No. 16-413

IN THE

Supreme Court of the United States

RAYMOND ARMSTRONG, *ET AL.*,

Petitioners,

v.

NATIONAL FOOTBALL LEAGUE, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Rules:

INTEREST OF AMICUS CURIAE[1]

Public Citizen is a non-profit consumer advocacy organization with members and supporters nationwide. Public Citizen is not a member of the settlement class in this action, and neither Public Citizen nor any of its attorneys represents any class member.

Public Citizen believes that class actions are an important tool for seeking justice where a defendant's wrongful conduct has harmed many people and resulted in injuries that are large in the aggregate but may not be cost effective to redress individually. Class actions, and class settlements, often offer the best means for both individual redress and deterrence of wrongful conduct, while also serving defendants' interests in achieving binding resolution of claims on a broad basis, consistent with due process.

The interests of both named and absent class members, defendants, the judiciary, and the public at large are best served by adherence to the principles incorporated in Federal Rule of Civil Procedure 23(a)(4) and due process. Accordingly, Public Citizen's attorneys have in some cases represented class members whose rights have been compromised by improper certification of classes and approval of settlements that have been entered in violation of their Rule 23 and due process rights. *See*, *e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Day v. Persels & As-*

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record for the parties received 10 days' notice of the filing of this brief, and letters of consent to its filing from counsel for the parties are on file with the Clerk.

socs., *LLC*, 729 F.3d 1309 (11th Cir. 2013); *In re Katrina Canal Breaches Litig.*, 628 F.3d 185 (5th Cir. 2010); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315 (3d Cir. 2001); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995).

In this case, Public Citizen is concerned that the certification of the settlement class reflects inadequate attention to the need for separate representation of class members with conflicting interests in the allocation decisions made by class counsel and reflected in the settlement agreement. Public Citizen filed briefs as amicus curiae in both the district court and court of appeals, and it believes its views may be helpful to this Court in determining whether to accept review of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in this case are claims of serious and life-threatening injuries sustained by large numbers of workers in a major industry, professional football. Those injuries—concussions and other head impacts suffered by football players—have already had grave effects on the health of many former players and present continuing severe risks of such health effects in the future. Lawyers for players and for the National Football League (NFL) have sought to use a federal damages class action to negotiate a resolution that determines which injured players will receive compensation and in what amounts, and which players will release all their claims for no monetary recovery.

Well-intentioned as that effort may be, the resulting settlement picks winners and losers among the injured class without providing necessary structural

protections. Rather than creating subclasses corresponding to the many disparate interests of differently affected class members before negotiating the terms of the deal, a small set of attorneys purported to provide adequate representation for those diverse interests—a task that Rule 23(a)(4) precludes them from undertaking in the circumstances of this case.

This Court has faced such an agreement twice before. In both *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Court invalidated settlements that sought to achieve a similar resolution of liability issues affecting the asbestos industry. In both cases, the Court concluded that when "named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses," the certification of a settlement class must be overturned because "the interests of those within the single class [were] not aligned." *Amchem*, 521 U.S. at 626; *see Ortiz*, 527 U.S. at 832–32, 856–57. When a settlement "makes important judgments on how recovery is to be *allocated* among different kinds of plaintiffs, decisions that necessarily favor some claimants over others," *Amchem*, 521 U.S. at 610, the settlement must afford "structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Id*. at 627.

Whether the certification of the settlement class in this case offered the assurances demanded by *Amchem* and *Ortiz* is an important question meriting review by this Court. The Third Circuit's approval of a settlement negotiated without adequate representation for class members on different sides of the many fault lines that the settlement agreement creates

among members of the class reflects a need for further guidance from this Court concerning the rigor with which such protections must be provided. The Third Circuit's decision contrasts sharply with decisions such as *In re Literary Works in Electronic Databases Copyright Litigation*, 654 F.3d 242 (2d Cir. 2011), and *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*, 827 F.3d 223 (2d Cir. 2016), in which the Second Circuit has insisted upon separate representation for differently situated class members in the negotiation of a class settlement that "impacts the 'essential allocation decisions' of plaintiffs' compensation and defendants' liability." *Id*. at 233–34. The significance of class settlements as a means by which our judicial system redresses widespread injuries makes resolving disagreements over the proper procedures for reaching such settlements a particularly important and appropriate task for this Court.

ARGUMENT: REASONS FOR GRANTING THE WRIT

I. The settlement allocates benefits among differently situated class members who did not receive adequate representation.

In this case, a small group of attorneys, eventually designated as representing two named class representatives, devised a settlement benefits plan that (1) includes only five compensable disease categories, plus death with chronic traumatic encephalopathy (CTE) if the death occurred before settlement approval, (2) excludes from compensation a large percentage of the class who have concussion-related conditions that are alleged in the class complaint but not included in the benefits grid, and (3) contains significant offsets to

settlement benefits based on age at time of diagnosis and eligible years played in the NFL. The flaw in the class certification can be stated succinctly: The attorneys for the class did not, and could not, properly represent the wide range of circumstances of the class as a whole in this settlement.

The petition for certiorari focuses largely on the inadequate representation of former players who will experience future health impairments resulting from head impacts suffered while playing in the NFL. The petition explains, for example, the settlement's differential treatment of present and future claimants with CTE, who receive the second-highest possible payment under the settlement if they died before the date of settlement approval but nothing if they die thereafter unless they have another "qualifying diagnosis." We write to amplify the breadth of the conflicts within the class, and the failure to provide adequate representation to the many divergent interests affected.

The settlement agreement created a grid with payment schedules for five specific diseases: amyotrophic lateral sclerosis (ALS), Alzheimer's, Parkinson's, and either moderate or severe dementia. According to the estimate prepared by class counsel's expert, only about 3,600 out of 21,000 class members (17%) will receive *any* monetary award under the grid. JA 1568.[2] Most class members will receive only a medical examination to determine their baseline health condition and counseling and/or certain treatment if they are found to suffer from level 1 (moderate) neurocognitive impairment. If a class member eventually

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[2] "JA" refers to the Joint Appendix filed in the consolidated appeals in the Third Circuit.

develops a diagnosed disease on the grid, he will then be entitled to monetary benefits. But if a class member does not develop any qualifying disease, he will receive no monetary benefits, regardless of how debilitating his symptoms and how much his life is disrupted because of them. And unless the class member opted out, his claims against the NFL are forever barred.

The qualifying diseases, however, by no means exhaust the range of actual, current health effects suffered by players who received head impacts during their careers. Indeed, the master class action complaint filed by class counsel specifically recognizes, and purports to seek damages for, a much broader range of conditions attributable to the brain injuries resulting from repetitive head impacts. Specifically, paragraph 74 of the complaint (JA 882) avers that studies and tests establish that such injuries may result in:

> early-onset of Alzheimer's Disease, dementia, depression, deficits in cognitive functioning, reduced processing speed, attention and reasoning, loss of memory, sleeplessness, mood swings, personality changes, and the debilitating and latent disease known as Chronic Traumatic Encephalopathy ("CTE"). The latter condition involves the slow build-up of the Tau protein within the brain tissue that causes diminished brain function, progressive cognitive decline, and many of the symptoms listed above. CTE is also is associated with an increased risk of suicide.

Although the settlement agreement's allocation decisions resulted in differential treatment of groups of class members who were divided across a variety of axes, class counsel divided the class into only two dis-

tinct groups: those who currently had a qualifying diagnosis and those who did not. The petition for certiorari explains a number of flaws in the representation provided to the "futures" subclass, including the timing of the selection of subclass counsel and subclass representatives in relation to the negotiation of the basic terms of agreement.

Importantly, the definition of the two subclasses directly reflects the decision to designate certain conditions as compensable and others as not compensable. The subclasses are not defined by reference to whether class members presently are suffering adverse health effects from head impacts, but are based on whether they have a condition that *qualifies for compensation under the agreement*. Thus, the crucial decision to privilege some conditions over others is *antecedent* to the definition of the subclasses. Class counsel decided which conditions are and are not "qualified," and they did so without first providing meaningful separate representation of class members with existing conditions that they decided would not qualify for compensation.

Moreover, the terms of the settlement agreement illustrate equally fundamental allocative conflicts *within* each of the two subclasses. For the subclass with present claims, the agreement provides significantly different amounts of recovery for different diseases, and then adjusts those amounts based on differences in the ages of class members and the number of years they played in the NFL. As the expert report prepared for class counsel reveals, more than 60% of the class have fewer than five years of credited service, which sharply reduces their benefits. JA 1572. That same report also estimates that the age-at-

diagnosis offset would reduce the payments by 90% to Alzheimer's victims alone, with ALS class members suffering an estimated 40% reduction. JA 1573.

Despite these critical divisions even within the group that would receive compensation, players suffering from different diseases or falling into different ranges of ages and years of service had no separate representation. The class representative for the subclass with current claims had the condition that was provided the highest compensation, and his years of service and age likewise placed him at the top of the grid. Neither a subclass representative nor, perhaps more importantly, subclass counsel was assigned to advocate on behalf of differently situated groups within the qualifying diagnosis subclass in claiming shares of the settlement benefits.

Likewise, within the futures subclass, no distinction was drawn between players *currently* experiencing health impairments not included in the list of qualifying conditions—conditions such as depression, sleeplessness, memory loss, and personality effects—and those who suffer no current symptoms but are at risk because of the common experience of head impacts affecting nearly all former players. Thus, the futures subclass provided no representation to the interest of players in receiving compensation for *existing* health impacts not included in the grid.

Rather than being based on a negotiation among representatives of the differently interested subdivisions of the class, the allocation decisions made in the negotiation process reflected class counsel's subjective judgments about the fairest way to divide among class members the amount that they perceived the NFL

would be willing to pay. The mediator who oversaw the negotiations described the process as follows:

> Plaintiffs' [*i.e.,* class counsel's] actions throughout the negotiations reflected a sound appreciation of the scientific issues associated with their claims. They were aware of mainstream medical literature linking traumatic brain injury to an increase in the likelihood for developing early-onset dementia, Alzheimer's Disease, Parkinson's Disease, and ALS. Informed by their experts and based on their investigation, the Plaintiffs concluded that it was fair to compensate retired players for those diagnoses as part of the Settlement.

Layn Phillips Dec., JA 3807, ¶ 8. In other words, the lawyers who conducted the negotiations decided who would be compensated and whose claims would be released without compensation based on their own views of fairness.

II. This Court's decision in *Amchem* requires structural protections for class members' divergent interests.

This Court's reasoning in *Amchem* demonstrates why the class here was improperly certified. The protections in Rule 23 are "designed to protect absentees by blocking unwarranted or overbroad class definitions [and] demand undiluted, even heightened, attention in the settlement context." 521 U.S. at 620. *Amchem* is incompatible with a process in which basic decisions about how to allocate payment among clients with conflicting interests are made without providing separate representation of those conflicting interests.

In *Amchem*, class counsel reached an agreement with defendants on behalf of a class of all individuals injured by asbestos. Some of those individuals had sustained or would sustain serious impairments, others would sustain lesser harms, and others would sustain no harm at all. Counsel agreed on a set of payments, like the grid here, applicable to all class members. Although the Court identified several concerns with the settlement and related class certification, the Court focused on the overarching problem that one set of lawyers was attempting to represent the entire class in negotiating a settlement where class members had very different injuries and, in many respects, conflicting interests.

The *Amchem* class counsel attempted to represent both class members with existing asbestos-related diseases and those who had no current asbestos-related symptoms and may not have even known that they had been exposed to asbestos. In addition to this "futures" problem, the Court rejected class certification because "named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned." 521 U.S. at 626. Specifically, some class members in *Amchem* would develop the deadly disease mesothelioma and others would develop asbestosis (some quite serious cases and others less so). *Id.* at 603. Many class members would have no physical impairment of their health, but would have lesions on their lungs that were detectable on x-rays and for which courts had been upholding jury verdicts, the so-called "pleurals." Under the settlement, the pleurals would receive no compensation "even if

otherwise applicable state law recognizes such claims." *Id.* at 604.

As in this case, class counsel in *Amchem* had decided how much each category of injury would receive, and they allotted nothing for the pleurals or for the consortium claims for spouses. The Court in *Amchem* emphasized that "the settlement does more than simply provide a general recovery fund"; "[r]ather, it makes important judgments on how recovery is to be *allocated* among different kinds of plaintiffs, decisions that necessarily favor some claimants over others." *Id.* at 610 (internal quotation marks omitted).

Likewise here, class counsel decided which diseases would be on the grid, how much each such disease would be paid, and what offsets would be made. Just as class counsel in *Amchem* decided that pleurals would receive no compensation, counsel here decided that thousands of class members (and spouses) whose claims and conditions are included in the class complaint would get nothing. As *Amchem* holds, Rule 23(a)(4) does not allow class counsel to make those choices, no matter how reasonable they may seem. Indeed, the Court in *Amchem* emphatically rejected the proposition that a "gestalt judgment or overarching impression of the settlement's fairness" can substitute for Rule 23's "standards … for the protection of absent class members." *Id.* at 621.

The problem of satisfying Rule 23(a)(4)'s adequacy-of-representation requirement arises because every class member is competing against every other class member for benefits in a situation in which the defendant is not willing to pay everyone in the class for all of their concussion-related conditions. The outcome of such competition cannot be dictated by "ob-

jective" factors such as the characteristics and severity of particular illnesses or the comparative strength of the claims of differently situated class members. Such considerations provide no determinative guidance as to which class members should recover, or how much more a claimant with ALS should receive than one with Alzheimer's Disease or dementia.

A case like this one is thus quite unlike cases in which there are relatively objective measures of the gradations of injuries suffered by members of a class—for example, the economic injuries suffered by class members who purchased different quantities of a product. And, unlike in asbestos cases, for example, there is no large body of historic data on the amounts that claimants suffering chronic effects of sports-related head impacts have received in litigation or settlement that can be used as a benchmark for ranking the values of different claims. Moreover, the settling parties did not suggest that these numbers could be derived from estimated costs of treatment, either in actual dollars or relative costs among the diseases. In short, class counsel made subjective judgments about the relative values of the five diseases on the grid and allocated the bulk of the settlement funds to class members who developed them, denying all compensation to the majority of the class whom they were required by Rule 23(a)(4) to represent adequately.

Under such circumstances, class counsel who undertake to decide who receives money (and in what amounts) and who receives none cannot adequately represent the diverse interests of all class members. Contrary to class counsel's view as expressed at the settlement hearing (JA 5374), the issue is not the accuracy of counsel's "line drawing," or whether class

counsel "could have done it better or should have gotten more, should have tweaked this that way." Rather, it is whether counsel had the right to draw such lines at all, without adequate representation of the constituencies on opposite sides of those lines, who could be expected to have their own ideas of what is "fair" and "appropriate." As the Second Circuit has emphasized, "[o]nly the creation of subclasses, and the advocacy of an attorney representing each subclass, can ensure that the interests of that particular subgroup are in fact adequately represented." *In re Literary Works*, 654 F.3d at 252.

III. The Third Circuit's misapplication of *Amchem* merits review by this Court.

The court of appeals discounted the conflicting interests of class members by focusing primarily on one aspect of the conflict between present and future claimants: whether the settlement would assure the same recoveries to future claimants who developed qualifying conditions that it gave to present claimants. The court concluded that, because both those with qualifying conditions and those who might develop them later were represented, and because the settlement fund is uncapped and settlement amounts are inflation-adjusted, class counsel had successfully surmounted any *Amchem* problem of conflict between presents and futures.

In so holding, the court overlooked that the futures problem here is not simply fair treatment as between those who currently have one of the few qualifying conditions and those who may develop one in the future. The more fundamental problem is that the division between presents and futures here presupposes the decision about which conditions are com-

pensable and which are not—a decision reached without adequate representation of class members seeking recovery for conditions that did not make the grid.

The court also virtually ignored the many other ways that the settlement represents allocative choices among claimants with different conditions and different histories, none of whom had separate representation for their distinct interests. Because the structure of the settlement self-evidently reflected fundamental allocative choices among a variety of conflicting interests within the class, the court was wrong to brush aside as "unnecessary" and impractical any consideration of the adequacy of representation of conflicting interests other than those of present and future claimants with respect to qualifying conditions. Pet. App. 28a n.9.

Beyond its conflict with the principles of *Amchem*, that approach cannot be squared with the Second Circuit's insistence that subclasses with separate counsel are required whenever a settlement "impacts the 'essential allocation decisions' of plaintiffs' compensation and defendants' liability." *In re Payment Card*, 827 F.3d at 233–34. It is hard to imagine a settlement more impacted than this one by interests that are "antagonistic to the others on a matter of critical importance—how the money would be distributed." *Id*. The Second Circuit's approach—that subclasses are required "when categories of claims have different settlement values," *In re Literary Works*, 654 F.3d at 250–51—would require a different outcome.

Even leaving the circuit conflict aside, further guidance from this Court would be of great value to practitioners and lower courts. Settlements remain the predominant way that class actions that are not

dismissed on legal grounds are resolved, and clarity concerning the procedural protections necessary to arrive at an enforceable resolution of a class action is therefore of significant importance. Although class settlements regularly produce recoveries of great value to injured plaintiffs with substantial claims, the high stakes at times result in deals that fail to reflect adequate concern for the interests of all groups of individuals whose rights are at stake. As this case illustrates, even respected and ethical attorneys seeking to achieve what they view as a fair settlement that provides benefits of undoubted value to some severely injured persons may do so in a way that papers over divisions within a class and sets the interests of some members against those of others. Review by this Court would help define more concretely the bounds of the due process rights of class members and the degree to which effective representation of divergent interests is required by Rule 23(a)(4) in the negotiation of class settlements.

This Court's review would also be helpful in determining the extent—if any—to which the need for such representation must be balanced against the possibility that representation of competing interests within the class might, as the court of appeals feared, "slo[w] or even hal[t] the settlement negotiations." Pet. App. 28a n.9. The suggestion that representation of interested parties should be limited by the interest in fostering settlement finds no support in the principles animating *Amchem*. Rule 23 does not guarantee a right to a class settlement regardless of what the facts or law may be. Rule 23(a)(4) and due process require that all members of the class be adequately represented. *Hansberry v. Lee,* 311 U.S. 32, 44–45 (1940).

In any event, separate counsel for significant subclasses could have been included in the settlement negotiations, so that their different (and potentially conflicting) interests were represented. The objection that such a process would be so unwieldy as to preclude the possibility of reaching agreement vastly overstates the number of necessary subclasses. Including in the negotiation process advocates for each of the major subgroups whose competing interests are disposed of in the agreement might have slowed or complicated the negotiation, but, more importantly, it would have ensured that the participants represented all of the distinct interests affected.

Once all interests were assembled, counsel could bargain to reach a settlement fair enough to be acceptable to everyone. This process is in essence what happens in major reorganization cases under the Bankruptcy Code, where no fixed amount is available for creditors, who must compete among themselves and with shareholders. *See*, *e.g.*, *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2006) (final approval of reorganization with multiple tort claimants and other creditors). Although the process would not be easy, the difficulties in litigating the claims either in a class action or in thousands of individual cases would create strong incentives to reach agreement. In this case, the incentives for the various groups of claimants to reach consensus would be aided by the fact that the NFL has already shown willingness to pay benefits expected to total $765 million. And as the mediator observed (JA 3812, ¶24):

> If the NFL Parties did not succeed on dismissing all of these cases as a matter of law, they faced years of very expensive discovery and potentially

> hundreds or thousands of trials in state and federal courts around the country. Among Plaintiffs' many claims and allegations, the NFL Parties faced the risks of litigating issues relating to helmet safety standards and rules of football play. Each potential lawsuit carried with it the risk of a significant damage verdict and a negative precedent that could affect all cases that followed.

Moreover, as an NFL attorney put it at the settlement hearing (JA 5389), "What has been lost in the fog of the objections is that the league chose to do the right thing here" by agreeing to a substantial monetary settlement. There is no reason to think that, when all sides are motivated to reach a fair settlement, fair representation of the interests at stake would render settlement impossible.

The Third Circuit was clearly correct on one point: The issue here is not whether a reviewing court might "want different terms or more compensation for a certain condition." Pet. App. 51a. Within the scope of possible allocations that might be defensible as fair, a court may lack a yardstick for preferring one over the other. By the same token, counsel attempting to represent a class with competing interests in allocating a potential recovery are also not entitled to place themselves above the conflicting claims of those they are supposed to represent and impose their own view of a fair resolution. To paraphrase this Court in *Amchem*, it is no more acceptable for class members' rights to be determined by a class-counsel's-foot appraisal than by a chancellor's-foot one. 521 U.S. at 621.

In a case like this one, a settlement arrived at by counsel who adequately represented the full range of

interests within the class, and providing appropriate benefits for the entire injured class, could well support certification of a class of retired players, consistent with Rule 23(a)(4) and due process. Such a settlement might be based on a similar grid and might even provide that not all players who suffered concussions would receive a monetary benefit. The fundamental problem with *this* settlement, and with the class certified solely for purposes of this settlement, is that it was constructed without the involvement of counsel representing significant segments of the class who are adversely affected by its offsets and exclusions. Whether the settlement class here satisfies Rule 23(a)(4) and the demands of due process is an important question warranting this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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