No. 19-305

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION

MCKESSON CORPORATION; CARDINAL HEALTH, INC.; AMERISOURCEBERGEN DRUG CORPORATION; PRESCRIPTION SUPPLY, INC.; DISCOUNT DRUG MART, INC.; WALMART, INC.; WALGREEN CO.; CVS PHARMACY INC.; AND RITE AID OF MARYLAND, INC.,

Petitioners.

On petition pursuant to Fed. R. Civ. P. 23(f) for permission to appeal from the United States District Court for the Northern District of Ohio, Eastern Division, Case No. 1:17-MD-2082
The Honorable Dan Aaron Polster

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

Steven P. Lehotsky
Jonathan Urick
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Andrew J. Pincus
Archis A. Parasharami
Charles A. Rothfeld
MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing the interests of approximately 300,000 direct members and indirectly representing the interests of more than three million businesses and organizations of every size, in every industry sector, and from every geographical region of the country. An important function of the Chamber is to represent the interests of its members in important matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases addressing issues of concern to the Nation's business community, and has repeatedly participated in cases in this Court and many others involving the meaning of Federal Rule of Civil Procedure 23.

The Chamber has a substantial interest in the issue presented in this case: businesses in all sectors of the economy are affected by class actions, which may be uniquely expensive and time-consuming forms of litigation. The Chamber believes that the experience of its members with these problems makes it well qualified to address the issues presented by the novel "negotiation class" certified by the district court in this case.[1]

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[1] Pursuant to Fed. R. App. P. 29, *amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*,

ARGUMENT

The district court began its decision with the candid recognition that it was engaged in "creative thinking" and was offering "an innovative solution: a new form of class action entitled 'negotiation class certification'" that rests on "a novel procedure." Mem. Op. Certifying Negotiation Class at 2-3, attached to Petition as Ex. B) (Mem. Op.). But the duty of a District Judge is not to come up with "new form[s] of class action": it is to apply the terms of Rule 23 to determine if there is a certifiable class. There is a reason that the "negotiation class" approved here is the "first-of-its-kind" (Alison Frankel, *Opioid MDL judge[] OKs novel negotiating class as 'likely to promote global settlement'*, Reuters (Sept. 12, 2019)): it departs from the requirements of Rule 23 and threatens to distort class action practice.

Petitioners demonstrate a number of respects in which the district court's ruling is flawed. The Chamber focuses on one central point: immediate review of the district court's certification order is imperative. That order ratifies use of an invented procedure that cannot be reconciled with Rule 23 and that is in plain tension with the requirements of Article III. And the

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its counsel, or its members made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

order will have pernicious practical effects, encouraging future use of dubious "negotiation classes" and threatening to infect certification decisions more widely, as plaintiffs' lawyers predictably will seek to leverage "negotiation class" certifications into the subsequent certification of litigation and settlement classes. In light of these consequences and the questionable basis for the decision below, review by this Court is warranted.

A. The district court's order runs afoul of Rule 23 and Article III.

At the outset, petitioners are correct in contending that the district court's ruling is inconsistent with Rule 23 and Article III. *See* Pet. 8-11. That is so for several reasons.

First, Rule 23 provides a mechanism for conducting and terminating litigation by means of a verdict or settlement that results in a binding final judgment with estoppel effect. That understanding follows from the history of the class action procedure, which, in part, developed as a means to determine "the proper extent of the judgment …, which would in turn help to determine the res judicata effect of the judgment if questioned in a later action." Fed. R. Civ. P. 23 Advisory Committee Notes, 1966 Amendment. And it is confirmed by the language of Rule 23, which authorizes representative parties to "sue or be sued" or to have their claims "certified for purposes

of settlement." Fed. R. Civ. P. 23(a), 23(e). Thus, even "the most 'adventuresome'" class actions—under Rule 23(b)(3)—are certified "to secure judgments binding all class members save those who affirmatively elected to be excluded." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614-15 (1997) (citation omitted).

But a "negotiation" class is fundamentally different in character. It is a "new form of class action" that is specifically designed "to *promote* global settlement"—that is, to coerce—before anyone has agreed to it. Mem. Op. at 2, 3 (emphasis added). This is not just a "novel" or "innovative" change; it transforms the purpose and effect of Rule 23 into a mechanism for "assisting parties in creating a settlement." *Id*. at 11. This use of the class action device has no foundation in the text, history, or policy of the Rule.

Second, as this background suggests, the "negotiation class" is really not adjudicatory in nature at all. Instead, it creates a formal negotiation mechanism that finds no support in either statutory law or the terms of Rule 23. The district court was expressly clear on this, explaining repeatedly that the "negotiation class" is a "voluntary mechanism developed to address the unique circumstances of this litigation" that the district court "hopes will directly or indirectly facilitate the voluntary, fair, adequate and reasonable resolution" of the claims before it. Order Certifying Negotiation Class and

Approving Notice at 7-8, attached to Petition as Ex. A ("Order"); *see* Mem. Op. at 4. The court regarded this as "an even more important judicial function" than resolution of a class action through certification of a settlement class. *Id*. at 10.

In fact, however, the district court's order—like the law review article upon which it is based—reads more like a new statute than a judicial decision that is resolving a concrete claim, setting out a lengthy list of "five stages" through which "[t]he negotiation class certification process unfolds." Mem. Op. at 5; *see id*. at 5-7; Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders* (June 13, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3403834, at 27-28. To this end, it includes numerous procedural steps and substeps and addresses policy considerations that, the district court believed, showed that "negotiation class[es]" are a good idea. *See* Mem. Op. at 7-11. This disconnect of the "negotiation class" from ordinary practice is further suggested by the genesis of the idea as an academic theory, first articulated in a law review article authored by a pair of professors who serve as special master and expert witness in this case. *See id*. at 2 n.1. This is, to say the least, an unusual provenance for a rule of judicial

decision. *See also* McGovern & Rubinstein, *supra*, at 33 ("Negotiation class certification has some attributes of a unionization drive[.]").

Moreover, the "negotiation class" regime is not only a legislative solution behind a judicial facade; it also was constructed specifically to assist plaintiffs by facilitating their ability to negotiate and to favor a particular outcome in substantial mass tort litigations. As the law professors acknowledge, "[t]he purpose of the negotiation class is to generate a negotiating bloc that can leverage its breadth to extract a meaningful lump sum settlement offer from a defendant." McGovern & Rubinstein, *supra*, at 29. *See* Mem. Op. at 3-4, 11. This goal is inappropriate for the judiciary and finds no parallel in Rule 23 itself, which authorizes the use of settlement classes but nowhere allows the court to reengineer the fundamental mechanics of settlement negotiation.

True, defendants are not obligated to negotiate with the "negotiation class" and are not legally required to enter into a settlement with the class. Mem. Op. at 3-4. But that theoretical assurance is belied by the substantial pressure that the district court here placed on defendants to settle (*see* Pet. 25)—and if the "negotiation class" really is so ephemeral, one wonders why the class plaintiffs and district court invested so much energy in achieving certification of a "negotiation class."

In reality, the "negotiation class" devised in this case has goals that are largely similar to, and suffer from some of the same defects as, those of the settlement class that the Supreme Court disapproved in *Amchem*. Like that attempted settlement class, the "negotiation class" in this case "evolved in response to a[] [mass tort]-litigation crisis" and "sought to achieve global settlement" of claims arising in that context. *Amchem*, 521 U.S. at 597. And as in that case, the novel Rule 23 procedure embraced by the district court "is a matter fit for legislative consideration." *Id.* at 622. But just as the Supreme Court explained in *Amchem*, however "sensibl[e]" a negotiation class mechanism might be, "Congress … has not adopted such a solution." *Id.* at 628-29.

Third, all agree that a "negotiation class," like any other class certified under Rule 23, must satisfy the Rule's requirements. Thus, although the Supreme Court has noted that trial management issues need not be considered when certifying a settlement class, the "other specifications of the Rule … demand undiluted, even heightened, attention in the settlement context." *Amchem*, 521 U.S. at 620. The Court added: "The safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments—checks shorn of utility—in the settlement-class context." *Id.* at 621.

Although the district court in terms acknowledged the need to comply with the elements of Rule 23, its understanding of those terms was incorrect. That is not surprising, in light of the court's guiding principle: it declared that "the text of Rule 23 does not dictate, nor therefore limit, the uses to which the class action mechanism can be applied," and opined that an expansive reading of the Rule's terms is appropriate because "Rule 23 is equitable in nature" and therefore should receive a "liberal application." Mem. Op. at 8, 9.[2]

But that approach gets things backwards, flouting Supreme Court precedent. As petitioners explain (Pet. 8), vague appeals to equity cannot displace fidelity to the terms of Rule 23. "The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual

[2] The point is confirmed by the article that serves as the template for the district court's approach. It dismissed the Supreme Court's holding "that the standards for certification of a settlement class are, but for one prong, the same as the standards for certification of a trial class *and* that these standards ought to be applied with more not less scrutiny at settlement," declaring that it is "accepted in practice that most courts undertake a more relaxed examination of the certification requirements for a settlement class." McGovern & Rubinstein, *supra*, at 34-35. Taking that result-oriented approach, the authors opined that an unopposed motion to certify a "negotiation class ought to benefit from a similar bias" in favor of certification. *Id.* at 35. But casting aside the Supreme Court's on-point precedent is a shaky basis for the district court's "innovative" approach.

named parties only. To come within the exception, a party seeking to maintain a class action must affirmatively demonstrate his compliance with Rule 23." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quotation marks and citation omitted). It is thus irrelevant that nothing in Rule 23 expressly *prohibits* negotiation classes, because nothing in the rule *authorizes* them. "[O]f overriding importance," the Supreme Court has instructed, "courts must be mindful that the Rule as now composed sets the requirements they are bound to enforce. … The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered[.]" *Amchem*, 521 U.S. at 620.

Finally, as petitioners explain (Pet. 9), the certification of such a class exceeds a federal court's authority under Article III. Courts are limited to resolving concrete cases and controversies. But the "negotiation class" does no such thing, and is not even a concrete step in the litigation process (as is certification of a class for trial). Instead, the "negotiation class" places the court's imprimatur on a mechanism that will facilitate negotiations by those who decide to participate. We are not aware of any decision that approves this sort of judicial free-lancing. And because "Rule 23's requirements must be interpreted in keeping with Article III constraints" (*Amchem*, 521 U.S.

at 613), the constitutionally dubious nature of the district court's approach militates in favor of reading Rule 23 to preclude "negotiation classes."

B. If left undisturbed, the district court's ruling will distort class action litigation.

In addition, there are important practical considerations that favor immediate review of the decision below.

First, it can be expected that the decision will serve as a template for future "negotiation classes" in all kinds of mass litigation. The authors of the study that is the basis for the "negotiation class" approved here sought to address what they characterized as a common problem that arises with frequency. *See* McGovern & Rubinstein, *supra*, at 8-17. If the decision below is not subject to immediate review—and therefore stands undisturbed, at least until a proposed resolution of the nationwide opiate litigation—plaintiffs in other cases, in this and other Circuits, are sure to seek approval of similar "negotiation classes." The result will be uncertainty, confusion, and a likely waste of judicial and litigants' resources, as parties contest the permissibility of (and as some plaintiffs seek to implement) the "negotiation class" procedure. Indeed, the mere availability of this procedure will encourage burdensome class actions that would not otherwise be brought. As one knowledgeable observer has noted, this "negotiation class" approach "could change the way major cases are litigated." Frankel, *supra*.

Second, even plaintiffs who have no expectation that a "negotiation class" will succeed in resolving the litigation may seek certification of such classes, with the goal of having certification of a "negotiation class" ease subsequent certification of a trial or settlement class. This prospect—and the related danger that the certification even of a "negotiation class" that is sought in good faith will infect future trial and settlement class certifications if the "negotiation class" is unsuccessful in resolving the case—is a substantial one. The district court itself seemed to anticipate this problem, repeatedly stating that "no class member or any party, or counsel to a party, to this proceeding may cite this Order or the accompanying Memorandum Opinion as precedent or in support of, or in opposition to, the certification of any class for any other purpose in any opioids-related litigation." Order at 6.

But this purported assurance will be cold comfort to those who subsequently oppose certification of the members of this "negotiation class" for trial or settlement purposes. Because, as we have noted, the Rule 23 certification criteria (aside from those addressing trial management) are supposed to apply identically across all the circumstances in which they are applicable, determinations made in the "negotiation class" context on matters such as adequacy and commonality may well be invoked in subsequent

stages of the litigation, at best causing confusion and at worst leading courts into error.

And this element of the district court's decision highlights the ruling's odd and nonjudicial character. It is difficult to imagine other circumstances in which a court has declared its decision a ruling that is not to be cited by the parties in future related proceedings and that is not even intended to serve as precedent. For this reason as well, the holding below is an aberrant one that this Court should review.

CONCLUSION

The petition for permission to appeal should be granted.

Respectfully submitted,

October 2, 2019

/s Andrew J. Pincus
Counsel of Record
Archis A. Parasharami
Charles A. Rothfeld
MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
apincus@mayerbrown.com

Steven P. Lehotsky
Jonathan Urick
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 5(c)(1) and 29(a)(5) because it contains 2,596 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in size 13.5 Century Schoolbook font.

Dated: October 2, 2019 /s/ *Andrew J. Pincus*

CERTIFICATE OF SERVICE

I certify that on October 2, 2019, I filed the foregoing via the CM/ECF system and the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

Dated: October 2, 2019 /s/ *Andrew J. Pincus*