NO. 15-15858

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: GOOGLE REFERRER HEADER PRIVACY LITIGATION

PALOMA GAOS, *et al.*,
Plaintiffs-Appellees,

THEODORE H. FRANK and MELISSA ANN HOLYOAK,
Objectors-Appellants,

v.

GOOGLE, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California at San Jose
No. 5:10-cv-04809-EJD, District Judge Edward J. Davila

Petition for Rehearing and Rehearing *En Banc* of Appellants Theodore H. Frank and Melissa Ann Holyoak

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FRAP 35(b)(1) Statement

This petition involves questions of exceptional importance because the panel decision conflicts with authoritative decisions of the Third, Fifth, Seventh, and Eighth Circuits. *In re Baby Products Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013); *Klier v. Elf Atochem N.A., Inc.*, 658 F.3d 468 (5th Cir. 2011); *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014); *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060 (8th Cir. 2015). The panel decision further conflicts with this Court's decisions in *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157 (9th Cir. 2013); *Kayes v. Pacific Lumber Co.,* 51 F.3d 1449 (9th Cir. 1995), *Dennis v. Kellogg Inc.*, 697 F.3d 858 (9th Cir. 2012); *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011); and *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003), and consideration by the full court is therefore necessary to secure and maintain uniformity of the Court's decisions. *See also Lane v. Facebook*, 709 F.3d 791, 793-95 (9th Cir. 2013) (Smith, J., dissenting from denial of *en banc* because of inconsistency of this Court's *cy pres* decisions).

Rehearing is independently required under FRAP 40 because the panel decision is incorrectly premised on the misapprehension of law that *Lane v. Facebook,* 696 F.3d 811 (9th Cir. 2012), dictates the result of a question of "infeasibility" that was not at issue in *Lane*, and because the panel did not address the district court's error in reasoning in applying even the lenient standards of the panel's conflict of interest requirements.

Introduction

The scene: Settlement negotiations in 2019 for the class action *Coyote v. Acme*.

Players: Opposing counsel for Coyote and Acme.

ACME: Your case is weak; your client routinely fails to look down. We're willing to create a $2 million common fund for the class to settle, but any more than that and we'll litigate class certification. There are a lot of class members, but if the claims process requires class members to answer questions, we can reduce the claims rate[1] and easily distribute the fund *pro rata*.

COYOTE: But with the 25% benchmark, I get $500,000 fees, and that's only $250/hour to me. Here's an idea. Acme gives tens of millions of dollars to charity every year. Take $8 million of that money, call it a *cy pres* settlement, and find charities with a nexus to the lawsuit that you already give money to or don't object giving to. Earmark a million of it to my *alma mater*; I'll make sure their grant proposal demonstrates nexus. Then we can call it an $8 million settlement, and I'll get 25% of that, but it's only costing you the $2 million in fees because you're just changing accounting entries on the rest.[2]

ACME: Aren't we required to give that money to the class?

COYOTE: Not if it's not feasible.

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[1] CFPB, ARBITRATION STUDY §8.3.4 at 31 (2015).

[2] *Dennis*, 697 F.3d at 867-68.

ACME: But it's surely feasible to distribute $8 million to the class. We were about to do it with a $2 million fund.

COYOTE: That would be true in most courts, but we're in the Ninth Circuit. Under *Google Referrer*, it's ok to ignore the class if it's at least somewhat sizable. It defined "feasibility" as whether it's possible to give money to every single class member,[3] and said it's okay to calculate fees as if we were giving all $8 million to the class.[4]

ACME: But it's almost always impossible to give money to every single class member. The vast majority of cases settle for less than a dollar or two a class member, but the money gets distributed *pro rata* without any problem because in most cases less than 1% of the class makes a claim.[5]

COYOTE: Yes, and every other circuit to decide the issue recognizes that and rejects *cy pres* except as a last resort. There's a reason we filed in the Ninth Circuit. My *alma mater* should give me an award for all the money I'm going to get them.

ACME: We just want to get out of the case cheaply; as long as we get a veto over who the charities are, we don't care whether you get $2,000,000 or the class does.[6] Deal.

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[3] Majority 9-10.

[4] *Id.* 20-21.

[5] *In re Carrier iQ, Inc., Consumer Privacy Litig.*, 2016 WL 4474366, at *4 (N.D. Cal. Aug. 25, 2016).

[6] *In re Dry Max Pampers Litig.*, 724 F.3d 713, 717-18 (6th Cir. 2013).

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If class counsel represented a single multi-millionaire instead of a class, there would be no question that it would not have the authority to redistribute its client's assets to a worthy charity without the client's permission. This remains true even if the client was an odious Martin Shkreli-type who would only spend the money on distasteful bacchanalia. The principle doesn't change just because class counsel represents many clients, rather than just one.

Every other federal appellate circuit to consider *cy pres* questions this decade has come down on the side of class members against the wishes of attorneys and parties who would prefer to send the class's money to third-party charities. The panel decision stands alone on treating *cy pres* as indistinguishable from cash to class members in determining settlement fairness. This Court creates circuit splits only upon "painstaking inquiry." *Zimmerman v. Oregon Dep't. of Justice*, 170 F. 3d 1169, 1184 (9th Cir. 1999). But the panel created an unnecessary circuit split here, and one that is bad public policy to boot, without addressing the contrary precedent. To the extent *Lane* controlled the panel's decision, it should be overruled, too.

Statement of the Case

A class action over alleged privacy violations by Google settled for an $8.5 million fund, but none of that would go to any of the 129 million absent class members. Instead, the net after attorney fees and administration would be distributed to six charities who agreed to promote privacy on the Internet—at least five of which were affiliated with either Google or class counsel or both. ER113-15. (Google recently
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entered a similar settlement with almost identical *cy pres* recipients—but instead of Chicago-Kent, class counsel's *alma mater* here, money went to a charity where class counsel was chairman of the board. *In re Google Cookie Privacy Litig.*, 2017 WL 446121 (D. Del. Feb. 2, 2017), *appeal pending*, No. 17-1480 (3d Cir.). A bipartisan group of state attorneys general filed an *amicus* brief supporting reversal of that settlement approval.)

Class members Frank and Holyoak objected to settlement approval, noting that it was feasible to distribute money to the class, and arguing that the *cy pres* recipients had improper significant prior affiliations with class counsel and the defendant. ER98-134. The settling parties did not dispute that the prior affiliations contributed to the selection of the *cy pres* recipients, and presented no evidence that the *cy pres* would not displace part of the millions of dollars that Google already regularly donated to the recipients, but argued that the recipients were above the court's scrutiny under *Lane v. Facebook*. *E.g.* Dkt. 75 at 5; ER56-57.

At the fairness hearing, the district court was critical of the parties' conflicts of interest and "lack of transparency in the selection process" and said the settlement "doesn't pass the smell test." ER54-55. Nevertheless, the district court, apparently feeling required to do so by *Lane*, approved the settlement. ER4. It found a "potential for a conflict of interest," but went ahead and approved the beneficiary choice because "the identity of potential *cy pres* recipients was a negotiated term included in the Settlement Agreement and therefore not chosen solely by Harvard alumni." ER22. It did not address *Radcliffe* or the ALI's PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.07 (2010), on which Frank had relied.

The panel affirmed. It held that there was no obligation to distribute funds to class members because the fund was "non-distributable" because a distribution to the entire class would be *de minimis* and there was no obligation for a court to consider ""possible' alternatives" such as a claims process. Majority 9-10. It held that the relationships between the *cy pres* recipients, Google, and class counsel do not "raise substantial questions about whether the selection of the recipient was made on the merits," even though the district court itself raised questions about the selection process; it held that the "district court explicitly or implicitly addressed this range of considerations" in approving the distribution. Majority 14. Any conflicts were unobjectionable so long as there the "nexus" requirement was satisfied. *Id.* 14-15. Judge Wallace, concurring in part and dissenting in part, would have remanded for hearings on the appropriateness of the selection of class counsel's *alma maters* as recipients. Slip op. 21-27.

Argument

I. The panel's definition of "feasibility" contradicts the law of other circuits.

> [A] class settlement generates property interests. Each class member has a constitutionally recognized property right in the claim or cause of action that the class action resolves. The settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members.
>
> These precepts define the first—and often the last—arena of analysis, imposing foundational limitations on a district court's discretion as it administers a class-action settlement. Because the settlement funds are the property of the class, a *cy pres* distribution to a third party of unclaimed settlement funds is permissible only

> when it is not feasible to make further distributions to class members.

Klier, 658 F.3d at 474-75 (cleaned up); *accord BankAmerica*, 775 F.3d at 1064-66; *Pearson*, 772 F.3d at 784.

Cy pres invites abuse. Though class counsel's fiduciary duty is to the class, if courts treat $1 million of *cy pres* distributions as equivalent to $1 million in distributions to the class, attorneys will almost always prefer to give money to *cy pres*. It's unlikely any of the 100,000 class members receiving $10 checks will send a thank-you note or a Christmas card, but with *cy pres* distributions, there's networking and gratitude and often publicized photographed ceremonies with oversized checks. E.g., *Andrews Osborne gets $50,000 in Cy Pres funds*, THE NEWS-HERALD (Jun. 3, 2012), available at http://www.news-herald.com/article/HR/20120603/NEWS/306039972 (last accessed Sept. 5, 2017). Class counsel gets an indirect benefit from the *cy pres* that it does not get from class distribution, and then double-dips with fees on a percentage of that donation. Small changes in the claims process have dramatic effects on claims rates. CFPB, *supra*. Class counsel thus has the power to throttle the claims process (or agree to preclude a claims process entirely as they did here) in settlement negotiations to increase unclaimed funds for *cy pres* recipients. If courts give class counsel the incentive to do so, it guarantees reduced class recovery. *Pearson,* 772 F.3d at 781; *see generally* 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 (2010) ("Redish"). Thus, if we care about class counsel's fiduciary duties, we need bright-line rules to encourage them to put class members first and *cy pres* as a last resort.

The panel here, however, held that it was not feasible to make *any* distribution to class members because it would be infeasible to distribute the $5 million net settlement fund to ***all*** of the 129 million class members. This is the wrong standard—and a test that will almost always permit parties to choose to ignore the class entirely.

Pearson is directly on point. The class there involved twelve million class members, but the parties could identify only 4.7 million of them after subpoenaing third-party retailer loyalty programs. 772 F.3d at 783-84. The defendant agreed to a $2 million fund, against which class members could make claims. 772 F.3d at 780-83. Because, as expected, only 30,245 class members made claims, there was $1.13 million in residual money designated by the settlement for *cy pres*. *Id.* at 780. That $1.13 million *cy pres* payment (or even the entire $2 million fund) divided by 12 million class members (or even the 4.7 million *known* class members) would be less than a dollar each per class member. Nevertheless, *Pearson* held the *cy pres* inappropriate as a matter of law. *Id.* at 784. In contrast, the panel's holding reaches the opposite conclusion: the *Pearson* parties could have simply agreed to a $0 settlement with all $2 million in the settlement fund going to *cy pres*.

It was not feasible to pay *every Pearson* class member, but the fact that it was feasible to pay *some Pearson* class members meant that those class members should be paid before any money went to *cy pres*. No appellee contends it is not feasible to pay a million or so class members $3 each; it is no less feasible to distribute $5 million to a fraction of 129 million class members $3 at a time than it is to distribute $1.1 million to a fraction of 12 million class members $3 at a time.

Similarly, there was no question that it was impossible to pay every single shareholder class member in *BankAmerica*. But because there was a list of *some* shareholders, *cy pres* was impermissible even though the district court found distribution to class members would be "costly and difficult." *BankAmerica*, 775 F.3d at 1065. Also *Turza*, which involved a class-action judgment: the impossibility of paying every single class member did not excuse the use of *cy pres* when further distributions to the class were feasible. *Ira Holtzman, CPA & Assoc., Ltd. v. Turza*, 728 F.3d 682, 689-90 (7th Cir. 2013) (Easterbrook, J.).

Within this Circuit, the panel approach is inconsistent with *Molski*, which rejected *cy pres* as an inadequate substitute for individual damages. It found "no evidence" justifying a resort to *cy pres* despite that the fact that the class numbered any estimated 500,000 persons and only $195,000 was available for distribution. 318 F.3d at 954 n.23, 955.

Here, there was undisputed evidence below that the net settlement could have been distributed to a percentage of class members that is typical of most claims-made settlements. ER110-ER111; ER34. For example, *Fraley v. Facebook* demonstrates conclusively as a factual matter that settling parties are feasibly able to distribute small funds to large classes through a claims process. 966 F. Supp. 2d 939 (N.D. Cal. 2013). The *Fraley* class was as large in magnitude as this one, but, though the settlement fund was less than $0.20 per capita, the parties were, at the behest of the district court, able to create a claims process that distributed $15/claimant to over 600,000 claimants. A similar claims rate here with *pro rata* distribution would distribute over $7 per claiming class member.

Carrier also approved a privacy class-action settlement that distributed a net settlement fund of $5.9 million amongst a 30-million-member class. As *Carrier* observed, "if all 30 million people were to make claims, then each person would get approximately 20 cents. However, that is not what actually happens under the settlement." 2016 WL 4474366 at *2. The *Carrier* settlement funds were distributed *pro rata* to eligible claimants, with a contingent *cy pres* provision only if distribution proved "economically unfeasible." *Id.* Ultimately, only 42,577 class members (0.14% of the class) filed claims, resulting in individual payments of well over $100. Such a low claims rate is customary. *Id.* at *4. Even if the *Carrier* class size had been five times larger, and the claims rate five times higher, class members still would have received over $5.50 each.

Simply put, the panel's definition of "distributable" would permit ***almost every consumer class-action settlement*** to completely ignore payments to class members. For example, this Court recently affirmed a settlement that established a $27 million gross fund and paid class members about $14.1 million net in cash and gift cards to 35 million class members. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 941 (9th Cir. 2015). $27 million divided by 35 million class members is less than 80 cents a class member. Under the panel decision, it would not be economically viable for the *Online DVD* parties to distribute money to the class. But they did. It was feasible through a *pro rata* claims process that ultimately paid 1.1 million class members a little over $12 each. But under the panel's holding, the settling parties in that case could have given zero dollars to the class and donated the entire $14.1 million to charity.

Even the $135,400,000 settlement fund in *Sullivan v. DB Investments* would be considered by the panel's rule to be "non-distributable." After attorneys' fees, there would be less than $1-$2/class member left for each of the 67 to 117 million consumer subclass members. 667 F.3d 273, 290 (3d Cir. 2011).

Such absurd and unprecedented results are permitted by the panel's interpretation of "distributable" as meaning something other than the conventional "able to be distributed."

Perhaps the panel felt constrained by *Lane*, which the panel read as holding that a $6.5 million fund is infeasible to distribute to 3.6 million class members. Majority 9. But *Lane* contains no such holding. The *Lane* appellants did not contend that it was feasible to distribute the settlement proceeds, and *Lane* did not reach the issue, simply deciding based on the uncontested question. 696 F.3d at 821. To the extent the panel felt *Lane* dictated a holding of infeasibility, it misapprehended the law, and it should grant rehearing under FRAP 40. And if *Lane* did dictate infeasibility, it conflicts with the law of every other circuit to consider the issue and should be overturned *en banc*.

The panel further reasoned that any claims-made or lottery distribution to the class was just a "possible" alternative, and therefore did not require overriding the district court's decision to adjudicate the allocation of the entire settlement fund to *cy pres* as satisfying Rule 23(e). Majority 9-10. Again, this conflicts with the law of every other circuit to consider the question. Distribution to the class is not a question of "possible" alternatives. *Cy pres* is permissible ***only*** if some distribution to the class is not feasible under *Klier*, *Turza*, *Pearson*, and *BankAmerica*. "[D]irect distributions to the class are preferred over [indirect] *cy pres* distributions" and class counsel has an obligation to

"prioritize[] direct benefit to the class." *Baby Products*, 708 F.3d at 173, 178. "Class members are not indifferent to whether funds are distributed to them or to *cy pres* recipients, and class counsel should not be either." *Id.* at 174. There is no reason for the circuit split and rehearing *en banc* is necessary to resolve it.

II. The panel ignored class counsel's obvious "appearance of divided loyalties" in violation of Circuit precedent.

The panel affirmed the district court's approval of the *cy pres* recipients because of the absence of a showing of an actual conflict of interest. This standard conflicts with *Radcliffe*. Rehearing is required to address this misapprehension of the law, or rehearing *en banc* is necessary to reconcile this Court's precedents.

The perverse incentive of class counsel to prefer *cy pres* to the class is magnified further if class counsel is allowed to favor hometown charities or charities like a class counsel's *alma mater*. Thus, cases like *Nachshin* forbid these sorts of conflict of interest, singling out in particular the practice of giving to an *alma mater*. *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039-40 (9th Cir. 2011). This Court has previously held that the "responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the ***appearance*** of divided loyalties of counsel." *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1167 (9th Cir. 2013) (emphasis added).

The panel's decision conflicts with *Radcliffe*, and does not try to reconcile its result with this Court's attention to class counsel's fiduciary duties. Instead, the majority required a showing of an actual conflict, improperly shifting the burden to objectors to suss this out when the district court refused to require any disclosures. Even there, the

majority disregarded the district court's *non sequitur* reasoning why there was no conflict of interest.

The panel recognized that "[t]here may be occasions alumni connections between the parties and the [*cy pres*] recipients could cast doubt on the propriety of the selection process." Majority 17. A relationship that "casts doubt" on the propriety satisfies the "appearance" test under *Radcliffe*, and should end the inquiry, especially when the district court also stated it didn't pass the "smell test." ER54-55. But the panel found that Frank was required to provide *more* than "allegations" of the alumni relationships. Majority 17. The panel's legal standard of an "actual conflict" conflicts with *Radcliffe* and with *Kayes*. As here, *Kayes* plaintiffs argued that there had been no "manifestation" of a conflict. No matter: "Plaintiffs misunderstand the law. The 'appearance' of divided loyalties refers to differing and potentially conflicting interests and is not limited to instances manifesting such conflict." 51 F.3d at 1465. The panel's requirement of proof of an actual conflict contradicts this Court's legal standard. This is especially true here, where, at the district court level, class counsel did not deny that they chose the *cy pres* recipients because of the prior affiliation, but instead argued that they had the absolute right to favor their *alma maters*. Dkt. 75 at 5.

The panel concluded that the district court "appropriately considered the substance" of the objections regarding the parties' affiliations with the *cy pres* recipients. Majority 17-18. But the district court reasoned that the conflict of interest was acceptable because the *alma maters* were "not chosen solely by Harvard alumni" (ER22). The district court's tolerance of an acceptable amount of conflict of interest fails *Radcliffe*'s "appearance" of conflict test. Worse, under the district court's reasoning, an

attorney could direct *cy pres* to a charity run by her husband because not every negotiator is married to him. Even under the panel's misapprehension of the law, the district court's reasoning is clearly erroneous and requires remand to apply the panel's standard correctly. But under *Radcliffe* and § 3.07's correct view, class counsel's indisputable potential conflict of interest requires settlement reversal. Rehearing or rehearing *en banc* is required on this issue to reconcile this Court's decisions.

III. *Lane* and the panel decision conflict with *Nachshin* and *Dennis* over Google's *cy pres* to the Stanford Center.

If a defendant uses a class-action settlement to simply redirect money that it would have given to a charity anyway, then the change in accounting entries serves to simply create the illusion of relief without any real change in the economic relationship of the class or the defendant. *Dennis*, 697 F.3d at 867-68. *Nachshin* similarly rejected the idea of *cy pres* subject to "the whims and self interests of the parties." 663 F.3d at 1039. But, though *Nachshin* rejected the idea that a court should defer to the compromise of the parties (*id.* at 1040), *Lane v. Facebook* permitted Facebook to create a new grant-making organization where it sat on the board and delegate *cy pres* to it. 696 F.3d 811 (9th Cir. 2012). The panel here sided with *Lane*, and *en banc* rehearing is needed to resolve the inconsistencies.

Here, the press has for years noted Google's use of *cy pres* and charitable donations as a source of power. *E.g.,* Roger Parloff, *Google and Facebook's new tactic in the tech wars*, FORTUNE (Jul. 30, 2012) (noting criticism in *Google Buzz* case that *cy pres* is steered to organizations that are currently paid by Google to lobby for or to consult for the company); Kenneth P. Vogel, *Google Critic Ousted From Think Tank Funded by the Tech*

Giant, N.Y. TIMES (Aug. 30, 2017). Money is fungible. The decision in this case and in this case's interpretation of *Lane* contradict *Dennis* given that there was no evidence in the district court that the *cy pres* was not displacing the millions of dollars Google already gives to the *cy pres* recipients here; the panel decision and *Lane* contradict *Nachshin* in permitting the "whims and self interest" of the defendant *carte blanche* in *cy pres* selection so long as there is a nexus.

The panel refused to "explore the contours" of the "significant prior affiliation" standard under Section 3.07. Majority 14. But if any affiliation were "significant," it would be Google's relationship with the Stanford Center. Google was founded at and is partially owned by Stanford. There is no dispute that Google has provided as much as the majority of the Center's funding. Google has donated millions of dollars to the Center, which supported Google's positions on liberalizing copyright law, and whose scholars have otherwise publicly spoken in support of Google's litigation positions, including on privacy issues. ER114-ER115; *e.g.*, John Hechinger and Rebecca Buckman, *The Golden Touch of Stanford's President*, WALL ST. J. (Feb. 25, 2007); Jeffrey Toobin, *The Solace of Oblivion*, THE NEW YORKER (Sep. 29, 2014); Parloff, *supra*. There is no question that Google has provided significant financial support to the Stanford Center and in turn, the Stanford Center has provided significant support of Google's legal positions and issues. If this is not a "significant prior affiliation," and a conflict under *Nachshin* and *Dennis*, then what is?

Conclusion

The Court should grant panel rehearing or rehearing *en banc*.

Dated: September 5, 2017

Respectfully submitted,

/s/ Theodore H. Frank

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Certificate of Compliance
Pursuant to Rules 35-4 and 40-1 for Case Number 15-15858

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing and for rehearing *en banc*:

Contains 4,199 words (petitions and answers must not exceed 4,200 words), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

Executed on September 5, 2017.

/s/ Theodore H. Frank
Theodore H. Frank

Certificate of Service

I hereby certify that on September 5, 2017, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

/s/ Theodore H. Frank
Theodore H. Frank