No. 19-4099

United States Court of Appeals for the Sixth Circuit

IN RE NATIONAL PRESCRIPTION OPIATE LITIGATION

CITY OF NORTH ROYALTON, OHIO; CITY OF EAST CLEVELAND, OHIO; CITY OF MAYFIELD HEIGHTS, OHIO; CITY OF LYNDHURST, OHIO; CITY OF HURON, OHIO; AND CITY OF WICKLIFFE, OHIO,
Plaintiffs – Appellants,

ALBANY COUNTY, NY, NEGOTIATION CLASS'S CLASS REPRESENTATIVES; CO-LEAD NEGOTIATION CLASS COUNSEL; CO-NEGOTIATION CLASS COUNSEL,
Plaintiffs – Appellees,

v.

PURDUE PHARMA L.P., ET AL,
Defendants.

On Appeal from the U.S. District Court for the Northern District of Ohio,
No. 1:17-md-02804-DAP

BRIEF FOR APPELLANTS

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a)(1) and Sixth Circuit Rule 34(a), Appellants respectfully request oral argument. The appeal raises important issues, with far reaching implications, as to whether the district court's certification of an admittedly novel "negotiation class" complies with Rule 23 of the Federal Rules of Civil Procedure and the U.S. Constitution. Oral argument would aid the Court in its decisional process.

INTRODUCTION

Dissatisfied with the class action rules in the Federal Rules of Civil Procedure, the district court below invented "a new form of class action entitled 'negotiation class certification'" based on an unpublished law review article written by his Special Master and court-appointed expert. Memorandum Opinion Certifying Negotiation Class, RE 2590 ("Opinion"), PageID# 413579 & n.1 (citing Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Large Claim Class Actions* (Duke Law Sch. Pub. Law & Legal Theory Series No. 2019-41, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3403834). The question in this appeal is whether the court exceeded its authority in inventing this new form of proceeding.

The district court's principal justification for displacing the ordinary class action rules was that the "Defendants have insisted throughout on the need for a 'global settlement.'" Opinion, PageID# 413579. This demand, the court found, posed an "obstacle" to a "standard settlement class action," because the Rules require allowing settlement class members to "opt out of the class after the settlement is reached." *Ibid*. This aspect of the Rule was objectionable because it posed the risk that "many of the[] Plaintiffs could opt out," depriving Defendants of the global settlement they desired. *Ibid*.

The court recognized that the Rules provide an alternative means for fixing the size of the class at the outset—certifying a "normal class action geared toward trial." Opinion, PageID# 413580. Under the Rules, once satisfied that the class meets the general requirements for class certification in Rules 23(a) and (b)(3), the court would order notice to the class and set a time for class members to exercise their right to opt out. Fed. R. Civ. P. 23(c)(2). Those who did not opt out would be bound to the eventual disposition of the case, whether by litigation or settlement. And Defendants would have what they claimed to need—a "fix[ed] class size" that would "provide the Defendants a sense of the precise scope of the group with whom they are negotiating." Opinion, PageID# 413580.

Of course, one consequence of certifying a "normal class action geared for trial" would be that if the negotiations failed, the case would proceed to litigation as a class action. The district court apparently viewed this consequence as objectionable as well, although it never explained why. Perhaps the court worried that Defendants would resist all-purpose classification, concerned about having to litigate the case on a class-wide basis if the settlement talks failed and knowing that this prospect would strengthen the Plaintiffs' hand in negotiations.

For whatever reason, the court viewed the Rules as insufficiently accommodating to Defendants' needs. It therefore invented the "negotiation class action," which dispensed with the aspects of the traditional rules the court viewed as

impeding a settlement and substituted a suite of what the court believed were acceptable alternative protections for class members. Opinion, PageID# 413582-4135884.

While Appellants appreciate the district court's desire to facilitate a fair settlement of the claims in this case, we are constrained to object that the district court exceeded its authority. The problem is not simply that the court surpassed the degree of "judicial inventiveness" allowed in administering the Rules. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). The problem is that the innovations are designed to lure Defendants to the negotiating table by offering them concessions that uniformly disadvantage the class. By stripping Plaintiffs of any right to litigate their claims collectively, the court "disarmed" class negotiators, leaving them unable to "use the threat of litigation to press for a better offer." *Id.* at 621. The Order simultaneously eliminates the Rules' principal protection against inadequate settlements negotiated by representatives so disarmed, precluding class members from reviewing the final settlement before deciding whether to opt out of the class. The Order thus gives class members the worst of both worlds, in order to give Defendants the best, in the hopes of enticing Defendants into a settlement.

If that were not bad enough, the court failed to ensure the adequate representation that Rule 23 and the Due Process Clause require, allowing a single set of named plaintiffs to represent a heterogeneous class with conflicting interests,

with counsel who face surpassing pressure to settle the case at all costs. The constitutional doubt raised by such an Order provides a final, compelling reason to vacate the decision below and remand for proceedings consistent with the Rules as enacted.

STATEMENT OF JURISDICTION

All federal cases concerning the improper marketing of and inappropriate distribution of various prescription opiate medications into state and local jurisdictions across the country were consolidated at the district court below into a multidistrict litigation pursuant to 28 U.S.C. § 1407. The district court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331.

On September 11, 2019, the district court certified a "negotiation class." Opinion, PageID# 413617. Appellants timely filed a Rule 23(f) petition for permission to appeal on September 25, 2019, *see* Fed. R. Civ. P. 23(f), which this Court granted on November 8, 2019. 19-306 Doc. 22-2 at 2. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1292(e) and Fed. R. Civ. P. 23(f).

STATEMENT OF ISSUES FOR REVIEW

1. Is the district court's certification of this "negotiation class" permitted by Fed. R. Civ. P. 23?
2. Is the district court's certification of this "negotiation class" consistent with the Due Process Clause?

STATEMENT OF THE CASE

1. This appeal arises from the opioid epidemic that has ravaged every corner of the nation, from its largest cities and counties to some of its most remote and least populated towns and villages. Jurisdictions have responded to the crisis in a wide variety of ways, often at great financial cost. Over the past few years, thousands of local governments of every size and description have sought reimbursement for those costs, as well as demanded other remedial actions and forward-looking reforms from the drug manufacturers, distributors, and pharmacies that created and fanned the epidemic through their unlawful and irresponsible conduct.

2. In December 2017, the Judicial Panel on Multidistrict Litigation transferred all opioid-related litigation pending in federal courts throughout the United States—more than 2,000 individual suits so far—to the district court below. Opinion, PageID# 413578. In addition, many other state and local governments are prosecuting similar opioid-related suits in state courts throughout the nation. *Id.*, PageID# 413579.

From the outset, the district court "encouraged the parties to settle," having determined that settlement is "especially important" in this particular case to "expedite relief to communities so they can better address this devastating national health crisis." Opinion, PageID# 413579. The court thus appointed a Special Master to oversee extensive settlement negotiations. *Ibid.*

In September of last year, in the hopes of advancing the settlement negotiations, the district court certified what it recognized was a "new," "novel," and controversial form of class action, which it called a "negotiation class" action. Opinion, PageID# 413579-413580. The court explained that the negotiation class action would proceed in five stages:

First, the court accepted a plan, developed by certain class members and their counsel, for allocating any lump sum settlement. Under that plan, 75% of the lump sum would go to counties based on "three equally-weighted public health factors." Opinion, PageID# 413582. That amount would be split with any plaintiff cities within the county, through negotiations or some process to be developed after the opt-out date. *Ibid*. Another 10% was set aside for attorney's fees, on top of whatever litigation expenses the Special Master might pay from a "Class Members' Special Needs Fund" that would also provide for "the special needs and expenditures of any Class member that are not addressed by the class-wide allocation formula." *Id.*, PageID# 413583. The rest of the terms of any settlement—including the amount of the lump-sum payment, industry reforms, other non-monetary relief, and waivers of liability—would be determined later, as part of the settlement negotiations.

The plan further called for the terms of any settlement to be approved by the class through a voting regime that "is both simple and complex." Opinion, PageID# 413583. The settlement would be put up for "single, simple, yes/no vote." *Ibid.*

Approval would require affirmative votes from "75% of all voting entities by number, 75% of all voting entities by population, and 75% of all voting entities by allocation." *Ibid*. Moreover, "each of those three types of votes will be counted twice, once among jurisdictions that had filed lawsuits as of June 14, 2019 ('litigating entities') and once among jurisdictions that had not ('non-litigating entities')." *Ibid*. The voting percentages required for approval are based on the number of "*voting* entities," such that a small minority of actual class members may constitute the "supermajority" needed for approval if large numbers of class members fail to vote.

Second, the district court would approve the proposal and certify the negotiation class. Unlike an ordinary class, the negotiation class would be limited to negotiating collectively, with no power to litigate as a class if the negotiations failed to produce a settlement. Opinion, PageID# 413583; *see also id*., PageID# 413609 ("[T]he Court makes clear that it has not certified these claims or issues for trial.").

Third, once the class was certified, class members would be given notice of the class action and a summary of the aspects of the settlement set forth in the plan (such as the partial allocation formula), but not the other terms of the settlement that had yet to be negotiated, such as the lump sum, non-monetary relief, and the scope of any waiver of liability. Opinion, PageID# 413584. In contrast to "a standard

settlement class action," in which "the class members can opt out of the class after the settlement is reached," *id*., PageID# 413579, any jurisdiction that did not opt out of the negotiation class within 60 days of its certification would be bound by whatever settlement was later negotiated by class counsel and approved through the plan's voting regime, *id.*, PageID# 413584.

Fourth, at the "conclusion of the opt-out period, with the size of the class set," class representatives would negotiate settlements with any willing Defendants. Opinion, PageID# 413584.

Fifth, any settlement would be submitted for preliminary approval by the court. Class members would then vote on the plan and be allowed to file objections with the court. If the settlement was approved by the class through the approved voting regime, class counsel would move for final approval by the court. The court "would then make the same determination as to the settlement's reasonableness as Rule 23 requires it to do in any class action." Opinion, PageID# 413584 (citing Fed. R. Civ. P. 23(e)(2)).

On the basis of this plan—and over the objections of nearly 40 state Attorneys General, various Defendants, and a number of putative class members (including Appellants, six Ohio cities)—the court certified a sprawling negotiations class of

over 33,000 counties, cities, and other forms of local government. *See* Opinion, PageID# 413578-413582.[1]

3. Appellants Ohio Cities and Defendants-Appellants in No. 19-4097 filed petitions for immediate review under Fed. R. Civ. P. 23(f), which this Court granted over class counsel's vigorous opposition. Review "is warranted," this Court reasoned, because the "question here—whether this class-action procedure is permitted under Rule 23—is both novel and relevant to class litigation in general." 19-306 Doc. 22-2 at 2.

SUMMARY OF ARGUMENT

I. The rules for class actions are developed through a detailed, deliberative process involving "a Rules Advisory Committee, public commenters, the Judicial Conference, [the Supreme] Court, the Congress." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). As a consequence, the Supreme Court has been emphatic that courts "lack authority to substitute for Rule 23's certification criteria a standard never adopted" through the rulemaking process. *Id*. at 622. Yet that is exactly what has happened in this case. Dissatisfied with the existing rules for class actions, the district court struck out on its own, developing a new kind of class action that is not authorized by, and fundamentally conflicts with, the text and design of Rule 23.

[1] The class does not include States, which are pursuing their own litigation in state court. *See* Opinion, PageID# 413580-413581.

A negotiation class is neither a litigation class nor a settlement class, lacking the essential protections of each. Although Rule 23 provides that the representative of a certified class may "sue . . . as representative parties on behalf of all members," Fed. R. Civ. P. 23(a), a representative of a negotiation class is limited to negotiating, not suing, on the class's behalf. And while Rule 23(e) provides a special procedure for cases in which a class is proposed to settle, rather than litigate, a case, the district court's rules for its negotiating class do not comply with Rule 23(e) either. Indeed, the court created the negotiation class device precisely to avoid having to comply with Rule 23(e)'s requirement that settlement class members be afforded an opportunity to opt out after reviewing the final version of the proposed settlement.

In reality, a "negotiation class" is little more than a litigation class or a settlement class stripped of some of its most important protections for class members. That is, a negotiation class is just a litigation class with no power to litigate, or a settlement class deprived of its opt-out rights. Thus, a negotiation class gives Defendants the best, and Plaintiffs the worst, of both worlds. It gives Defendants the benefit of a litigation class by requiring plaintiffs to make an early opt-out decision, thereby fixing the size of the class with which Defendants will negotiate any settlement. But it divests the class representatives of their usual negotiating leverage by depriving them of the right to proceed to litigation as a class if Defendants' settlement demands are unreasonable. Defendants also get the

principal benefit of a settlement class (the right to settle class-wide without having to acquiesce to class litigation if the settlement falls through) while stripping Plaintiffs of the main countervailing protection provided to settlement class members (the right to opt out after seeing the final settlement proposal).

To be sure, the district court purported to provide the class with alternative protections. But the Supreme Court has repeatedly held that courts lack the power to rewrite the Rules, even if they believe that the Rules are not well adapted to the mass litigation the courts face and are convinced that their revision of the Rules is fair. *See, e.g.*, *Amchem*, 521 U.S. at 619-22 (asbestos litigation); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 864 (1999) (same).

Finally, the district court offered no convincing reason why its innovation was even necessary. It said a settlement class was unacceptable because it allowed opt-outs and Defendants needed assurance that any settlement would globally resolve most or all of their exposure. *See, e.g.*, Opinion, PageID# 413579. But the court never explained why there was reason to fear a sizable number of opt-outs in this case, so long as the settlement was fair (which the district court took pains to ensure it would be). Moreover, even if fixing the size of the class early on were essential, the court could have certified an ordinary litigation class, which also requires class members to opt out before negotiations take place. The court offered no reason why that option was unacceptable. To the extent it was simply acceding to Defendants'

preference to face a certified class in negotiations but not litigation (and to enjoy the negotiation advantages of that arrangement), that concession was improper.

II. Even if a negotiation class were not categorically prohibited, the district court abused its discretion in certifying this one because it failed to ensure the class would be adequately represented. *See* Fed. R. Civ. P. 23(a)(4). First, the court overlooked serious conflicts within the class over the mix of relief Plaintiffs should seek. Second, by requiring class counsel to bear the costs of representing an enormous class through the negotiations stage, but precluding them from litigating on behalf of a class if the negotiations fail, the court put untenable pressure on counsel to reach a settlement out of their own financial self-interest, regardless of the interests of their clients.

III. Any doubt should be resolved against the Certification Order, given the serious constitutional questions raised by the Order's failure to ensure adequate representation and to protect class members' opt-out rights.

STANDARD OF REVIEW

Although the decision whether to certify a class is generally reviewed for abuse of discretion, "the district court . . . must exercise that discretion within the framework of Rule 23." *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 446 (6th Cir. 2002). "A district court abuses its discretion 'when [it] relies on erroneous findings of fact, applies the wrong legal standard, misapplies the correct

legal standard when reaching a conclusion, or makes a clear error of judgment.'" *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 560 (6th Cir. 2007) (alteration in original) (quoting *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 644 (6th Cir. 2006)). Whether the Federal Rules of Civil Procedure permit certification of a negotiation class is a question of law this Court reviews de novo. *See Bisig v. Time Warner Cable, Inc.*, 940 F.3d 205, 219 n.8 (6th Cir. 2019) (questions of law reviewed de novo); *Whitlock v. FSL Mgmt., LLC*, 843 F.3d 1084, 1088-89 (6th Cir. 2016) (whether state law prohibits certain class actions reviewed de novo).

ARGUMENT

I. The Certification Order Cannot Be Reconciled With The Text And Design Of Rule 23.

The district court's "negotiation class" conflicts with the text and design of Rule 23. The Rule expressly provides that class certification authorizes the class representatives to "sue"—that is, to pursue litigation ending in either a settlement or a trial—"on behalf of all members" of the class. Fed. R. Civ. P. 23(a). The defining feature of a negotiation class, however, is that it withholds from the class representatives the very thing that class certification under the Rules promises—the authority to sue on behalf of the class. And although the negotiation class is created with the hopes of developing a settlement, it is not an application of Rule 23's provision governing settlement classes either. To the contrary, the class order here

is designed precisely to *avoid* affording class members the Rule's most important protections for settlement class members (*e.g.*, post-settlement opt-out rights).

Accordingly, the negotiation class is not simply unauthorized by the Rules as written. It is, in reality, nothing more than a means of selectively dispensing with critical requirements of the Rules, in order to give Defendants the advantages of both litigation and settlement class certification while depriving Plaintiffs of the essential protections of each. The district court no doubt believed that making these concessions to Defendants would make a global settlement more likely and serve the greater public good. And it attempted to provide absent members a different set of protections of its own devising. But the court lacked the power to revise the Federal Rules, however well-meaning the revision may be. Rule 23(b)(3) is already class actions' "most adventuresome" innovation. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (citation omitted). Any further innovations to class practice to meet the challenge of opioid litigation must be vetted through the established process for amending the Federal Rules or enacted by Congress.

A. The Text Of Rule 23 Precludes Invention Of A "Negotiation Class Action."

1. We start on common ground: the district court acknowledged that its negotiation class constituted a "new form of class action" that departs from the forms of class action expressly provided for in the Rules. Opinion, PageID# 413579. The

negotiation class complies with neither the requirements for what the district court called a "litigation class" or a "settlement class."

By "litigation class," the court meant a class certified prior to settlement (normally near the outset of the litigation), under Section 23(a) and one of the subsections of Rule 23(b). Section 23(a) provides that "[o]ne or more members of a class may *sue* or *be sued* as representative parties on behalf of all members" when the Rule's criteria are satisfied. Fed. R. Civ. P. 23(a) (emphasis added). Hence a "litigation class," because a class so certified is entitled to litigate its claims collectively, whether that litigation ends in a settlement or a litigated judgment. The whole point of a negotiation class, on the other hand, is to limit the class to negotiating, rather than litigating, its claims collectively. Opinion, PageID# 413579.

Nor does the negotiation class conform to the requirements of a "settlement class" under Rule 23(e). That Rule contemplates that putative class representatives may reach a proposed settlement with the defendants before a suit is filed, or after it is filed but before a litigation class is certified. When that happens, Rule 23(e) requires the court to review the proposed settlement in full and, if it decides it will "likely be able to . . . approve the proposal" and "certify the class for purposes of judgment on the proposal," issue a notice to the class. Fed. R. Civ. P. 23(e)(1)(B). When, as here, the settlement proposes to settle claims for damages, the notice must inform class members of their right to opt out of the class before the settlement is

approved. *See id*. 23(c)(2)(B)(v). In contrast, the district court's negotiation class is designed to avoid giving class members an opportunity to opt out of the case after viewing the completed settlement agreement. Opinion, PageID# 413579.

2. The district court deemed it unimportant that the Rules do not expressly authorize negotiation classes. The "text of Rule 23," the court proclaimed, "does not dictate, and therefore does not limit, uses to which the class action mechanism can be applied." Opinion, PageID# 413585. That is incorrect.

The text of Rule 23 expressly dictates the "uses to which the class action mechanism can be applied," *contra* Opinion, PageID# 413585, declaring that when its requirements are met, "[o]ne or more members of a class may *sue* or *be sued* as representative parties on behalf of all members," Fed. R. Civ. P. 23(a) (emphasis added). Accordingly, the authorized use of a class action is prosecuting a lawsuit. While that suit may ultimately be resolved by a court's issuance of a contested judgment or acceptance of a settlement, the plain language leaves no doubt that if a class is properly certified, the plaintiffs are entitled to engage in the full panoply of litigation options, including by litigating the case to judgment if the case does not settle. That is what it means to "sue . . . on behalf of all members." *Ibid*.

The function of the class action authorized by Rule 23 is confirmed by other aspects of the Rule as well. Rule 23(b) describes three circumstances in which a "class action may be maintained," each identified by the nature of the litigation the

class will undertake. Rule 23(b)(1) allows class actions when "*prosecuting* separate actions . . . would create a risk of . . . inconsistent or varying *adjudications*" or "*adjudications* with respect to individual class members that, as a practical matter, would be dispositive of the interests" of others or impair their ability to protect those interests. Fed. R. Civ. P. 23(b)(1) (emphasis added). The next subsection authorizes class actions when the *result* of the litigation—"final injunctive relief or corresponding declaratory relief" from a court—would be "appropriate respecting the class as a whole." *Id*. 23(b)(2). Finally, Rule 23(b)(3), the rule that applies here, likewise describes the purpose and criteria for certifying a class in terms of litigation. It requires, for example, that the district court determine that "a class action is superior to other available methods for fairly and efficiently *adjudicating* the controversy." *Id.* 23(b)(3) (emphasis added). To answer that question, the court is required to consider "class members' interest in individually controlling the *prosecution or defense* of separate actions"; the "extent and nature of any *litigation* concerning the controversy already begun by or against class members"; and the desirability of "concentrating the *litigation of the claims* in the particular forum." *Id.* 23(b)(3)(A)-(C) (emphasis added).

Notably, none of the permissible forms of class actions is defined in terms of the desirability of aggregating plaintiffs together for purposes of negotiations, much less *only* for negotiations. And despite the Rule's reticulated, context-specific rules

for when particular kinds of class actions may be maintained and how they are to be conducted, the Rule is silent as to when a negotiation class is permissible and what rights and protections are afforded to absent class members in that form of action. That is why the district court was forced to cobble together a set of requirements, picking and choosing between the rules governing litigation classes, rules for settlement classes, and additional procedures of the court's own devising. *See* Opinion, PageID# 413582-413584. It is implausible that Rule 23 authorizes negotiation classes yet fails to specify the rules governing them, leaving that form of class action—and that form alone—to whatever constraints individual district courts believe appropriate.

That Rule 23(e) provides procedures for simultaneously certifying a class and approving a class settlement does not show otherwise. To the contrary, a settlement class is just a specific instance of class representatives being authorized to resolve class claims through the litigation process, a process that commonly results in negotiated, rather than litigated, judgments. The Rule's contemplation of such an outcome hardly suggests that its drafters envisioned class actions in which the named plaintiffs lack the power to vindicate class members' rights through collective litigation if negotiations fail.

3. The district court nonetheless determined that it had authority to invent a new form of class action "because Rule 23 is equitable in nature and its purpose is

to provide practical means for addressing complex litigation problems." Opinion, PageID# 413586. But the Supreme Court has emphatically rejected the contention that the Rule's equitable origins authorize judicial improvisation outside of Rule 23's express terms.

In *Amchem*, for example, the Court considered "the legitimacy under Rule 23" of a "class-action certification sought to achieve global settlement of current and future asbestos-related claims." 521 U.S. at 597. In particular, the Court addressed a circuit conflict over whether a district court could dispense with compliance with Rule 23(b)(3)'s ordinary requirements for a litigation class in order to approve a class settlement the court deemed fair and "in the best interests of all concerned." *Id*. at 608; *see also id*. at 618. The Supreme Court held that it could not. The Court recognized that class litigation "stems from equity practice," *id.* at 613, but stressed that Rule 23 is now the product of "an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress," *id.* at 620 (citing 28 U.S.C. §§ 2073, 2074). "The text of a rule thus proposed and reviewed limits judicial inventiveness," *ibid*., such that courts "lack authority to substitute for Rule 23's certification criteria a standard never adopted" through the rulemaking process, *id*. at 622; *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999) (courts "not free to alter [Rule 23] except through the process prescribed by Congress in the Rules Enabling Act");

Taylor v. Sturgell, 553 U.S. 880, 901 (2008) (rejecting attempt to allow what was "in effect, a common-law kind of class action" not subject to the "protections, grounded in due process" created by the Federal Rules) (citation omitted).[2]

The district court brushed aside *Amchem*'s admonitions as "inapposite," Opinion, PageID# 413586, reasoning that in *Amchem* itself, the Court had approved certifying settlement classes even though Rule 23 at the time did not specifically mention that use and some believed it unauthorized, *id.*, PageID# 413585-413586. But the Supreme Court explained that settlement classes were permissible only because they involved an application, not modification, of the Rules. *See Amchem*, 521 U.S. at 619-20. Nothing in the Rules at the time prevented courts from considering class certification at the same time it approved a class settlement, so long as the courts complied with both the ordinary certification requirements and the rules for approving settlements. Accordingly, the Court held that while "[s]ettlement is relevant to a class certification," the "specifications of the Rule . . . demand undiluted, even heightened, attention in the settlement context." *Id*. at 620. In contrast, the entire point of the negotiation class is to eliminate aspects of the existing

[2] Rule 23(b)(3) actions for money damages are a particularly poor candidate for invoking the traditions of equity, as damages claims (being forms of legal, not equitable relief), were not subject to class litigation in equity courts. *See* 1 *Newberg on Class Actions* §§ 1:12, 1:13 (5th ed.). Instead, damages class actions are the product of the modern rule making process. *See ibid*.; *see also Amchem*, 521 U.S. at 614-15.

Rules the court deemed impediments to a global settlement—*e.g.*, the right to litigate the case if negotiations fail and the right to opt out of a settlement negotiated in the absence of litigation authority. That is exactly the kind of modification of the Rules *Amchem* forbids.

The district court emphasized the alternative set of protections its Order provided for class members' interests, such as its supermajority voting rules. *See* Opinion, PageID# 413580. But the Supreme Court rejected a similar justification in *Amchem*, holding that courts have no power to eliminate the structural protections of Rule 23 simply because the court has committed to rigorous scrutiny of the fairness of any eventual deal. 521 U.S. at 620-22. The district court's need to invent new safeguards simply confirms its violation of *Amchem*'s direction that courts "are not free to amend a rule outside the process Congress ordered." *Id.* at 620.

The district court also stressed the enormity of the litigation before it. Opinion, PageID# 413578-413579. But that no more authorizes judicial revision of the Rules than did the "asbestos-litigation crisis" in *Amchem*. 521 U.S. at 597. Indeed, the Supreme Court has fully acknowledged that the "elephantine mass of asbestos cases . . . defies customary judicial administration." *Ortiz*, 527 U.S. at 821. But it has still insisted that courts lack the power to develop new class action procedures to meet the challenge, calling instead for "national legislation" to respond to the problem. *Ibid.*; *see also id.* at 864 (noting danger in providing "an allowance

for exigency" in the application of Rule 23, given the "economic temptations at work on counsel in class actions").

B. A District Court Cannot Create A "New Form" Of Class Action By Simply Stripping The Current Forms Of Important Protections For Absent Class Members.

What the district court portrayed as the creation of a new form of class action is, in reality, nothing more than the selective deletion of parts of the rules that would otherwise govern a litigation or settlement class. That is, the negotiation class is essentially a litigation class that will be decertified if a settlement is not reached, or a settlement class without the opt-out rights.

There should be little doubt that courts lack the authority to excise portions of the Rule, even to entice recalcitrant Defendants to the bargaining table. *See, e.g.*, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175-77 (1974) (district court lacked authority to waive individual notice requirement in Rule 23(b)(3) class actions). A court could not, for example, simply prohibit class members from opting out of a settlement class because it thought that the prospect of opt-outs was preventing a settlement from being reached. That would contravene the plain language of the Rule, even if the decision was well-meaning and even if the court imposed other requirements that it believed served as an adequate substitute protection for the class.

Likewise, having certified a litigation class, a court surely would abuse its discretion by decertifying the class because the case failed to settle. "By its terms,"

Rule 23 "creates a categorical rule *entitling* a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) (emphasis added). As Justice Scalia explained for the Court, although the Rule states that an action satisfying its criteria "*may* be maintained" as a class action, Fed. R. Civ. P. 23(b) (emphasis added), the "discretion suggested by Rule 23's 'may' is discretion residing in the plaintiff," not the court, *Shady Grove*, 559 U.S. at 400. Thus, while the Rules allow a court to "alter[] or amend[]" a class certification order "before final judgment," Fed. R. Civ. P. 23(c)(1)(C), that authority is limited to reconsidering whether the class continues to satisfy the requirements of the Rule, *see* 3 *Newberg on Class Actions* § 7:38 (5th ed.) ("Decertification or modification of a class certification order is appropriate if, in the course of litigation, the existing class fails to meet the requirements of Rule 23."). And failure to settle does not change the class's compliance with Rule 23.

In *Shady Grove*, the Supreme Court thus held that state legislatures lack the power to prevent class-wide adjudication of state law claims in diversity actions in federal court when the case otherwise meets Rule 23's requirements. 559 U.S. at 398-406. District judges lack the same power for the same reason. Yet that is, at base, what the district court's negotiation class does. The court specifically found that the case satisfied the requirements for a litigation class, Opinion, PageID# 413588-413609, but declared that if the case does not settle, it will be effectively

decertified without regard to whether anything of relevance to the class's compliance with Rule 23 has changed.

C. The Certification Order Dramatically Shifts The Balance Of Negotiating Leverage In Defendants' Favor, In Conflict With The Rule's Design.

For the reasons just discussed, the district court's Certification Order would be unauthorized even if its effect on the parties' rights were entirely benign. In fact, however, the negotiation class unravels the Rule's careful balancing act, giving Defendants the best, and class members the worst, of both litigation and settlement class actions.

1. The two existing methods for settling class claims provide a balanced mix of advantages and disadvantages for plaintiffs and defendants, designed ultimately to ensure a fair result for all absent parties.

In a litigation class, class members are required to decide whether to opt out before they know the outcome of any settlement negotiation or trial. That provides a distinct benefit to defendants who, like Defendants here, wish to ensure that any settlement achieves a global peace. But it does so at a cost to the class members, who risk being bound to a settlement they would have never agreed to if they had known its details at the time of their opt-out decision. The Rules minimize that risk in two important ways. First, class members are assured that the class will be negotiating from a position of strength, by counsel able to credibly threaten class

litigation (with commensurate potential liability) if the defendants act unreasonably. *See, e.g.*, *Amchem*, 521 U.S. at 623 (acknowledging reality and importance of that leverage). Second, the negotiations take place against the backdrop of the district court's authority to allow class members another opt-out opportunity after the settlement is negotiated. Fed. R. Civ. P. 23(e)(4). That prospect gives both class counsel and the defendants an additional incentive to ensure fair and adequate treatment for all class members in order to ensure a truly comprehensive resolution to the case.

Settlement class actions under Rule 23(e) provide a different mix of benefits to defendants and protections for class members. Defendants are given the possibility of a broad resolution of the claims pending against them, without having to acquiesce to class litigation even if the settlement is disapproved. But that benefit to defendants comes at a real cost to plaintiffs. The proposed agreement will have been crafted in the context of uncertainty over whether a litigation class will be certified if the parties fail to reach a settlement, weakening the plaintiffs' negotiating hand. Moreover, the putative class representatives and counsel who negotiated the deal will not have been vetted by the court ahead of time, raising the risk that the interests of some class members may have been given inadequate consideration in the negotiation process.

But Rule 23(e) provide two countervailing protections to compensate for those deficiencies. First, and most importantly, the Rule allows class members to review a settlement and opt out of the class if they are dissatisfied with its terms. Second, class members are put to that opt-out choice only after the district court has determined, based on a thorough review of the final settlement proposal, that it is likely to approve the proposal and certify the class. Fed. R. Civ. P. 23(e)(1)(B). In doing so, the court will have determined whether class members were adequately represented in the negotiations and whether they are fairly treated by the actual terms of the settlement. *Id*. 23(e)(2)(A), (D).

2. The district court's negotiation class gives Defendants the most favorable parts of both litigating and settlement classes, while simultaneously depriving the class of the compensating protections of each.

Compared to a litigation class, a negotiation class enters its negotiations "disarmed," given that "[c]lass counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer." *Amchem*, 521 U.S. at 621. The implausibility of the Rules being intended to put class counsel in that position was one of the reasons the Supreme Court gave in *Amchem* for rejecting the idea that a case that did not meet the requirements for a litigation class under Rule 23(b)(3) could nonetheless be certified for settlement. *Ibid*. Yet the district court has done something similar here: declaring that a class it refuses to certify for litigation will

nonetheless enter into settlement talks disarmed, with a view toward imposing the agreement so negotiated on the class as a whole.

At the same time, although the district court purported to hold open the possibility of allowing opt-outs after a settlement is reached, Opinion, PageID# 413586, that representation will have no real constraining effect on the negotiations. "[T]he entire purpose of the negotiation class procedure is to fix the class size prior to the negotiation and to bind the class to the will of its supermajority." Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Large Claim Class Actions* 46 (Duke Law Sch. Pub. Law & Legal Theory Series No. 2019-41, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3403834; *see also* Opinion, PageID# 413579 (same). That being so, no one can seriously believe the court will pull the rug out from under Defendants by allowing broad opt-out rights once a deal is struck.

Likewise, the negotiation class subjects plaintiffs to the risks of a settlement class action, without its corresponding protections. That is, like the members of a settlement class, the class members here are offered a settlement that was negotiated without the usual leverage of a litigation class. But they will lack the corresponding protections of being allowed to opt out of the case after seeing the final settlement. In addition, although the district court has already tentatively approved some aspects of the settlement proposal, such as a portion of the allocation formula, based on the

court's *prediction* that it will result in a fair settlement for all parties, the court dispensed with Rule 23(e)'s requirement that it review the entirety of the final proposal and *confirm* that it treats all class members fairly *before* forcing them to an opt-out decision.

D. The District Court Identified No Reason Why The Current Rules Could Not Accommodate Its Concerns.

If the foregoing were not enough, the district court also failed to explain why invention of a new form of class action was even necessary to meet the concerns it identified. The court declared that an ordinary settlement class action was unsuitable because it allowed class members to opt out after the settlement was fully negotiated. Opinion, PageID# 413579. But it did not explain why it assumed there was a genuine risk of large-scale opt-outs from any reasonable settlement that might be reached. And, in any event, it offered no reason why certifying a litigation class (which also requires opt-out decisions before negotiations take place) could not achieve the same objective.

1. To start, the district court never identified any reason to think that there would be large numbers of opt-outs from an ordinary settlement class. To the contrary, the court noted the plaintiffs' urgent need for a resolution of their claims to address the immediate needs of their community. Opinion, PageID# 413579. It insisted that the process it had created for the negotiation and approval of any settlement would ensure a fair deal for all class members. *Id*., PageID# 413580.

And the court committed to ensuring that this expectation was met when it reviewed the final settlement. *Id.*, PageID# 413584. There would seem little reason for the court or Defendants to expect, then, that any resulting deal would be unsatisfactory to many jurisdictions. At the same time, class members rejecting any deal would be compelled to shoulder the extensive burden of litigating their claims, providing a significant disincentive to opting out. *See id.*, PageID# 413607 (noting that only "a small fraction" of the class is litigating individually). Perhaps there would be grounds for special concern if the court had reason to believe that there was some unusual risk of unreasonable behavior by the particular class members in this case. But the court never even hinted that this was so. And given that the class consists exclusively of local governments, surely it is not.

In addition, other defendants facing similarly large and complex class actions have found ways to provide additional protection against the prospect of unexpected opt-outs. They have, for example, negotiated "walk away" provisions requiring a minimum class participation rate for the deal to take effect.[3] Parties have also included other settlement terms that reduce the incentive for opt-outs, such as "most-favored-nation" clauses that promise that those who remain in the class will receive additional payments if the defendants reach a better deal with any opt-out litigant

[3] *See* D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 Fordham L. Rev. 2175, 2179-81 (2017).

(thereby reducing the incentive to opt out in pursuit of a better deal).[4] The district court did not address any of those alternatives.

2. Why these Defendants genuinely needed a modification of the Rules to further protect against opt-outs is thus unclear. But even assuming the district court reasonably sought to provide Defendants with a fixed class at the outset of negotiations, it could have simply certified an ordinarily litigation class, which would have forced plaintiffs to make an immediate opt-out decision as well.

Why that option was unacceptable, the district court never says. The only evident explanation is that the court was acceding to Defendants' preference to have the case resolved on a class basis only if a settlement could be reached, while avoiding the prospect of class litigation if the negotiations broke down. *Cf.* Opinion, PageID# 413609 (noting that because "of the limited nature of the negotiation class certification . . . many Defendants in this MDL did not even file opposition briefs"); *ibid.* (emphasizing that the order "is in no way meant to foreclose any Defendant from making any argument in opposition to a later motion for class certification").[5] If that was the district court's reason, it was impermissible. As discussed, if the case meets Rule 23's requirements for a litigation class—which the court did not doubt,

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[4] *See Closure Provisions in MDL Settlements*, *supra*, at 2185-86; *see also id*. at 2179-99 (listing many other options for achieving closure in MDL litigation).

[5] *See also The Negotiation Class*, *supra*, at 33-34 (noting that by limiting class to negotiations, the court will reduce defendant opposition to certification).

Opinion, PageID# 413588-413609—then Defendants had no legal basis for objecting to certifying a litigation class at the outset of the case, as Rule 23 contemplates. *See Shady Grove*, 559 U.S. at 398-400; Fed. R. Civ. P. 23(c)(1)(A) (requiring certification decision at "an early practicable time"). To be sure, such certification may alter the dynamics of settlement negotiations. But that is not a reason to deny certification if the putative class otherwise satisfies Rule 23. *See Shady Grove*, 559 U.S. at 398-400. Indeed, Congress, the Supreme Court, and the Rules Committee have repeatedly resisted calls to alter the rules for class certification to avoid placing undue settlement pressure on defendants, instead responding to defense bar pleas in other ways, including by authorizing interlocutory appeals of certification orders like this one. *See, e.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276-77 (2014); *Shady Grove*, 559 U.S. at 402-04; *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978); Fed. R. Civ. P. 23(f).

3. If a court may revise Rule 23 to better suit defendants' strategic preferences, in the hopes of securing a class-wide settlement, negotiation classes will quickly become the norm, eclipsing the forms of class litigation actually provided for in the Rules.

What defendant would not prefer to negotiate with a fixed class that has reduced bargaining leverage and no downstream opt-out rights, all the while making no commitment to class litigation if the negotiations fail? And what defendant will

not demand these concessions before undertaking serious settlement negotiations if making the demands is all it takes to obtain these strategic advantages? Given that the district court identified nothing special about this case that made accommodating those desires unusually necessary to promote a settlement, this Court should expect requests for negotiating classes to become the norm if it approves of the practice in this case. And because nothing in the Rules addresses negotiation classes, there is nothing in the Rules to constrain other courts from broadly employing them as a substitute for what the Rules actually authorize. Perhaps this Court could develop an extra-textual set of criteria to govern their use. But the need for such draftsmanship is just another indication that the project is beyond the courts' authority.

II. The District Court Failed To Ensure Adequate Representation For All Class Members.

Even if Rule 23's text and design did not categorically preclude recognition of negotiation class actions, the district court abused its discretion in certifying one here. As just discussed, the court failed to justify the need to resort to this extraordinary device on the facts of this case. Independently, the court failed in its acknowledged duty to ensure adequate representation for all members of the sprawling class it certified.

The district court acknowledged that every class action is subject to Rule 23's requirement that "the representative parties will fairly and adequately protect the

interests of the class." Fed. R. Civ. P. 23(a)(4); *see* Opinion, PageID# 413597. The Certification Order failed to enforce that requirement in two respects. First, the Order provides "no structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Amchem*, 521 U.S. at 627. Given the disparate and conflicting interests within the class, the court should have certified separate subclasses with their own counsel assigned to negotiate any settlement. Second, by limiting class counsel to settling, but not litigating, plaintiffs' claims on a class-wide basis, the court put untenable financial pressure on class counsel to ensure the case settles, regardless of where their clients' interests may lie.

A. The Court Was Required, But Failed, To Divide The Class Into Separately Represented Subclasses.

To be an adequate representative of the class, a class representative must "possess the same interest . . . as the class members." *Amchem*, 521 U.S. at 625-26 (citations omitted). Where, instead, the interests of subgroups within the class diverge and conflict, the court is required to create subclasses with separate class representatives and counsel whose "role is to represent solely the members of their representative subgroups." *Id*. at 627 (quoting *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 743 (2d Cir. 1992)); *see also Ortiz*, 527 U.S. at 856 (class with divided interests "requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel").

The counties and cities in the class operate in vastly different factual and legal contexts, spread across all fifty States. *See* Opinion, PageID# 413593, 413598. Those differences inevitably affect their interests in the nature of the relief they hope to obtain and the consideration they may be willing to exchange for it. For example, a significant aspect of any settlement may be a commitment by industry members to adopt various forms of self-regulation to reduce the risk of future harms from their products. Such non-monetary settlement terms have been an important feature of similar class actions, including those regarding the tobacco industry,[6] the Volkswagen emissions scandal,[7] the BP Deepwater Horizon oil spill,[8] Vioxx,[9] and the transvaginal mesh litigation.[10] But many of the commitments Defendants might

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[6] *See* Consent Decree, Tobacco Master Settlement Agreement, *In re Tobacco Cases I*, Case No. J.C.C.P. 4041 (Cal. Super. Ct. Dec. 9, 1998), https://oag.ca.gov/sites/all/files/agweb/pdfs/tobacco/consent_decree.pdf.

[7] *See* U.S. EPA, Volkswagen Clean Air Act Civil Settlement, https://www.epa.gov/enforcement/volkswagen-clean-air-act-civil-settlement (last visited Feb. 7, 2020).

[8] *See Deepwater Horizon* Medical Benefits Class Action Settlement Agreement, *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, MDL No. 2179 (E.D. La. May 3, 2012), http://www.deepwaterhorizonsettlements.com/Documents/Medical%20SA/Medical_Settlement_Agreement.pdf.

[9] *See* Consent Judgment, *Iowa ex rel. Miller v. Merck & Co.*, No. EC 59178 (Iowa Dist. Ct. May 20, 2008), https://www.iowaattorneygeneral.gov/media/cms/Vioxx_Consent_Judgment_2323D7AEA24ED.pdf.

[10] *See* Press Release, N.Y. Attorney Gen., Johnson & Johnson and Subsidiary to Pay $117 Million Settlement After Endangering Women's Health (Oct. 17, 2019),

offer may already be required by state law in some jurisdictions, or there may be other state or local regulation that achieves similar ends. For counties and cities in those States, promises of industry reform may be worth very little, yet likely will be offered as an excuse for providing a lesser recovery for past damages.

Relatedly, there will also be differences in interests between class members regarding the relative importance of addressing past versus future harm. Those jurisdictions hardest hit will be most interested in obtaining immediate retrospective relief to alleviate the fiscal distress caused by years of financial outlays responding to the harm that has already been inflicted. In jurisdictions that have suffered comparatively less harm to date, however, maximizing Defendants' obligations to self-regulate may be a higher priority, as may be restricting the scope of any waiver of claims for future injury.

These conflicting priorities are similar to the conflicts that precluded certification of a single class in *Amchem* and *Ortiz*. In those asbestos cases, the class contained individuals who were already seriously ill and those who were exposed to asbestos but had yet to manifest any disease. For those "currently injured, the critical goal is generous immediate payments." *Amchem*, 521 U.S. at 626. But that "goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-

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https://ag.ny.gov/press-release/2019/johnson-johnson-and-subsidiary-pay-117-million-settlement-after-endangering.

protected fund for the future." *Ibid*. The Court held that such a class could not be maintained without providing for separately represented subclasses. *Id*. at 627; *see also Ortiz*, 527 U.S. at 857-58. The same is true here. The interests of jurisdictions that have already suffered serious harm, and those whose worst injuries may lay in the future, cannot be represented by the same class representatives and the same class counsel.

The district court further acknowledged that "each county and its constituent cities will need to work together – or, arguably, negotiate against one another – to divide the county-level allocation among themselves." Opinion, PageID# 413598-413599; *see also id*., PageID# 413582 (allocation formula awards money at county level, leaving cities to negotiate with their respective counties for a share of the award). Class counsel cannot possibly represent both sides in this competition to divide any settlement award. Nor can the district court approve a settlement that does not, in fact, finally settle the parties' damages entitlement even while extinguishing Defendants' liability to them.

It therefore is not enough that each class representative "shares the same overriding interests as the other members of the Class in addressing the consequences of the opioid epidemic." Opinion, PageID# 413597-413598. In *Ortiz*, the Supreme Court explained that it was no "answer [to] the settlement's failures to provide structural protections in the service of equity to argue that the certified class

members' common interest in securing contested insurance funds for the payment of claims was so weighty as to diminish the deficiencies beneath recognition here." 527 U.S. at 857. As in *Ortiz*, the question *how* best to address the consequences of the opioid epidemic divides the class and, therefore, requires separate subclasses.

Nor are these conflicts remedied by the mechanisms the district court adopted for class approval of any settlement, or by the court's own approval of the partial allocation formula. Those features of the scheme were proposed by putative class counsel and named plaintiffs purporting to represent the entirety of an incurably heterogeneous class. In *Ortiz*, the Supreme Court held that such conflicts cannot be remedied by the district court's post-hoc assessment of the proposal's fairness. There, as here, class counsel purporting to represent the entirety of a conflicted class proposed a global settlement, which the district court declared fair to all members. 527 U.S. at 831-32. But the Supreme Court vacated the settlement class certification because the district court "took no steps at the outset to ensure that the potentially conflicting interests of easily identifiable categories of claimants be protected by provisional certification of subclasses under Rule 23(c)(4), relying instead on its *post hoc* findings at the fairness hearing that these subclasses in fact had been adequately represented." *Ibid*. Focusing only on the objective terms of the settlement "ignores the fact that Rule 23 requires protections under subdivisions (a) and (b) against inequity and potential inequity at the precertification stage, quite independently of

the required determination at postcertification fairness review under subdivision (e) that any settlement is fair in an overriding sense." *Id*. at 858.[11]

Here, Rule 23 required the district court to ensure that *all* aspects of the settlement, including its allocation and approval rules, are developed by counsel separately representing homogeneous subclasses. The court's failure to do so provides an independent basis for vacating the Certification Order.

B. The Negotiation Class Creates Intolerable Conflicts Of Interest Between The Class And Its Counsel.

Ensuring adequate representation also requires careful attention to the incentives of class counsel. *See, e.g.*, *Amchem*, 521 U.S. at 626 n.20; *Ortiz*, 527 U.S. at 852-53. Particularly in a large class action in which counsel may be required to expend considerable resources on contingency, pursuing the best interests of the class can come into tension, if not outright conflict, with the financial interest of the lawyers. That possibility can arise in any class action case. But the negotiation class certified here creates financial pressures that are different in degree and kind from those experienced in other forms of class litigation.

[11] It made no difference in *Ortiz* that class members worried about intraclass conflicts could opt out. The Rules entitled them to choose between litigating on their own and joining a class with adequate representation by conflict-free class representatives and counsel.

In certifying a class for negotiations, but not litigation, the court put overwhelming financial pressure on counsel to settle the case. As in any other class action, counsel will be required to expend resources on a massive, class-action scale. But unlike a case in which a class is certified for both potential settlement *and* trial, counsel for a negotiation class faces substantial uncertainty over whether they will be able to recover fees commensurate with their expenses by any means other than settlement. That is because the very act of refraining from certifying a litigation class, and limiting class treatment to negotiations only, conveys the court's disinclination to tolerate class litigation if the negotiations fail. Indeed, the district court emphasized in this case that its certification of the negotiation class should not be taken as an indication that a class would be certified for trial. Opinion, PageID# 413609. And it noted that the relative ease of certification for negotiations should not be taken as a sign that certification for trial would be as easy, observing that because "of the limited nature of negotiation class certification . . . many Defendants in this MDL did not even file opposition briefs." *Ibid*. Accordingly, if the case does not settle, class counsel can expect fierce opposition to any certification for trial. And even if the district court ultimately certifies a litigation class, that decision will be subject to potential appeal by Defendants to this Court. *See* Fed. R. Civ. P. 23(f).

The Supreme Court noted that similar pressures in *Ortiz* risked an intolerable conflict of interests between class counsel and their clients. There, the lawyers

charged with negotiating a global class settlement had already struck deals on behalf of certain individual clients, the payment of which was contingent on counsel reaching a broader settlement with the defendants on behalf of the full class. 527 U.S. at 852. The Court reasoned that this left counsel in an intolerable position: "Class counsel thus had great incentive to reach any agreement in the global settlement negotiations that they thought might survive a Rule 23(e) fairness hearing, rather than the best possible arrangement for the substantially unidentified global settlement class." *Ibid*.

So, too, here, "with an already enormous fee within counsel's grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant," *Ortiz*, 527 U.S. at 852 n.30, or on behalf of a class certified for litigation. The pressure to subordinate the interests of class members in order to reach such a lucrative settlement is magnified enormously when counsel is given only the power to settle, but not litigate, the claims on a class-wide basis.

III. Any Doubts Must Be Resolved Against The Certification Order, Given The Serious Constitutional Questions It Raises.

If any doubt remains, it should be resolved in favor of vacating the Certification Order given the significant Due Process doubts it raises. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) (construing Rule 23 to avoid drawing federal class action rules into serious constitutional doubt); *Ortiz*, 527 U.S. at 845-46 (same).

Class actions are an exception to our "deep-rooted historic tradition that everyone should have his own day in court." *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) (citation omitted). Due Process thus requires that absent class members have their "interests adequately represented by someone with the same interests who is a party." *Ibid*. (quoting *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989)). Moreover, when a suit seeks predominately damages relief, "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class" after receiving adequate notice of the litigation. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *see also Dukes*, 564 U.S. at 363 (same).

As discussed, by its nature, a negotiation class creates structural conflicts of interest between the class and its counsel. *See supra* § II.B. And in this case, those conflicts were layered on top of the conflicting interests of subgroups within the class itself. *See supra* § II.A.

Moreover, the Order seriously impinges on class members' ability to meaningfully exercise their Due Process opt-out rights. Electing to remain a member of a class action constitutes a waiver of the right to one's own day in court. As with the waiver of any constitutional right, the decision must be both knowing and voluntary. *See, e.g.*, *Hergenreder v. Bickford Senior Living Grp., LLC*, 656 F.3d 411, 420 (6th Cir. 2011) (waiver of right to jury trial must be "knowing and

voluntary"); *United States v. Riddle*, 249 F.3d 529, 534 (6th Cir. 2001) ("Of course the waiver of this [Due Process] right, as with other constitutional rights, must be knowing and voluntary."). In the ordinary case, when a class action is certified for litigation at the outset of the proceedings, class members are required to make their opt-out decision without knowing the details of any eventual judgment or settlement. But, as discussed, they are provided a set of compensating assurances by the district court's close scrutiny of the named plaintiff and class counsel's adequacy as representatives before they engage in any negotiations on the class's behalf; by the knowledge that any settlement proposal will be negotiated from a position of strength; and by the genuine possibility that another opt-out opportunity may be provided if a settlement is reached.

In contrast, when a settlement has been negotiated in the absence of those protections—*i.e.*, by counsel who have not yet been vetted by the court, on behalf of clients whose interests may be not be aligned with all the class's members, through a negotiation in which the plaintiffs lacked the ordinary negotiating leverage of a litigation class—a knowing and voluntary waiver can only arise if class members are provided an opportunity to review the proposed settlement in all its details before deciding whether to exchange their day in court for participation in the class settlement. *Cf.* Fed. R. Civ. P. 23(e) (so requiring).

In this case, certain essential features of any future settlement, including part of the formulae for distributing its proceeds among the plaintiffs, have been developed outside the protections of the class certification process. Yet class members will be deprived of the ordinary opt-out rights deemed essential for protecting their rights. They will be required to opt out of the case, or be bound by any eventual settlement, before knowing crucial details of any final deal, including what remedy it will ultimately afford them. Their awareness of *some* of the details now, like the partial allocation formulae, is hardly sufficient. In the end, what matters to plaintiffs is how much compensation and other relief they actually receive. A facially troublesome allocation formula may be tolerable in the context of a fulsome lump sum agreement, but devastating if the class representatives agree to anemic compensation for the class. And if a smaller lump sum is justified on the ground that Defendants have made other concessions regarding their future conduct or other non-monetary remedial action, class members will have opted out without *any* notice of those terms of the agreement. Nor has the class been given any information regarding the scope of the waiver of claims Defendants will demand, a matter of significant concern, particularly if the waiver extends to claims for future harm, the magnitude of which may be difficult to foresee. And once the full terms *are* disclosed, class members will be bound to those terms not based on any knowing

and voluntary waiver of their right to their own day in court, but based on a vote of other jurisdictions pursuing their own interests.

Perhaps the district court and the negotiating class counsel believe that the protections of Rule 23(e) extend substantially beyond what Due Process requires. Or they may think that the alternative protections invented for this negotiation class provide adequate substitutes. But the fact that this Court cannot affirm the class certification in this case without confronting those serious constitutional questions is reason in itself to resolve any doubts in favor of reversing the Certification Order.

CONCLUSION

The district court's Certification Order should be vacated and the case remanded.

February 7, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because this brief contains 10,566 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Rule 32(b)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman.

February 7, 2020

/s/ Thomas C. Goldstein
Thomas C. Goldstein

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on February 7, 2020. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Thomas C. Goldstein
Thomas C. Goldstein

ADDENDUM PURSUANT TO SIXTH CIRCUIT RULES 28(b)(1)(A)(i) AND 30(g)(1)

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rules 28(b)(1)(A)(i) and 30(g)(1), Appellants designate the following docket entries from N.D. Ohio Docket No. 1:17-md-02804-DAP:

RE	Description	Page ID# Range
513	Corrected Second Amended Complaint and Jury Demand (Summit County, OH)	10556-10898
1690	Plaintiffs' Corrected Notice of Motion and Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class	47084-47206
1720	Memorandum of Certain Defendants in Opposition to Plaintiffs' Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class	51578-51614
1723	Certain Pharmacy Defendants' Opposition to Plaintiffs' Corrected Motion for Certification of a Rule 23(b)(3) Negotiation Class	51619-51624
1726	Letter from State Attorneys General to Judge Polster	51634-51638
1820	Plaintiffs' Renewed and Amended Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class	56631-56648
1820-1	Plaintiffs' Memorandum in Support of Renewed and Amended Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class	56649-56790
1949	Memorandum of Certain Defendants in Opposition to Plaintiffs' Renewed and Amended Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class	119733-119792
1951	Letter from National Association of Attorneys General to Judge Polster	119886-119897

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1958	Certain Plaintiffs' Memorandum in Opposition to Renewed and Amended Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class	129866-129882
1973	Letter from Ohio Attorney General to Judge Polster	209115-209119
2076	Plaintiffs' Reply Brief in Further Support of Renewed and Amended Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class	286358-286386
2135	Notice on Behalf of Plaintiff City of Manchester, New Hampshire Supplementing Plaintiffs' Renewed and Amended Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class	287989-287995
2217	Plaintiff City of Fargo's Further Response to Plaintiffs' Renewed and Amended Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class	337628-337633
2579	Report of Special Master Cathy Yanni	412994-413010
2583	Interim Co-Lead Counsel's Amendment and Supplement to Renewed and Amended Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class	413489-413514
2590	Memorandum Opinion Certifying Negotiation Class	413578-413617
2591	Order Certifying Negotiation Class and Approving Notice	413618-413625
2674	Certain Plaintiffs' Notice of Filing of Petition for Permission to Appeal Pursuant to Fed. R. Civ. P. 23(f)	417260-417340

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2713	Order Clarifying Negotiation Class Certification Order	419212-419215