, have turned down substantial *cy pres* awards rather than ratify a settlement that would be adverse to the mission of the organization. For example, in *Fraley*, the Center for Commercial Free Childhood (CFCC) rejected a *cy pres* award that would have equaled 90 percent of its annual budget because the settlement would have "authorize[d] Facebook to continue to violate laws in seven states" that protect the privacy interests of children, limiting the use of a person's name or likeness for advertising purposes. Letter from Campaign for a Commercial-Free Childhood to the United States Court of Appeals for the Ninth Circuit (Feb. 12, 2014).[18] As CFCC stated, "not only is the settlement bad, it is *worse* than no settlement at all." *Id*. (emphasis in original).

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[18] http://www.commercialfreechildhood.org/sites/default/files/CCFCAmicusLetter.pdf.

The prestigious MacArthur Foundation also asked to be removed from a controversial consumer privacy settlement. The Foundation noted that it was not an appropriate *cy pres* recipient and asked that the funds be "redirected to other non-profit organizations engaged in the underlying issues . . ." EPIC, *MacArthur Foundation Withdraws From Consumer Cy Pres Settlement* (Sept. 25, 2013).[19] "The Foundation, one of the 14 non-profit groups selected to receive money by Facebook and class action lawyers, declined the award on the ground that it doesn't work on issues related to consumer privacy." Jeff Roberts, *Why Privacy Settlements like Facebook's "Sponsored Stories" Lawsuit Aren't Working*, Gigaom (Sept. 19, 2018).[20]

B. Proposed *cy pres* recipients must show a sufficient nexus between the purpose of the litigation and proposed activities that benefit class members.

Cy pres distributions can, in some cases, advance the underlying objectives of the lawsuit where the chosen organizations represent the interests of the class. But courts must engage in a thorough analysis to ensure a sufficient nexus between the purpose of the lawsuit and the organization's proposed activities. Courts should consider: (1) whether the organization has an extensive service record of representing the interests of the class and (2) whether the organization's written proposal will advance the underlying statutory claims.

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[19] https://epic.org/2013/09/macarthur-foundation-withdraws.html.

[20] https://gigaom.com/2013/09/19/why-privacy-settlements-like-facebooks-sponsored-stories-lawsuit-arent-working/.

Courts have often awarded *cy pres* to organizations with no service record at all, or with service records unrelated to the interests of the class. The most egregious example of this was in *Lane*, where *cy pres* funds went to the Digital Trust Foundation ("DTF"), a "bespoke creation of this settlement" with "*no* record of service." *Lane*, 709 F.3d at 793 (Smith, J., dissenting from denial of rehearing *en banc*).

In *In re Google Cookie Placement*, the court approved a *cy pres*-only settlement that included an organization that did not have "privacy" listed in any of the ten practice areas listed on its website.[21] The district court failed to explain how a *cy pres* distribution to the organizations bore a sufficient nexus to the interests of the class, simply concluding that each organization would agree to "devote the funds to promote public awareness and education, and/or support research, development, and initiatives, related to the security and/or privacy of Internet browsers." *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, No. cv-12-md-2358 (SLR), 2017 WL 446121, at *4 (D. Del. Feb. 2, 2017), *appeal docketed*, No. 17-1480 (Mar. 7, 2017). The *cy pres* allocation also excluded several consumer privacy organizations that had directly challenged the conduct by Google that gave rise to the lawsuit. *See*, *e.g.* EPIC, Complaint, Request for Investigation, Injunction, and Other Relief*, In the Matter of Google, Inc.,* before the Fed. Trade Comm'n (Feb. 16, 2010).[22]

The lower court in this case failed to conduct any inquiry into the service records of the recipient

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[21] http://www.publiccounsel.org/practice_areas/.

[22] https://epic.org/privacy/ftc/googlebuzz/GoogleBuzz_Complaint.pdf.

organizations. The court only mentioned the issue in one cursory sentence, stating "[h]aving carefully reviewed the proposals by counsel, the court is satisfied that the proposed *cy pres* distribution 'bears a substantial nexus to the interests of the class members' as required by the Ninth Circuit." *In re Google Referrer Header Privacy Litig.*, 87 F. Supp. 3d 1122, 1133 (N.D. Cal. 2015), *aff'd*, 869 F.3d 737 (9th Cir. 2017). A *cy pres* award cannot represent the "next best" distribution where the organization's service record bears little or no nexus to the interests of the class.

Courts similarly fail to examine whether the organization's proposed use of the funds will advance the underlying statutory claims. As Judge Smith wrote in his dissent in *Lane*, "it is not enough simply to identify any link between the class claims and a *cy pres* distribution . . . [i]nstead, an appropriate *cy pres* recipient must be dedicated to protecting consumers from the precise wrongful conduct about which plaintiffs complain." *Lane*, 709 F.3d at 794 (Smith, J., dissenting from denial of rehearing *en banc*). In consumer privacy settlements, courts often mistakenly assume that educating consumers and challenging misconduct are interchangeable in terms of the benefit they provide to the class. But user education has little to do with the aim of privacy law in the United States, which is "to limit the collection and use of personal data." Marc Rotenberg, *Fair Information Practices and the Architecture of Privacy*, 2001 Stan. Tech. L. Rev. 1 (2001).

Judge Smith highlighted this schism in *Lane*, emphasizing that the purpose the plaintiffs' statutory claims was to prevent "*unauthorized* access or disclosure of private information," while the Digital Trust Foundation would dedicate the funds "to educat[ing]

users, regulators[,] and enterprises' on how to protect Internet privacy 'through user control.'" *Lane*, 709 F. 3d at 794 (Smith, J., dissenting from denial of rehearing *en banc*). Judge Smith underscored the inherent mismatch between the proposal and the aims of the litigation, stating, "an organization that focuses on protecting privacy solely through 'user control' can *never* prevent unauthorized access or disclosure of private information where the alleged wrongdoer *already has unfettered access* to a user's records." *Id*.

So long as organizations exist that actively defend the privacy interests of Internet users and actively challenge the business practices that give rise to these cases, distributions used for education or research cannot represent the "next best" use of settlement funds. *Enforcing Privacy Rights*, *supra*.

C. To prevent collusion, courts must conduct close oversight of proposed *cy pres* distributions.

Courts must pay special attention to any potential conflicts of interest in *cy pres* settlements to avoid the risks of collusion between the defendant and class counsel. Courts must be on the lookout "not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 749 (9th Cir. 2017) (Wallace, J. dissenting).

In particular, *cy pres* awards designated for organizations that have previously received substantial payments from the named defendant should be subject to exacting scrutiny. Such distributions risk undermining the interests of the class by rewarding

organizations that will advance the defendant's interests at the expense of the class. The ALI has stated that "a *cy pres* remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the award was on the merits." *ALI Principles*. Courts have raised concerns about *cy pres* awards that benefit organizations to which the defendant has made prior payments. *See Molski*, 318 F.3d at 954 (stating that "it seems somewhat distasteful to allow a corporation to fulfill its legal and equitable obligations through tax-deductible donations to third parties"); *Dennis*, 697 F.3d at 867–68 (noting that a *cy pres* award that allows the defendant to use "previously budgeted funds" to make the same contribution it would have made anyway is a "paper tiger" in terms of deterrence).

In *Lane*, the terms of the settlement dictated that at least one of the three board members of the newly-established Digital Trust Foundation would be a current employee of Facebook. *Lane v. Facebook, Inc.*, 696 F.3d 811, 821 (9th Cir. 2012), *cert. denied* 134 S. Ct. 8 (U.S. 2013). The other two board members of DTF also had financial ties to Facebook. As Judge Kleinfeld noted in dissent, the *cy pres* award would be used to "fund nothing but an 'educational program' amounting to an advertising campaign for Facebook." *Id*. at 834.

Google, in particular, has sought to protect its commercial interests through the strategic allocation of funds to non-profit organizations, researchers, and universities so as to promote views, publications, and scholarship that is favorable to the company. Marc Scott & Nicholas Hirst, *Google's Academic Links*

Under Scrutiny, Politico (May 13, 2018);[23] *Google Spends Millions on Academic Research to Influence Opinion, Says Watchdog*, The Guardian (Jul. 13, 2017);[24] Adam Rogers, *Google's Academic Influence Campaign: It's Complicated*, Wired (Jul. 14, 2018);[25] Brody Mullins & Jack Nicas, *Pay Professors: Inside Google's Academic Influence Campaign*, Wall St. J. (Jul. 14, 2017);[26] Jonathan Taplin, *Google's Disturbing Influence Over Think Tanks*, N.Y. Times (Aug. 30, 2017).[27]

The Ninth Circuit acknowledged this practice but dismissed out of hand the concerns these organizations would then be reluctant to pursue the privacy interests of consumers or take a stand against the practices of Google. 869 F.3d at 745. These concerns merited more substantive consideration. Google is free to allocate resources to defend its commercial interests as it chooses. But when the company takes money that would otherwise go to class members and redirects those funds, by means of a *cy pres* only settlement, to organizations that are routinely aligned with the company's interests, that is an entirely different matter. That is not only unfair. It is also unjust.

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[23] https://www.politico.eu/article/google-campaign-for-accountability-lobbying-humboldt-ceps-astroturfing-oracle/.
[24] https://www.theguardian.com/technology/2017/jul/13/google-millions-academic-research-influence-opinion.
[25] https://www.wired.com/story/googles-academic-influence-campaign-its-complicated/.
[26] https://www.wsj.com/articles/paying-professors-inside-googles-academic-influence-campaign-1499785286.
[27] https://www.nytimes.com/2017/08/30/opinion/google-influence-think-tanks.html.

In fact, this is not the first time that Google has directed funds, via *cy pres*, to its preferred organizations. For example, in the *Google Cookie Placement* settlement, Google funded two of the same organizations that were funded by this Settlement. *See In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 2017 WL 446121, at *4. As in this settlement, those organizations did not propose to use the funds to stop Google's unlawful data collection, but rather to "promote public awareness and education, and/or support research, development, and initiatives, related to the security and/or privacy of Internet browsers." *Id.*

A judicially-administered application process based on objective criteria could resolve these concerns. *See Enforcing Privacy Rights*, *supra*. Courts have utilized objective claims processes in similar consumer privacy settlements. In *In re Google Buzz Privacy Litigation*, for example, the parties initially proposed that Google would identify recipients of *cy pres* funds. Notice of Motion and Memorandum in Support of Motion for Order Granting Final Approval of Class Settlement, Certifying Settlement Class, and Appointing Class Representatives and Class Counsel at 6, *In re Google Buzz Privacy Litigation*, 2011 WL 7460099 (No. 10-00672 JW) (N.D. Cal. entered Feb. 16, 2011). The district court found this process "lacked specificity and oversight required to provide a reasonable benefit to the Class," and instead ordered the parties to nominate *cy pres* recipients based on these criteria:

i. The organization's name and address;
ii. A description of an established program currently undertaking policy or education efforts directed specifically at Internet privacy;

iii. The number of years that the program has been established and focused on Internet privacy;
iv. A short statement as to how the particular program will benefit the Class;
v. The annual operating budget of the organization and the specific Internet privacy or education program; and
vi. The amount received, if any in contributions from Google, Inc. in 2010, independent of the Settlement.

Id. The court made explicit its concern that absent such procedures, worthwhile recipients could be improperly excluded. *Id*. A similar application process was also used in *In re Netflix Privacy Litigation*, 5:11-cv-00379, 2011 WL 7460099 (N.D. Cal. Mar. 18, 2013).

An objective claims process would guard against the risks of collusion, ensure that the organizations have a service record aligned with the interests of the class, and guarantee that the funds will go to a purpose that furthers the underlying statutory claims. The Court should adopt such an approach to ensure that class action settlements are "fair, reasonable and adequate," and *cy pres* awards provide the "next best" distribution.

* * *

For the foregoing reasons, this Court should reject the Settlement and remand with the appropriate guidance.

CONCLUSION

For the foregoing reasons, *amici* respectfully ask this Court to reverse the decision of the U.S. Court of Appeals for the Ninth Circuit and remand the case.

Respectfully submitted,

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