No. 20-15616

IN THE

United States Court of Appeals for the Ninth Circuit

In re: GOOGLE INC. STREET VIEW ELECTRONIC COMMUNICATIONS LITIGATION,

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BENJAMIN JOFFE; LILLA MARIGZA; RICK BENITTI; BERTHA DAVIS; JASON TAYLOR; ERIC MYHRE; JOHN E. REDSTONE; MATTHEW BERLAGE; PATRICK KEYES; KARL H. SCHULZ; JAMES FAIRBANKS; AARON LINSKY; DEAN M. BASTILLA; VICKI VAN VALIN; JEFFREY COLMAN; RUSSELL CARTER; STEPHANIE CARTER; JENNIFER LOCSIN,
Plaintiffs - Appellees,

DAVID LOWERY,
Objector - Appellant,

v.

GOOGLE, INC.,
Defendant - Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 3:10-cv-2184-CRB

BRIEF OF AMICI CURIAE U.S. PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND AND THE NATIONAL CONSUMER LAW CENTER IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amici curiae United States Public Interest Research Group Education Fund, Inc. and the National Consumer Law Center are non-profit entities that do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in them.

/s/ Michael Landis
Michael Landis

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INTERESTS OF AMICI CURIAE[1]

United States Public Interest Research Group Education Fund, Inc. ("U.S. PIRG Education Fund") is an independent 501(c)(3) organization that works for consumers and the public interest. Through research, public education, and outreach, it serves as a counterweight to the powerful special interests that threaten our health, safety, and well-being. U.S. PIRG Education Fund regularly participates as amicus curiae in cases that will have a substantial impact on consumers and the public interest, such as this one. U.S. PIRG Education Fund has been a recipient of court-awarded cy pres funds as part of residual class action funds, and it uses these awards to protect the interests of the public and consumers through research, policy analysis, education, and advocacy.

The **National Consumer Law Center** is a non-profit research and advocacy organization that focuses on the legal needs of low-income, financially distressed, and elderly consumers. Founded at Boston College Law School in 1969, NCLC is a 501(c)(3) and legal aid organization that

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), counsel for amici curiae certify that all parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for amici curiae state that no counsel for a party authored this brief in whole or in part, and no person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

employs many attorneys and advocates with twenty or more years of specialized consumer law expertise.

NCLC has been a leading source of legal and public policy expertise on consumer issues for Congress, state legislatures, agencies, courts, consumer advocates, journalists, and social service providers for more than fifty years. NCLC is the author of a twenty-one-volume Consumer Credit and Sales Legal Practice Series. NCLC has been a recipient of court-awarded cy pres funds as part of residual class action funds and uses these awards to protect the rights of economically vulnerable consumers through education, publications, policy analysis, and advocacy.

SUMMARY OF ARGUMENT

Amici submit this brief to assist the court by providing their unique perspective (based on years of experience) on the importance of class actions and the cy pres doctrine for the effective and meaningful enforcement of consumer protection statutes, and their importance to low-income consumers, in particular.

Consumers in the United States today are engaging more frequently in an increasingly complex marketplace. Companies that are national or international in scope commonly use standardized forms, sales methods, and contracts of adhesion. Class action litigation was developed, in part, to address challenges inherent in providing a remedy for the abuse of consumers that is widespread but perhaps relatively minor on an individual level. Class actions continue to be an essential tool to help protect consumers in today's modern marketplace.

The remedy of cy pres serves an important role in consumer protection class actions. When direct distribution to class members of all or part of a monetary recovery is infeasible, the cy pres doctrine provides courts with an indispensable mechanism for distributing these funds in a way that benefits absent class members while also effectuating the disgorgement and deterrence goals of consumer protection statutes. To

prevent possible abuse, comprehensive and effective guidelines have been developed—chief among them is the American Law Institute's Principles of the Law of Aggregate Litigation—to govern the use of cy pres awards, thereby allowing them to prove a workable and advantageous distribution option for over a half-century.

In deciding this case, the court should be mindful of the possible negative impact that unduly hampering class actions would have on consumers, and particularly low-income consumers, in this circuit. Class actions are often the most effective—and, very often, the only—means of vindicating the rights of consumers as enshrined in consumer protection statutes. In addition, the court should be wary of unduly circumscribing the use of cy pres distributions in class action settlements in this circuit when direct distribution to class members is infeasible because they are the next-best use of the funds recovered from such lawsuits and provide indirect benefit to absent class members.

ARGUMENT

I. Prohibiting class actions simply because direct distribution is infeasible would disserve the very purposes of the consumer protection statutes upon which these suits are often premised.

Class actions remain an indispensable mechanism for the effective enforcement of consumer protection statutes and are of particular import

for safeguarding the rights of low-income consumers. When the funds recovered from such lawsuits cannot be directly distributed to class members, the cy pres doctrine provides the settling parties and the court with a framework for distributing them in a way that benefits absent class members while also serving the goals of the consumer protection statutes at issue in the litigation.

In assessing the value of a given class action lawsuit, Objector David Lowery focuses almost exclusively on one criterion: monetary relief awarded directly to class members. He opens his brief by asserting that the settlement at issue in this case "pays $13 million to the attorneys and to third-party *cy pres* beneficiaries . . . but nothing to class members except injunctive relief equally applicable to class members and non-class members alike." Opening Brief of Appellant David C. Lowery ("Lowery Br.") at 4-5, Dkt. 17. Lowery argues that a class action cannot be a worthwhile—let alone the superior—method of litigation if "a *cy pres*-only settlement is necessary because it would be too costly to distribute the settlement funds to individual class members." Lowery Br. at 17. Accordingly, rather than permit a next-best use of funds, he argues that class certification is improper if a court were to find that direct distribution to class members is infeasible. *Id.* at 36-39.

If restitution were class actions' sole purpose, Lowery's arguments might be availing. But it is not. Lowery ignores the "policy at the very core of the class action mechanism," which is to "overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997) (internal quotations and citations omitted). "A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Id.*

In other words, Lowery's approach would prohibit class action lawsuits in precisely those cases where they have been deemed essential: cases involving very small claims for individuals that, in the aggregate, involve substantial sums that will otherwise remain in the hands of the wrongdoers. Class actions—including those that involve cy pres awards—are, therefore, the superior method of litigation for the enforcement of consumer protection statutes involving small individual damages. *See* Section II, *infra*.

Lowery's myopic focus on individual recovery also overlooks—or perhaps willfully ignores—the other well-established policy purposes of the consumer protection statutes that often form the basis of these suits:

enhancing the fundamental fairness of the marketplace, deterring illegal conduct, and disgorging ill-gotten gains. When direct distribution to class members is infeasible, distributing cy pres awards to organizations working in the field of consumer protection indirectly benefits class members and better effectuates these purposes than do other options for the distribution of residual funds.

II. Class actions—including those involving cy pres awards—often are superior to alternative methods of litigation for protecting the rights of low-income consumers.

Class actions are critical in labor, civil rights, and many other contexts, but consumer claims provide perhaps the quintessential example of large-scale illegal profit-seeking behavior by companies that nevertheless does not financially harm any individual enough to induce litigation in the absence of the class action device. As one federal court put it, "[c]lass actions are often the most suitable method for resolving suits to enforce compliance with consumer protection laws because the awards in an individual case are usually too small to encourage the lone consumer to file suit." *Carr v. Trans Union Corp.*, 1995 U.S. Dist. LEXIS 567 (E.D. Pa. 1995) (class certified based on allegation of misleading debt collection notices); *see also Amchem Prods.*, 521 U.S. at 617 (discussing "negative value" suits).

Compounding the necessity of class actions to enforce many violations of consumer protection statutes is the fact that low-income consumers, who are disproportionately the victims, are less able to bring suits themselves. Thus, class action lawsuits are indispensable tools for protecting the interests of these consumers. And, indeed, they are the superior method of litigation in many cases.

When individual awards for violations of consumer protection statutes are not only so small that they do not provide an incentive for individual action, but are so small that they would be swallowed by the costs of distributing them—in other words, in those circumstances in which the cy pres remedy may be triggered—the need for class actions to protect consumers' rights only is heightened.

A. Often, the "alternative" to class treatment for small consumer claims is no enforcement at all.

In theory, one benefit of the class procedure is its efficiency: adjudication of a properly constituted class action saves the resources of courts and parties by permitting an issue affecting numerous individuals to be litigated at once. In reality, a consumer class action rarely is filed to supplant numerous individual lawsuits. Rather, class actions are often the only economically viable way to provide legal representation for clients—particularly economically disadvantaged clients—with relatively small

claims. As was noted in *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004):

> The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30. But a class action has to be unwieldy indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all.

Indeed, for many consumers, entry into court itself proves an insurmountable barrier to vindication of their rights. For members of the armed services, for example, the realities of deployments, transfers out of the state where the courts have jurisdiction, and restrictions on their time often render the doors of small-claims courts (where these suits would likely be filed) effectively closed to them. And many low-income individuals cannot afford to forgo a day's wages to recover a lesser sum taken from them.

A class action—including one involving the prospect of a cy pres award because settlement funds cannot otherwise be economically distributed—is, therefore, the only realistic alternative, and it will nearly always be superior to no litigation at all. For example, consumer class actions for violations of the Servicemember's Civil Relief Act (SCRA) have proved an important tool for enforcing the economic rights of military

servicemembers. *See, e.g.*, *Olson, et al. v. Citibank, N.A.*, 10-cv-2992, 2012 WL 1231787 (D. Minn. Apr. 12, 2012) (preliminarily approving settlement agreement for monetary and injunctive relief in a class action alleging illegal mandatory forbearance on servicemember student loans under the SCRA). More broadly, without the legal restraint imposed by a lawsuit, a defendant that has wrongly acquired a sizeable windfall by illegally obtaining small sums of money from a large group of people will continue doing business in the future as in the past.

B. Class treatment is also superior to individual consumers pursuing claims in small-claims court.

Even if some individual claims are filed in small-claims court—which will often be without the assistance of counsel—companies are apt to simply treat these small individual judgments as a cost of doing business. Companies may well continue to engage in the same illegal conduct with their other customers because there is no economic incentive to do otherwise.

On the other hand, class-wide judgment disgorges these unlawful gains, eliminating the profit-motive for the misconduct. Moreover, even the mere possibility of class-wide judgment can deter defendants from transgressing legal boundaries, before their doing so can harm consumers.

C. Class actions are superior to punitive damage awards in small-claims consumer protection cases.

If small compensation class actions are discouraged, the only realistic alternative for achieving the deterrence goals of consumer protection statutes will be to seek large punitive damages awards on behalf of a few consumers who, while litigating relatively small individual claims, can prove willful, widespread misconduct by defendants. *See, e.g.*, *Nat'l Ass'n of Consumer Advocates*, Standards and Guidelines for Litigating and Settling Consumer Class Actions, 6 (3d ed. 2014), available at https://www.consumeradvocates.org/sites/default/files/NACA%20Class%20Action%20Guidelines%20Updated%20May%202014.pdf.

This alternative is second-rate. First, the heightened "willful" standard is a more difficult and costly one to prove. More important, it frequently fails to capture injuries that businesses cause through recklessness or negligence. Finally, even in those cases where punitive damages successfully extract large payments from defendants, using class actions to distribute cy pres awards is a better societal outcome. By distributing funds to appropriate charitable or public service organizations serving consumers in ways that are closely related to the underlying claims of the case, cy pres awards go one step further than punitive damages awards. They help to fund efforts to prevent the same harms from being

perpetrated on future, similarly situated consumers, instead of providing relief merely to the few consumers who prevailed in their individual punitive damages claims.

III. Cy pres distribution of residual class action funds best effectuates the purposes of consumer protection statutes.

Consumer protection laws are meant to ensure that the choices given to consumers in the marketplace are unimpaired by fraud or the withholding of material information, and that the power differential between consumers and commercial enterprises is equalized. *See* N. Averitt & R. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 Antitrust L.J. 713 (1997). Consumer protection laws seek to improve the functioning of the marketplace by making it unprofitable to operate dishonestly. *Id.* And, of course, consumer protection laws seek to compensate consumers for the wrongs inflicted upon them.

Making all class members whole is the optimal outcome of any class action. Period. This case, however, involves circumstances in which distribution to class members would not be possible. *See* Answering Brief of Defendant-Appellee Google, Inc. ("Google Br.") at 23-37, Dkt. 31; Plaintiff-Appellees' Answering Brief ("Plaintiff-Appellees' Br.") at 17-27, Dkt. 33. The three third-party options usually considered are: (1) escheat to the state, (2)

reversion to the defendant, and (3) cy pres distribution. *See* H. Newberg, 2 Newberg on Class Actions §§ 10.13-10.25 (3d ed. 1992).

In consumer protection class actions, the underlying statutes' aims of promoting fundamental fairness in the marketplace, deterrence of fraud, and disgorgement of illegally obtained profits must be weighted heavily in making this determination. Cy pres awards, when the doctrine is applied as directed, are that next-best option. They benefit absent class members while also fully effectuating consumer protection statutes' deterrence and disgorgement goals.

A. Escheat falls short by failing to serve the consumers harmed by the consumer statute violation.

The escheat option (i.e., transfer of abandoned property to the state) generally fails to serve consumer protection statutes' goals to the fullest extent possible. Escheat can be broken into two categories: general and earmarked.

General escheat has been appropriately deemed "the least focused compensation to the class." *State of California v. Levi Strauss & Co.*, 41 Cal. 3d 460, 475 (Cal. 1986). This option holds little promise of benefiting absent class members because the funds may be used for virtually any governmental purpose, with no attempt to realize the objectives of the underlying substantive law. *Id.* Moreover, it is lacking in deterrent power

because it does nothing to support the efforts of those working to prevent similar conduct.

Earmarked escheat refers to an award of the funds toward a specific government agency in a position to assist citizens similar to the injured class. If used properly, this option can benefit consumers greatly and satisfy the deterrence and disgorgement goals with low administrative costs. It has been looked upon favorably, but has rarely been applied. *See, e.g.*, *Market St. Ry. Co. v. Railroad Commission*, 28 Cal. 2d 363 (Cal. 1946). The reluctance of courts to rely upon earmarked escheats stems from concerns that the funds will be used for agency purposes unrelated to the subject of the lawsuit and, therefore, not benefit class members. *See* McCall, Sturdevant, Kaplan and Hillebrand, *Greater Representation for California Consumers: Fluid Recovery, Consumer Trust Funds, and Representative Actions*, 46 Hastings L.J. 797, 809 (1995).

B. Reverting funds to the defendant frustrates rather than serves consumer protection goals.

Reversion of residual funds to the defendant is, of course, rarely an appropriate option, and Lowery does not propose it—at least not directly. Reversion is inappropriate because it neither compensates class members nor satisfies consumer protection goals. Rather it allows the defendant, the alleged wrongdoer, to keep the fruits of its wrongdoing. *See In re*

Motorsports Merch. Antitrust Litig., 160 F. Supp. 2d 1392, 1394 (N.D. Ga. 2001); *see also In re Wells Fargo Secs. Litig.*, 991 F. Supp. 1193, 1196 (N.D. Cal. 1998); Am. Law. Inst., Principles of the Law of Aggregate Litigation § 3.07 cmt. B (2010) (rejecting reversion because it would "undermine the deterrence function of class actions"). Reversion is only appropriate in limited cases where the defendant acted in good faith, and/or when punitive damages are disallowed pursuant to statute. *See, e.g.*, *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807 (5th Cir. 1989) (an example of appropriate reversion in a Title VII action).

Curtailment of class action certification along the lines that Lowery proposes would not be reverting funds to defendants but rather never requiring defendants to hand over their ill-gotten gains in the first place. This is because the likely consequence of discouraging these actions, as discussed in section II.A., *supra*, is to discourage the only realistic form of litigation for challenging this misconduct when it inflicts injuries to individuals too small to rationalize non-collective action.

C. Cy pres distribution often best effectuates the purposes of consumer protection statutes.

The final option is cy pres distribution, the primary purpose of which is to serve as a deterrent to would-be wrongdoers and to enable the effective enforcement of the policies underlying the cause of action. It does so by

helping to fund organizations that work to prevent the same wrongs from being perpetrated on future consumers and redressing those wrongs when they do, inevitably, recur.

Not only does Lowery incorrectly discount this option, he unnecessarily vilifies it. Rather than permit funds to be distributed to entities serving the relevant interests of class members, he argues that if a court were to find that distribution to class members is infeasible, then no class should be certified in the first instance. But, as discussed throughout this brief, restitution is not the sole aim of class actions or consumer protection statutes, and cy pres awards can help realize and amplify the various other benefits that consumer protection class actions achieve.

Cy pres distribution often provides the ideal solution for the distribution of non-distributable funds because it provides a mechanism through which absent class members receive indirect benefit, and it deters future misconduct and disgorges wrongful gains. *See Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (noting that the cy pres doctrine is utilized to prevent defendants "from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement . . . to the class members").

Moreover, to prevent possible abuse, appropriate guidelines have been put in place to govern the use of cy pres awards, allowing these awards to prove a workable and advantageous distribution option for over a half-century. Appellate courts overwhelmingly have adopted section 3.07 of American Law Institute's Principles of the Law of Aggregate Litigation,[2] which provides guidelines on the limited circumstances where cy pres distribution is appropriate, including standards regarding appropriate recipients, and neither Congress nor the Rules Advisory Committee have found reason to diverge from these well-functioning principles. In consumer protection class actions, in particular, finding a worthy cy pres recipient—namely, one who will promote the interests of the class of consumers and the purposes of the statutory prohibitions underlying the litigation—is made easier by the array of reputable organizations working in the consumer protection space.

For all of these reasons, allowing residual funds to be distributed via cy pres awards when direct distribution is not possible fulfills these funds' next-best use.

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[2] NCLC participated in the drafting of—and adheres to—the National Association of Consumer Advocates' (NACA) Standards and Guidelines for Litigating and Settling Consumer Class Actions. Guideline 7 of NACA's guidelines closely follows section 3.07 of ALI's Principles of the Law of Aggregate Litigation.

CONCLUSION

U.S. PIRG Education Fund and the National Consumer Law Center, on behalf of the low-income consumers who are its clients, respectfully urge the court to affirm the judgment of the district court granting final approval of the parties' class settlement agreement.

Dated: October 20, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Federal Rule of Appellate Procedure 29(a)(5) and contains 3,484 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f). This brief's typeface and type style comply with Federal Rule of Appellate Procedure 32(a)(5), (6).

Dated: October 20, 2020

/s/ Michael Landis
Michael Landis

CERTIFICATE OF SERVICE

I certify that on October 20, 2020, I electronically filed the foregoing brief of *Amici Curiae* with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Michael Landis
Michael Landis