NO. 20-15616

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: GOOGLE LLC
STREET VIEW ELECTRONIC COMMUNICATIONS LITIGATION

BENJAMIN JOFFE, *et al.*,
Plaintiffs-Appellees,

DAVID C. LOWERY,
Objector-Appellant,

v.

GOOGLE, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California at San Jose
No. 3:10-cv-2184-CRB, District Judge Charles R. Breyer

Petition for Rehearing and Rehearing *En Banc* of Appellant David C. Lowery

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FRAP 35(b)(1) Statement

Among all the circuits to consider the question of *cy pres*, the Ninth stands alone.

As Judge Bade's concurring opinion reveals, this petition presents a question of exceptional importance that warrants this Court's plenary consideration: whether and under what circumstances class action settlements may employ *cy pres* remedies. Concurrence 39-45.[1] Importing the doctrine from state trust law to federal class action proceedings raises a host of "fundamental concerns." *See Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting the denial of certiorari). But five years ago, this Court, over a dissent, affirmed an all-*cy pres* settlement. *In re Google Referrer Header Litig.*, 869 F.3d 737 (9th Cir. 2017). The Ninth Circuit's position was idiosyncratic: *Google Referrer* conflicted with authoritative decisions of the Third, Fifth, Seventh, and Eighth Circuits. *See 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 Supreme Court granted review, ultimately vacating and remanding on jurisdictional grounds. *Frank v. Gaos*, 139 S. Ct. 1041 (2019). One Justice reached the merits and concluded that *Google Referrer*'s approach to *cy pres* contravened Rule 23 in several different ways. *Id.* at 1046-48 (Thomas, J., dissenting).

Nevertheless, still finding the vacated *Google Referrer* persuasive authority, the panel decision here reenshrines *Google Referrer*'s idiosyncrasies as the law of the Circuit.

[1] Under a *cy pres* provision, funds generated by the class action are disbursed to non-party charities instead of plaintiff class members.

Most notably, the panel reaffirms the rule that settlement funds are "non-distributable"—and so *cy pres* diversion is permissible—when parties cannot distribute funds to *every* class member, even if parties could distribute funds to some class members—as happens in virtually every class action. Opinion 22; *Google Referrer*, 869 F.3d at 742. This resurrects the circuit conflict that precipitated *Frank*'s certiorari grant , and warrants *en banc* rehearing under Fed. R. App. P. 35 and Cir. R. 35-1. The decision also contradicts Rule 23(e)(2)(C)(ii) without mentioning it.

The panel decision also generates a new conflict with the Third Circuit's decision in *In re Google Cookie Placement Consumer Privacy Litigation*, by rejecting the American Law Institute's "significant prior affiliation" standard for evaluating conflicts of interest in the *cy pres* context. *Contrast* Opinion 34, *with Google Cookie*, 934 F.3d 316, 331 (3d Cir. 2019); *see also Google Referrer*, 869 F.3d at 749 (Wallace, J., concurring in part and dissenting in part) (advocating for adoption of the American Law Institute standard). Other decisions of this Court review *cy pres* settlements with a more jaundiced eye. *E.g., Dennis v. Kellogg Inc.*, 697 F.3d 858 (9th Cir. 2012); *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011); *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003); *cf. also Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157 (9th Cir. 2013) (strict standard for class counsel conflicts of interest). Thus consideration by the full court is necessary to secure uniformity of the Court's decisions. *Lane v. Facebook*, 709 F.3d 791, 793-95 (9th Cir. 2013) (Smith, J., dissenting from denial of rehearing *en banc* for this reason); Order, *Google Referrer*, No. 15-15858 (9th Cir. Oct. 5, 2017) (Wallace, J., dissenting from the denial of rehearing *en banc*).

En banc consideration is also necessary to secure uniformity of this Court's class certification decisions. *Compare In re Hotel Tel. Charges*, 500 F.2d 86, 89-90 (9th Cir. 1974) (class device lacks superiority "whenever the principal, if not the only, beneficiaries to the class action are to the attorneys for the plaintiffs and not the individual class members" and rejecting fluid recovery—a form of *cy pres*—as a solution), *with* Opinion 27 n.7 (ignoring that *Hotel Telephone* addressed fluid recovery at all) *and Google Referrer*, 869 F.3d at 743 n.3 (similar).

Introduction

If class counsel represented a single millionaire instead of a class, there would be no question that they would not have the authority to redistribute their client's assets to a worthy charity without the client's permission. This remains true even if the client were 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 instead of one. *See* Concurrence 41 n.1 (Bade, J.).

No other federal appellate circuit to consider *cy pres* questions has endorsed a settlement that substitutes *cy pres* relief wholesale for class recovery, leaving class members empty handed in the process. This is "*cy pres* gone wrong." D. Brooks Smith, *Class Action and Aggregate Litigation: A Comparative International Analysis*, 124 PENN ST. L. REV. 303, 338 (2020). The panel decision stands alone on treating *cy pres* as equivalent to cash to class members in determining settlement fairness. This Court creates circuit splits only "after the most painstaking inquiry." *Zimmerman v. Oregon Dep't. of Justice*, 170 F.3d 1169, 1184 (9th Cir. 1999). But the panel created an unnecessary split here, one

that will produce pernicious consequences, without addressing the contrary precedent or the only Supreme Court opinion on the topic.

Background

A class action over alleged privacy violations by Google settled for a $13 million fund, but not a penny would go to the 60 million absent class members. Instead, the net recovery after attorney fees and administration would go to nine organizations who agreed to promote privacy on the Internet—several of which already received monies from Google, and one of which (ACLU) had served as co-counsel in other cases with lead counsel here. 2-ER-188-89. (Google has recently entered similar settlements with overlapping *cy pres* recipients—but instead of class counsel's former litigation partner, money there went to class counsel's *alma maters* and to a charity where class counsel was chairman of the board. *See respectively Google Referrer*, 869 F.3d at 749; *Google Cookie*, 934 F.3d at 330).

Class member David C. Lowery timely objected to settlement approval. Among other things, he objected that the *cy pres* settlement violated Rule 23 because it was feasible to distribute money to the class through either a claims process or a lottery distribution to class members who self-identified, and because the *cy pres* recipients had improper significant prior affiliations with class counsel and the defendant. 2-ER-116-21; 2-ER-126. The undisputed evidence is that claims rates in class-action settlements without direct notice were almost always less than one percent. 2-ER-117; 2-ER-143-45. In particular, the settlement for a larger unidentified class of over 100 million members in *Fraley v. Facebook, Inc.* used a claims process after the district court

rejected the possibility of a *cy pres*-only settlement, and successfully distributed $15 per class member to the 614,000 class members who made claims. 966 F. Supp. 2d 939 (N.D. Cal. 2013).

Lowery maintained that if it really was not feasible to distribute any money to class members, then Rule 23(b)(3) certification was inappropriate, because of the lack of superiority to other forms of adjudication. 2-ER-126-30. In such a scenario, the settlement release benefited only Google, and the class members were no better off than if there was no litigation at all and worse off than if they had collectively opted out.

After the fairness hearing, at which both Lowery's counsel and Arizona's Solicitor General appeared to argue against the all-*cy pres* settlement, the district court approved the settlement and awarded counsel more than $3 million in attorneys' fees. It held that the *cy pres* award indirectly benefits the class. 1-ER-10-11. The court rejected Lowery's argument that it was feasible to distribute the $13 million settlement fund to class members because while a claims process could yield $15 per class member, the court need "not calculate feasibility based on whether some money can be paid to some small fraction of the class." 1-ER-21. The district court agreed with plaintiffs that a claims process was infeasible because class members were unable to self-identify. 1-ER-22. (The district court did not reconcile this conclusion with its holding that there was standing based on the allegations of the complaint, or its $500 incentive award to named plaintiffs who self-identified without confirmatory discovery. 1-ER-6-8; 1-ER-18.). The district court also held that even if a claims process were practical, delivering

relief to *cy pres* recipients was superior to delivering relief to 1% of class members. 1-ER-23.

Based on *Lane* and *Google Referrer*, the district court rejected Lowery's alternative Rule 23(b)(3) argument that a class action was not superior if it was infeasible to distribute settlement funds to class members or to identify them. 1-ER-12-13.

The panel affirmed. Among other things, it determined that the standard for feasibility was not whether it was feasible to distribute settlement funds to some class members, but whether the fund could deliver relief to each and every class member. Opinion 22. It declined to apply the ALI's test disallowing *cy pres* recipients with "any significant prior affiliation" to a party "that would raise substantial questions about whether the award was made on the merits." Opinion 34. And it held that a court could certify a (b)(3) class even without any possibility of compensating class members. Opinion 26-27.

Judge Bade, concurring, felt "constrained" to affirm the settlement based on precedents of this Court declaring *cy pres* to be an "indirect benefit" for the class. Concurrence 41-42. But, as a matter of first principles, Judge Bade doubted that conclusion, finding "a compelling argument that class members receive no benefit" from *cy pres* distributions. Concurrence 43-44. Judge Bade noted that the settlement arguably benefited opt-outs and non-class members more than class members. Concurrence 43-44. The concurrence recommended that the full Court "reconsider the practice of *cy pres* awards." Concurrence 45.

Argument

I. The panel's definition of "feasibility" contradicts the law of other circuits and Rule 23(e)(2)(C)(ii).

"[A] class settlement generates property interests…. The settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members. *Klier*, 658 F.3d at 474. "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." *Id.* at 475; *accord BankAmerica*, 775 F.3d at 1064-66; *Pearson*, 772 F.3d at 784.

Cy pres invites "serious ethical, procedural, and constitutional problems." Concurrence 44-45. Though class counsel's fiduciary duty runs to the class, if courts treat $1 million of *cy pres* distributions as equivalent to $1 million in distributions to the class, attorneys will often prefer to give money to *cy pres*. It's unlikely any of the 600,000 class members receiving $10 checks will send a thank-you note or a Christmas card, but with *cy pres* distributions, there's networking and public gratitude and often photographed ceremonies with oversized checks. *E.g.*, Florida Bar Foundation (@FL_Bar_Found), TWITTER (Jun. 8, 2018, 12:40 PM), *archived at* http://archive.li/h0YaV; *see also* Chris J. Chasin, *Modernizing Class Action Cy Pres Through Democratic Inputs: A Return to* Cy Pres Comme Possible, 163 U. PENN. L. REV. 1463, 1484 (2015). 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 and class recovery—which is why the 2018 amendments creating Rule 23(e)(2)(C)(ii) require

courts to consider the "effectiveness" of distribution. *Cf. Briseño v. Henderson*, 998 F.3d 1014 (9th Cir. 2021). Class counsel thus has the power to throttle the claims process (or agree to preclude any claims process as they did here) in settlement negotiations to increase 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"). To safeguard vulnerable class members, we need bright-line rules. Though Lowery raised the Rule 23(e)(2)(C)(ii) problem, the panel does not mention the rule or the requirement that courts consider "effectiveness" of distribution.

The panel here, however, affirmed the district court's and reaffirmed *Google Referrer*'s conclusion that feasibility of class payments is determined by whether the net fund can be practicably distributed among ***all*** of the class members. Opinion 22. This is the wrong standard—and a test that will almost always permit parties to choose to ignore the class entirely, even in much larger settlements

Though the panel thought Lowery cited "no authority" to the contrary, he did. In *Pearson*, the class comprised twelve million 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 claims fund. *Id.* 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 nine cents per class

member. Still, *Pearson* held the *cy pres* inappropriate as a matter of law. *Id.* at 784. 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 the settlement must pay those class members before any money goes to *cy pres*. In contrast, the panel's holding here dictates 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*.

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.

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 an estimated 500,000 persons and only $195,000 was available for distribution. 318 F.3d at 954 n.23, 955.[2]

Here, there was undisputed evidence below that the net settlement was large enough to have been distributed to a typical percentage of claiming class members.

[2] Perhaps the panel felt constrained by *Lane v. Facebook, Inc.* on the meaning of feasibility. Opinion/Concurrence 21, 25, 39 (citing *Lane*). But *Lane* contains no such holding. The *Lane* appellants did not contend that it was feasible to distribute the settlement proceeds, 696 F.3d at 821, and *Lane*'s unexamined acceptance of litigants' agreement on a point of law does not create binding precedent. *E.g.*, *Medina-Rodriguez v. Barr*, 979 F.3d 738, 747 (9th Cir. 2020). If *Lane* did dictate infeasibility, it should also be overturned *en banc*.

2-ER-117; 2-ER-143-45. *Fraley v. Facebook* demonstrates as a factual matter that settling parties can feasibly distribute small funds to large unidentified classes through a claims process. 966 F. Supp. 2d 939 (N.D. Cal. 2013). The *Fraley* class was larger than this one, but, though the settlement fund was less than $0.20 per capita, the parties created a claims process that distributed $15/claimant to over 600,000 claimants. A similar claims rate here with *pro rata* distribution would distribute nearly $40 per claiming class member.

Carrier IQ also approved a privacy class-action settlement that distributed a net settlement fund of $5.9 million among a 30-million-member class. There, "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." *In re Carrier IQ, Inc. Consumer Priv. Litig.*, No. 12-md-02330, 2016 WL 4474366 at *2 (N.D. Cal. Aug. 25, 2016). 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.

And the claims process in *Fraley* permitted class members to self-identify by attesting that their name and likeness "may have been displayed in a Sponsored Story shown to my Facebook Friends" even though claimants could not know their class membership with certainty. No. 11-cv-01726, Dkt. 235-6 at 4 (N.D. Cal. Oct. 5, 2012). So too in *In re Google Plus Profile Litigation*, No. 18-cv-06164, 2021 WL 242887 (N.D. Cal. Jan. 25, 2021), where the class was defined as those Google+ account holders who had their non-public profile information exposed as a result of software bugs. But that exposure depended on which applications others in one's friends circle had authorized—information that claimants could only speculate about. *See Google Plus*,

Dkt. 6 at 7. And, contrary to the panel's incorrect supposition (Opinion 23 n.5), Google in that case admitted it didn't possess "data that would allow it to specifically identify each person that qualifies as a member of the class." *Google Plus*, Dkt. 70 at 22.

Because the question is one of feasibility, showing "direct payments to class members in analogous cases involving very large classes" *does* establish an abuse of discretion. *Contra* Opinion 23 n.5. In every other circuit, *cy pres* is permissible ***only*** if some distribution to the class is not feasible under *Klier*, *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* could resolve it.

Simply put, the panel's definition of "distributable" would permit ***most consumer class-action settlements*** to completely bypass payments to class members. Nine-digit antitrust or data breach class settlements involving much of the country's adult population could ignore class relief simply because recovery is *de minimis* on a *per capita* basis. Conscientious decisions refuse to allow premature *cy pres*. *See, e.g.*, *Fraley*; *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 330 (N.D. Cal. 2018) (Koh, J.) (describing how court prompted a settlement amendment to safeguard the $115 million fund for the 79 million class members); *Connor v. JPMorgan Chase Bank, N.A.*, No. 10-cv-1284, 2021 WL 1238862, 2021 U.S. Dist. LEXIS 65011, *3 (S.D. Cal. Apr. 2, 2021) ($8.19 distributions/claimant are "non-*de minimis*"). But other decisions too readily accept contentions that *cy pres* is appropriate because distributing $28/class member is

too "burdensome and inefficient" or because $9.71 checks are "*de minimis*." *See respectively Beaver v. Tarsadia Hotels*, No. 11-cv-01842, 2020 WL 1139662, 2020 U.S. Dist. LEXIS 40415, at *7 (S.D. Cal. Mar. 9, 2020), *and Knell v. FIA Card Servs, N.A.*, No. 12-cv-00426, 2020 U.S. Dist. LEXIS 217452, at *4 (S.D. Cal. Nov. 19, 2020); *see also In re EasySaver Rewards Litig.*, 906 F.3d 747, 761 (9th Cir. 2018) ($3M to over a million non-claimants).

Such incongruous results arise from the panel's interpretation of "distributable" as meaning something other than the conventional "able to be distributed." To prevent additional confusion and distortion of the class device, "it is time" for the Court to "reconsider the practice of *cy pres* awards." Concurrence 45.

II. The panel's rejection of the "significant prior affiliation" test creates a circuit split and tension with Circuit precedent.

The panel affirmed the district court's rejection of the standard for approving *cy pres* recipients set by the ALI: *cy pres* is impermissible if "any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the award was made on the merits." *ALI Principles of the Law of Aggregate Litigation* § 3.07 *comment (b)*. Had the court applied this standard, it would have rejected most of the *cy pres* recipients that received settlement funds here because of such prior affiliations. More broadly, its failure to adopt this standard puts this Circuit's law in conflict with the Third Circuit and muddles its own *cy pres* precedent.

The "significant prior affiliation" standard protects class members from the magnified incentive of class counsel to prefer *cy pres* to the class. If courts permit class counsel to favor former co-counsel and supporters and organizations defendants have long-favored over potential recipients with which it has no prior affiliation, the natural

inclination is for class counsel to do so even against the best interests of the class. Jeremy Kidd & Chas Whitehead, *Saving Class Members from Counsel*, 58 SAN DIEGO L. REV. 579, 609-11 (2021). Thus, the Third Circuit explicitly adopted the ALI standard in *Google Cookie*. 934 F.3d at 331.

The panel rejected the "significant prior affiliation" standardbecause the Court has "never adopted" the test and "no binding authority" compelled it. Opinion 34. *En banc* hearing would give the Court an opportunity to adopt the standard, and thereby mend the circuit split while protecting class members from the human impulse to inappropriately favor those with whom class counsel is most familiar.

En banc hearing would also give the Court an opportunity to clarify the Circuit's *cy pres* standard, as the panel's decision creates tension with Circuit precedent. Cases like *Nachshin* forbid these sorts of conflict of interest, noting, for example, the problem of choosing organizations already favored by the lawyers and judges. 663 F.3d at 1039. While the panel distinguished the holding in *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1167 (9th Cir. 2013), as involving state law governing ethics where the interests of class representatives diverged from the interests of the class, that view of the holding is unduly narrow. Lowery does point to "such improper incentives here." *See supra* 4, 7; *contra* Opinion 35. And the panel provides no reason that class counsel's responsibility "does not permit even the appearance of divided loyalties of counsel," per *Radcliffe*, when it comes to incentive awards but not in the *cy pres* context. Opinion 34. *Lane* did not directly address this question. 696 F.3d 811 (addressing impropriety of *defendant's* employee sitting on the board). But to the extent *Lane* did, this Court should grant *en*

banc review to reconcile the internal conflict with *Radcliffe*, as well as the circuit split with *Google Cookie*.

III. The panel upsets Circuit precedent by permitting a Rule 23(b)(3) class certification even when there is no possibility of compensating class members.

When individual questions preclude the possibility of class compensation such that "the principal, if not the only, beneficiaries to the class action are to be the attorneys for the plaintiffs and not the individual plaintiffs," a (b)(3) class cannot be certified. *Hotel Tel. Charges*, 500 F.2d at 89-92. The panel accepts the major premise (that there must be "the possibility of meaningful relief" when certifying a class) but denies the minor premise (that *cy pres* is not meaningful relief). Opinion 26.

That holding is inconsistent with *Hotel Telephone Charges*, which rejects *cy pres* (in the form of fluid recovery) as a workaround even though it "will serve to 'punish' and 'deter' [legal] violations." 500 F.2d at 92. ("Fluid recovery" is *cy pres* that distributes money to those doing future business with the defendant. After the term "fluid recovery" encountered a hostile reception from federal courts, the plaintiffs' bar rebranded it as "*cy pres*" with payments to third-party organizations rather than to future consumers. *See* Redish, 62 FLA. L. REV. at 662-63; *Six Mexican Workers v. Ariz. Citrus Growers*, 901 F.2d 1301, 1305-06 (9th Cir. 1990) (using two terms interchangeably).) "[A]llowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights." *Id.* at 90. The panel does not grapple

with this aspect of *Hotel Telephone Charges*. Opinion 27 n.7.[3] Nor does it grapple with Justice Thomas's conclusion that "*cy pres* payments are not a form of relief to the absent class members and should not be treated as such." *Frank*, 139 S. Ct. at 1047.

Judge Bade provides additional reasons why *cy pres* provides no benefit to class members. Concurrence 42-44. Not least among them: "*cy pres* settlements arguably benefit opt-outs more than class members because out-outs reap any positive externalities of the settlement provisions while retaining the value of the claims that the settlement extinguished for class members." *Id.* at 43-44.

Put simply, no class complaint includes a request for *cy pres* in its prayer for relief; it is not a cognizable form of class relief. *Frank*, 139 S. Ct. at 1047 (Thomas, J., dissenting). The Court should heed Judge Bade's call to reconsider the pressing and recurrent question of *cy pres* remedies in class action settlements. *E.g.*, *Nunez-Reyes v. Holder*, 646 F.3d 684, 688 (9th Cir. 2011) (*en banc*) (revisiting legal question raised by panel concurrence).

Conclusion

The Court should grant rehearing *en banc*.

[3] *Google Referrer* incorrectly construes *Hotel Telephone Charges* as "not involv[ing] a *cy pres* distribution." 869 F.3d at 743 n.3.

Dated: January 10, 2022

Respectfully submitted,

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Certificate of Compliance
Pursuant to Rules 35-4 and 40-1 for Case Number 20-15616

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

Contains 4,183 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 January 10, 2022.

/s/ Theodore H. Frank

Certificate of Service

I hereby certify that on January 10, 2022, 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