No. 16-413

In The Supreme Court of the United States

RAYMOND ARMSTRONG, et al.,

Petitioners,

v.

NATIONAL FOOTBALL LEAGUE AND NFL PROPERTIES LLC,

Respondents,

KEVIN TURNER AND SHAWN WOODEN, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF 135 FORMER NATIONAL FOOTBALL LEAGUE PLAYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

This brief is filed on behalf of 135 former National Football League (NFL) players who are members of the class and whose claims will be extinguished by the settlement in this case if this Court denies certiorari.[2] *Amici* did not object to the settlement below. But they have grave concerns about the way the settlement handles (or more accurately ignores) the claims of living victims of Chronic Traumatic Encephalopathy (CTE). Although *Amici* favor a settlement, they do not believe that the current structure of the settlement is fair and reasonable.

Specifically, *Amici* are class members who are suffering from the symptoms of CTE or fear that they will someday suffer from those symptoms. As described in the Petition and this *Amicus* brief, CTE is caused by repeated head trauma and often results in serious and debilitating emotional and psychiatric injuries separate and apart from cognitive deficits and dementia. In the settlement's current form, such injuries are not compensated at all if diagnosed after the date of the settlement's approval, regardless of whether they lead to economic ruin, disintegration of a player's family, or

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[1] All parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of Court. The parties were notified ten days prior to the due date of this brief of the intention to file. *Amici* state this brief was not authored, in whole or in part, by counsel to a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than *Amici* or their counsel.

[2] A list of all *Amici* can be found in the attached appendix.

even his death, unless the player can prove that he suffers from another qualifying disease.

For example, *Amicus* Tony Gaiter is a 42-year-old former player with the New England Patriots. Mr. Gaiter cannot drive a car or hold a job. He suffers from severe depression. He has a history of homelessness. He mutters to himself and has difficulty carrying on a conversation with friends and family members. He no longer cares about his appearance. According to his life-long friends and relatives, his condition has worsened over time. But none of these symptoms of his decline, all of which occurred after his retirement from the NFL and all of which are signs of CTE, are compensable under the current terms of the settlement.

Tracy Scroggins, a 47-year-old former Detroit Lion, also joins this brief. Mr. Scroggins has withdrawn from the world as a result of his bouts of aggression, anxiety, poor impulse control, and anger. He suffers from depression. He has severe insomnia, often going several nights without sleeping. He has difficulty with focus, attention, concentration, and memory. As a result of his symptoms, he can no longer hold a job and support himself. Mr. Scroggins' symptoms and medical evaluations strongly indicate that he is suffering from CTE. But unless he also manifests a qualifying disease, the settlement will not compensate him for these losses.

Rose Stabler, the ex-wife of Hall of Fame quarterback Kenny Stabler, joins this brief. Mr. Stabler died in 2015, and his autopsy revealed severe stage-3 CTE. Before his death, Mr. Stabler suffered from mood

swings and other mental issues that destroyed their marriage. Mr. Stabler and his heirs cannot recover for CTE injuries under the settlement as currently drafted because he died after the settlement was finalized. In its current form, the settlement compensates players who died with CTE prior to April 22, 2015, up to $4 million. Any player unfortunate enough to die with CTE after that date recovers nothing under the settlement, absent proof of another qualifying disease. Which means, although Kenny Stabler died with severe CTE on July 8, 2015, a mere two and a half months after the cut off, his estate can recover nothing under the current settlement.

William Floyd also joins. Mr. Floyd played with the San Francisco 49ers and Carolina Panthers during his seven-year NFL career. At age 44, he suffers from chronic headaches. He cannot stay on task. He is socially isolated. As his neuropsychological assessment concludes, "Mr. Floyd is totally disabled to the extent that he is unable to engage in any occupation for remuneration or profit."

These individuals, along with the rest of the *Amici*, file this brief to express their concern about the failure of the settlement to address the severe physical, mental, and debilitating impacts of CTE in living players (or players dying after April 22, 2015). Although the settlement releases all of their claims against the NFL, many of the *Amici* may recover nothing under the settlement regardless of the severity of their emotional injuries or the impact CTE has on their life.

In supporting the Petition, *Amici* wish to assist this Court by highlighting how the failure to include CTE sufferers in the settlement negotiations and the resulting omission of CTE from the settlement impacts the class.

Finally, *Amici* address the likely argument that the relatively small number of formal objections is proof that the class is overwhelmingly in favor of the settlement. *Amici* emphasize in this brief that their decision not to formally object to the settlement should not be interpreted as approval of the settlement in its current form.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court requires "heightened scrutiny" of class-wide settlements entered into before a class is certified.[3] This scrutiny is "vital" to protect the interests of absent parties, who face being bound by a process plagued by incentives to sacrifice the interests of some class members for the "greater good" of others. *Amchem*, 521 U.S. at 620. This brief is filed on behalf of a sampling of the many former NFL players whose interests have been sacrificed at the altar of this settlement.

Amici are living class members (or their families) suffering from the severe effects of CTE. Some suffer

[3] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *Ortiz v. Fibreboard Corp*., 527 U.S. 815, 848-49 (1999).

from depression. Others cannot hold a job, have been homeless, or have difficulty maintaining their family relationships. Some, in extreme cases, have considered suicide – all as a result of the trauma caused by multiple head injuries during their NFL careers. Although this litigation was initiated in large part to compensate *Amici* and other NFL players for these very injuries, many will receive no compensation at all under the settlement approved below. Yet, the NFL received a full release of all claims, specifically foreclosing all CTE claims while providing nothing to those suffering with CTE. As to *Amici* and other sufferers of CTE, the settlement is fundamentally wrong and unfair.

The Armstrong Petitioners are correct in requesting this Court's guidance. The courts below misunderstood their obligations to absent class members, despite this Court's teachings in *Amchem* and *Ortiz*. Moreover, as Petitioners explain, there is a divergence among the circuits in applying those teachings. Although recognizing its fiduciary-like obligations to absent class members, the Third Circuit gave complete deference to the bargain struck by Class Counsel and the NFL (the "Settlement Proponents"), declining to interfere with the product of their horse trading.

But this case provides a vivid illustration of why such deference is inappropriate in a case beset by intra-class conflicts and a lack of structural protections for absent class members – the result is a demonstrably defective bargain. The Third Circuit was wrong to permit the parties to sacrifice the interests of some members of the class in favor of the interests of others,

particularly when those sacrificed did not sit at the table. As the result of the decision below makes clear, certiorari review is necessary to provide practical meaning to the abstract principles described by *Amchem* and *Ortiz*.

ARGUMENT

I. The Settlement is Fundamentally Flawed

The master long form complaint in this case focused largely on the severe symptoms of CTE (A.782). In fact, CTE is mentioned nearly twice as often as the three most serious qualifying diseases combined. Parkinson's disease and Amyotrophic Lateral Sclerosis (ALS), which became foundations of the current settlement, were barely mentioned at all.

The original focus on CTE is not surprising. Although the courts below understated its symptoms as "emotional problems" and "mood swings," the effects of the disease are debilitating and life threatening. CTE leads to severe changes in mood and behavior "including depression, hopelessness, aggression, and poor impulse control" (A.2957; A.3028-29). These changes, in turn, result in life-altering behaviors such as an inability to maintain employment, homelessness, social isolation, domestic abuse, divorce, substance abuse, excessive gambling, poor financial decision-making, and death from accidental drug overdose or suicide (A.2956). Two former NFL stars, Junior Seau and Dave Duerson, are tragic examples, each having committed suicide while suffering from the disease (A.2956;

A.3029-30). In short, CTE's behavioral and mood problems are "serious" and "devastating" (A.3028-29).[4]

Understating CTE as an emotional disease also ignores the dramatic biological manifestations of the disease. The buildup of Tau proteins from multiple head traumas literally can disintegrate a former player's brain. *See* Tim Rohan, *A Football Widow's Traumatic Journey*, N.Y. Times (Apr. 8, 2013), http://www.nytimes.com/2013/04/09/sports/football/eleanor-perfettos-journey-coping-with-dementia-and-death-of-former-nfl-player-ralph-wenzel.html?_r=0 ("At the time of his death, [Ralph] Wenzel's brain was scarred and unsightly . . . most noticeably, the entire brain had shrunk to half its size. It could fit in the palm of a hand. It weighed 910 grams, about the size of a 1-year old's brain.").

Nor is there anything speculative about the existence of the disease (A.4426-27). CTE-like symptoms resulting from multiple head traumas have been recognized in the scientific literature for generations, particularly in connection with boxing ("punch drunk" syndrome) (A.4420). The NFL now acknowledges the existence of CTE and admits the connection between

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[4] Co-lead class counsel confirmed this emphasis on their website. After noting that thousands of football players "are dealing with horrible and debilitating symptoms," counsel then explained, "CTE is believed to be the most serious and harmful disease that results from NFL and concussions." *Up-To-Date Information on NFL Concussions*, Seeger Weiss LLP (Sept. 9, 2014), http://www.seegerweiss.com/football-concussions/#ixzz3CByBHxui (A.2236-37).

NFL service and CTE, although it denied this connection for years. *See* Steve Fainaru, *NFL Acknowledges, For First Time, Link Between Football, Brain Disease*, ESPN.com (Mar. 15, 2016), http://www.espn.com/espn/otl/story/_/id/14972296/top-nfl-official-acknowledges-link-football-related-head-trauma-cte-first. The fact that the settlement awards up to $4 million to players with CTE who died before the settlement (with autopsy confirming the disease) demonstrates that the NFL knows that CTE is serious and warrants significant compensation. But for players currently living with CTE, the settlement offers nothing.

That means *Amici*, who are likely CTE sufferers, may recover nothing from the settlement – regardless of whether their CTE causes economic ruin, destroys their family, or kills them – unless they can also fit into one of the qualifying disease categories such as Parkinson's, ALS, or Alzheimer's. Thus, any *Amici* could be completely debilitated by mood and emotional problems, suffer from homelessness, be unable to hold a job or run his business, leave his family, or commit suicide, and he would recover nothing from the settlement, which completely releases his CTE claims against the NFL. This would be true even if he could prove definitively that his symptoms were caused by his NFL service.

There is no dispute about this. The NFL admits that at least eleven percent of CTE sufferers will suffer from the debilitating problems of CTE long before, and maybe without ever, suffering from the cognitive deficits or qualifying diseases covered by the settlement

(A.2962; A.3498) (Doc. 6455 at 20 n.21). Junior Seau and Dave Duerson are two fateful examples. Both were killed by CTE, yet probably would not have qualified for any benefits under the settlement at all had they been required to also prove a qualifying disease (A.2957; A.3029-30).

The objectors' experts, however, believe that even the NFL's significant admission that eleven percent would go uncompensated is much too low. The percentage may be as much as several times higher (A.2956-64; A.3029-31; A.3068-72).

The omission of CTE from the settlement could not be more unfortunate. There is no cure for CTE. Yet, these sufferers receive no compensation under the settlement and are left to fight their battle against the disease alone.

The Petition ably explains this remarkable disparity between the original complaint, which largely focused on compensating players for CTE, and the settlement, which largely ignores it. No one disputes that *Amchem* requires each member of the class to be adequately represented in the negotiations. *Amchem*, 521 U.S. at 607, 625-27. But, despite the complaint's emphasis on CTE, living CTE sufferers were not at the settlement table – at all. Pet. 4-9. Acknowledging *Amchem*, class counsel knew that they had to address the conflict between players who were currently suffering symptoms and those plaintiffs who might suffer symptoms in the future. *See Amchem*, 521 U.S. at 627; Pet.

5-6. Thus, they selected a named class representative and lawyer for each of these two subclasses. Pet. 5-6.

But class counsel ignored an equally broad divide between those who might suffer from cognitive deficits, or a qualifying disease such as ALS, and those who were suffering from the debilitating emotional effects of CTE. Instead, they chose as the class representative for the "futures class" a player who expressed concern about suffering from a qualifying disease, but expressed no concern about CTE. Pet. 6. Compounding the problem, they selected this futures class representative after the deal was largely formed. *Id.* And worst of all, the lawyer they chose to represent the future injury subclass was a lawyer who had an inventory of presently injured plaintiffs and thus had a conflict of interest. *Id.*; *see Amchem*, 521 U.S. at 607 (holding that attorney with a stable of immediately injured clients had an irreconcilable conflict with class members who might be injured in the future).

Thus, without future CTE sufferers at the table, the plaintiffs and the NFL reached a bargain that compensated the qualifying diseases at high levels, compensated CTE sufferers who died before the settlement at high levels, and did not compensate future CTE sufferers at all – unless they also proved a qualifying disease or significant cognitive deficits. Pet. 7-9.

Although the benefits to the settlement are genuine for those who fit within its narrow parameters, the fact is, only a relatively small number of players will

qualify for significant recovery by developing ALS, Alzheimer's disease, or Parkinson's disease (A.2955-57; A.2959-61; A.3028-30; A.3070-72; A.4422-43). Unfortunately, the much larger class of former players suffering from the debilitating emotional effects of CTE is left uncompensated. And, even more remarkably, the NFL receives a full release of these CTE claims without providing any compensation to its sufferers. All this in a lawsuit originally brought to address the problems of CTE.

II. It is Improper to "Horse Trade" Away the Rights of Many Class Members

The response of the Settlement Proponents will be that this was a tough deal, negotiated forcefully on both sides through the assistance of a skilled mediator. Deals require horse trading, and the horse trade here was the promise of significant compensation for qualifying diseases in exchange for offering no compensation at all to living CTE sufferers (or those dying with CTE after the date of final approval of the settlement), regardless of the severity of their suffering. This horse trade was necessary, the settlement narrative continues, because it is impossible to diagnose CTE in living players and because the symptoms of CTE are also present in the general population.

As discussed below, these concerns were overstated and had easy solutions. But the bigger problem is that the narrative was flawed in its application of

the governing legal principles. In accepting this narrative and expressing their reluctance to "second-guess" the settlement, the courts below largely abdicated their responsibility to apply heightened scrutiny to the fairness of the deal and to act as a fiduciary in protecting absent class members.

To begin with, there is a huge difference between meddling with the particular terms (such as the amount of compensation for various diseases), and ensuring that significant numbers of the class are not left out. Many living CTE sufferers, including many of those filing this brief, could be left out of this settlement entirely, despite suffering injuries for which they must provide the NFL a complete release.

Thus, while compromise is what every settlement is about, a compromise that benefits part of the class at the expense of another is completely improper, as special counsel for the class has himself acknowledged. *See* Samuel Issacharoff, *Governance & Legitimacy in the Law of Class Actions*, 1999 S. Ct. Rev. 337, 340-41 (1999) (hereinafter "Issacharoff Class Action Review") (explaining that the major failing of the settlement in *Amchem* was the agreement of counsel to a settlement in which certain class members would receive nothing); *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 797 (3d Cir. 1995) (hereinafter *GM Trucks*).

Put another way, courts may not approve a settlement in the name of the "greater good" (or under the

guise of not second-guessing the settlement proponents' conception of the "greater good") that sacrifices the interests of some class members to promote the interests of others. *See Amchem*, 521 U.S. at 621 (emphasizing that a settlement without adequate structural protections cannot be approved on a "gestalt judgment or overarching impression of the settlement's fairness"); *Ortiz*, 527 U.S. at 857-58 (holding that the need and efficacy of the settlement cannot override protections for absent class members).

In that regard, this settlement suffers from the same deficiencies that caused this Court to reject the settlements in *Amchem* and *Ortiz*. In each, the Court was concerned that the interests of a significant number of absent class members were not adequately protected. As Judge Becker cautioned in the first in-depth review of this issue, courts should be suspicious when some segments of the class are treated differently than others. *GM Trucks*, 55 F.3d at 808 (discussing the "duty to assure the settlement is fair, reasonable, and adequate with respect to *each* category of the class" (emphasis by Judge Becker) (citing *Piambino v. Bailey*, 610 F.2d 1306, 1329 (5th Cir. 1980))).

This settlement has all the warning signs of an unfair deal. As to CTE, the recovery is "significantly less than" one might expect. *GM Trucks*, 55 F.3d at 806 (emphasis omitted). Major claims for relief in the complaint have been entirely left out. *Id*. Many absent class members will recover nothing in exchange for their full release. *Id.*

But, as the Petition ably explains, what stands out in this case is not just the omission of living CTE sufferers. The bigger problem is their omission without a clear record that they had a place at the settlement table at all. In this regard, *Amchem* and *Ortiz* are on all fours. The lack of structural protections to ensure the adequacy of representation, coupled with the indisputable fact that many class members will recover nothing in exchange for their release, leaves no doubt that the courts below misunderstood their fiduciary obligations to the class.

Thus, while it is easy to articulate the principle that class settlements must be given heightened scrutiny, this approval of the settlement here demonstrates that the application of those principles in practice is subject to widely differing interpretations, as the Petition describes. Pet. 19-26. This case provides the perfect vehicle for this Court's intervention and explanation.

III. There Were Solutions Available

The settlement did not need to eliminate the claims of living CTE sufferers to work. There were numerous solutions to the concerns articulated by the Settlement Proponents.

Essentially the Settlement Proponents make two broad arguments. First, they argue that the science is too young. They point out that it is currently impossible to definitively diagnose CTE sufferers before their death. Similarly, they argue that the science cannot yet

establish a definitive connection between CTE and the debilitating non-cognitive impacts experienced by *Amici* and other living CTE sufferers. According to the Settlement Proponents, because folks in the general population also suffer from depression, homelessness, and suicide, it would be too difficult to try to compensate these symptoms, however serious they may be. Second, they argue that compensation for CTE is unnecessary because many players will also suffer from a qualifying disease. We address these arguments in turn.

A. The Science

Why Freeze the Science in Place? As to the arguments that the science is too young, there were ways to deal with scientific uncertainty. Objectors' experts testified that, although a definitive diagnosis of CTE cannot currently be made until death, medical science is developing rapidly and within the next five to ten years, living CTE sufferers may be diagnosable with certainty (A.2957; A.3030; A.4420-21; A.4754). There was no need to make a settlement agreement stretching sixty-five years into the future a slave to the past.

Indeed, there has been much progress on the scientific front in the two years since the fairness hearing. Even during the appellate process of this case, new studies emerged concerning the diagnosis of CTE in

living patients.[5] Scientists are beginning to understand the physical markers of the disease in the brain and are working hard to develop tests that can identify these markers. In just the last two months, researchers have announced further progress in identifying CTE in the living using biomarkers linked to the disease.[6] In

[5] *See* Daniel G. Amen et al., *Perfusion Neuroimaging Abnormalities Alone Distinguish NFL Players from a Healthy Population*, 53 J. Alzheimer's Disease 237 (2016); Robert A. Stern et al., *Preliminary Study of Plasma Exosomal Tau as a Potential Biomarker for CTE*, 51 J. Alzheimer's Disease 1099 (2016); Ken Belson, *N.F.L. to Spend $100 Million to Address Head Trauma*, N.Y. Times (Sept. 14, 2016), http://www.nytimes.com/2016/09/15/sports/football/nfl-concussions-100-million-roger-goodell.html.

[6] *See* Brenda Kelley Kim, *Using PET Technology & Protein Tracers to See CTE*, Labroots (Oct. 4, 2016), http://www.labroots.com/trending/neuroscience/4231/using-pet-technology-protein-tracers-cte; *Experimental Imaging Agent Reveals Concussion Related CTE in Living Brain*, Neuroscience News (Sept. 27, 2016), http://neurosciencenews.com/cte-concussion-neuroimaging-5138; DL Dickstein et al., *Cerebral Retention Pattern in Clinically Probable CTE Resembles Pathognomonic Distribution of CTE Tauopathy*, 6 Translational Psychiatry 900 (2016) (tauopathy imaging may be a promising tool to detect and diagnose CTE-related tauopathy in living subjects); Ken Belson, *Researchers Make Progress Toward Identifying C.T.E. in the Living*, N.Y. Times (Sept. 26, 2016), http://www.nytimes.com/2016/09/27/sports/football/cte-concussions-diagnose-in-living.html; Genevieve Wanucha, *Tackling the Science of Brain Injury & Dementia Risk*, UW Medicine Memory & Brain Wellness Center (May 13, 2016), http://depts.washington.edu/mbwc/news/article/what-we-know-about-head-trauma-and-dementia-risk-qa-with-dr.-dirk-keene. Other studies are being funded at significant levels, which may well lead to early breakthroughs in diagnosis and treatment.

light of the tremendous medical and scientific attention being given to CTE, there can be no doubt that further developments will be on the near horizon.[7]

The parties differ on how far these studies will go over the next decade or two. But the important point is that there was no need to guess. The settlement could have been tied to scientific advances. For example, in the parallel litigation concerning head injuries in college athletes, the district court approved a settlement that includes medical tests that will assess symptoms related to CTE.[8] Equally important, the settlement calls for an annual review to permit the benefits from the settlement to change as the science develops. *NCAA Settlement*, 314 F.R.D. at 586.

Another option would have been to create a CTE qualifying diagnosis. This would allow players who are later diagnosed with CTE to obtain compensation. To account for the changing science, the settlement could establish a framework for constant reevaluation of the diagnostic criteria related to CTE, which was the approach adopted in the NCAA concussion settlement.

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[7] *See* Belson, *N.F.L. to Spend $100 Million to Address Head Trauma*, *supra* note 5; Mark Sundman, P. Murali Doraiswamy & Rajendra A. Morey, *Neuroimaging Assessment of Early and Late Neurobiological Sequelae of Traumatic Brain Injury*: *Implications for CTE*, 9 Frontiers in Neuroscience 334 (2015) (noting the "recent explosion of research focused on improving the diagnosis and treatment of Traumatic Brain Injury" and CTE).

[8] *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Injury Litig.*, 314 F.R.D. 580, 586 (N.D. Ill. 2016), *settlement approved*, MDL No. 2492, 2016 WL 3854603 (N.D. Ill. July 15, 2016) (hereinafter *NCAA Settlement*).

Id. And unlike the current settlement – which gives the NFL the power to forever veto compensation for CTE – the settlement could authorize an objective committee of scientists to approve changes and "keep pace with the changing science and medicine." *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 630-31 (3d Cir. 1996).[9]

In short, reasonable solutions were available to address the developing science. It was wrong for the settlement to freeze the science in place. *Amchem*, 521 U.S. at 610-11.

The Settlement Proponents will respond that the parties can reexamine the settlement again in ten years, but this right is ephemeral at best. First, why wait ten years? Retired players are suffering now. Second, the NFL has no obligation other than to discuss in good faith possible "prospective modifications to the definitions of Qualifying Diagnoses." Nothing about that clause obligates the NFL to ever compensate players who suffer from CTE. It is naïve to think that the same NFL that went to great lengths to hide and deny the long-lasting effects of concussions would ever agree to pay for the widespread effects of the disease concussions cause.

There were other ways to deal with developing science without abandoning compensation for living sufferers of CTE symptoms. Consider the scope of the

[9] *See NCAA Settlement*, 314 F.R.D. at 586 (appointing a joint committee of experts on both sides of the question, supervised by a retired federal district court judge).

release. The biggest problem with the settlement is that CTE sufferers give a full release to the NFL but receive nothing in return. Why not simply craft a release that does not include CTE claims in the living? *See, e.g.*, *In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. 112, 125 (E.D. La. 2013) (approving release that would not cover later-manifested physical conditions arising from exposure).

Alternatively, the settlement could have included a "sturdy back-end opt-out right[]" permitting CTE sufferers who receive no compensation to opt out later and pursue their rights in court. *Amchem*, 521 U.S. at 610, 627 (recognizing back-end opt-out rights to protect future injury plaintiffs).[10] If, as the Settlement Proponents suggest, these CTE claims are so very weak, then the NFL would be giving up little by narrowing the release or adding a back-end opt out.

Structural Concerns. In addition to these alternatives in crafting the terms of the settlement, the Settlement Proponents could have ensured that CTE sufferers were at the settlement table. Class counsel could have appointed a class representative who was suffering from CTE symptoms. At the very least, the class could have appointed a class representative who articulated that he was worried about CTE symptoms.

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[10] This mechanism has been embraced by several scholars. *See* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, & Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 433 (2000); Issacharoff Class Action Review, *supra*, at 368-70.

Class counsel had no need to exacerbate the problem by assigning an attorney with a conflict of interest. Class counsel could easily have added another subclass or obtained separate representation for players suffering from CTE symptoms – in particular, a lawyer without an inventory of presently injured clients. *See Ortiz*, 527 U.S. at 856 (representing more than one class against the same defendant is impermissible); Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. Rev. 439, 477 (1996) (representing future injury class and presently injured claimants is impermissible); Issacharoff Class Action Review, *supra*, at 383-87 (identifying that the settlement in *Amchem* failed because some members of the class recovered nothing in the face of a structural incentive by counsel to favor presently injured parties).

Merits of the science argument. The Settlement Proponents argue that there was no choice but to settle because of the problems of proving causation. But such arguments prove too much, because other aspects of the settlement suffer from similar infirmities. For example, it is impossible to definitively identify Alzheimer's disease in the living (A.2957), yet the settlement recognizes, as does medical science, that there are markers that permit a diagnosis in the living, despite the absence of definitive proof. The astounding development of the science in treating and diagnosing Alzheimer's disease foreshadows likely developments in CTE diagnosis and treatment in the living. There

was no need to treat Alzheimer's disease and CTE so differently.

Similarly ironic is the Settlement Proponents' claim that it is impossible to demonstrate the connection between CTE symptoms in the living and service in the NFL. Objectors' experts explained that these CTE symptoms are just as amenable to detection and diagnosis as cognitive disorders (A.2956). Moreover, the NFL has now admitted the connection between CTE and head trauma caused by an NFL career. Indeed, the connection between CTE and neurological problems is, if anything, stronger than the proof of the connection between head trauma and Parkinson's disease, Alzheimer's disease, or ALS. The one thing that can be said definitively about CTE is that it is caused by multiple head traumas (A.3028).

Simply put, the Settlement Proponents have it backwards. The risk of proving causation is much less for CTE, which is directly linked to brain trauma, while ALS, Parkinson's disease, Alzheimer's disease, and cognitive deficits are prevalent in the general population.

The solution of the court below was to express its hesitance to wade into the opposing arguments on science and causation. We understand that reluctance. But the fact is, refusing to examine the science to avoid "second-guessing" the Settlement Proponents is to suggest that there is no role for the courts at all. Any deal can be justified under the rubric of not interfering with the parties' compromise. *See Comcast Corp. v. Behrend*,

133 S. Ct. 1426, 1433 (2013) (cautioning courts not to refuse to entertain arguments relevant to class certification by dismissing them as pertinent to the merits determination).

The significant difference here is that living CTE sufferers have had their rights traded away completely. Even if one accepted the argument that this trade was for the "greater good," this is a tradeoff that the law simply does not allow. *See Amchem*, 521 U.S. at 620-21, 627 (noting the problem of approving a settlement that completely extinguishes some claims); *GM Trucks*, 55 F.3d at 806; Issacharoff Class Action Review, *supra*, at 383 (stating that the major failing of the settlement in *Amchem* was the "internal disunity of the class – in particular, the agreement of counsel to a settlement in which certain class members would receive nothing").

In fact, this trade does not work even if examined from the framework of negotiating a deal. Essentially, class counsel bartered away the rights of living CTE sufferers for nothing. It is impossible to say that living CTE claims are worth *nothing at all*, even if they may be presently difficult to prove.

B. CTE Claims are Not Redundant

As to the claim that many CTE sufferers will also suffer from a qualifying disease, this may be true. But it is equally true that there are many class members, like *Amici*, who may suffer from the debilitating problems of CTE without otherwise qualifying for the

settlement. There can be no justification for requiring these class members to trade a release for potentially no compensation, no matter how serious their injuries.

Even the Settlement Proponents agree that at least eleven percent of CTE sufferers will not suffer from any other qualifying disease (A.3498). The objectors' experts, however, testified that the percentage was actually much higher (Doc. 6455 at 20 n.21). Whether that number is eleven percent or higher, it cannot justify assigning no value to these separate claims.

Similarly, it is impossible to fairly explain why the settlement would provide significant compensation for CTE diagnosed in players who died before the settlement was finalized (at the second highest lump sum level), but provide nothing for living CTE victims, regardless of the severity of their symptoms, even if they are officially diagnosed with CTE after death. After all, it would seem that if the big question is the difficulty of diagnosis, this difficulty disappears after death.

The Settlement Proponents suggest that compensating earlier CTE victims is simply a convenient method of determining a right to compensation. But then why terminate the proxy at the date of the settlement? Why not continue it for all class members who die and are diagnosed with CTE after death? The Settlement Proponents' unsatisfactory response is that living plaintiffs will have the opportunity to prove other qualifying diseases. But not all will be able to prove that they suffer from these other diseases, even

though they may face economic ruin or death as a result of the emotional injuries they suffer. Equally important, by far the most common potential "proxy" (dementia) is compensated at a tiny fraction of CTE. Absent a situation where every person with CTE also suffers from a qualifying disease, which everyone agrees is not the case, other qualifying diseases cannot serve as a proxy for CTE.

One last observation. The Settlement Proponents argue that approval was justified because there are relatively few formal objectors to the settlement. We filed this brief, in part, to address that concern. *Amici* did not formally object, but their silence did not indicate their approval of the terms of the settlement and certainly did not indicate their approval of the omission of CTE from its terms.

Nor should this Court infer anything from the silence of other class members. Courts have cautioned that the number of objectors is not a good indication of problems with the settlement. By the time the settlement is presented, it appears to be a *fait accompli*. *GM Trucks*, 55 F.3d at 789. For many, the costs and trouble of objecting may not be worth it, particularly when there are enormous resources being marshaled in support of the settlement. For others, who are bordering on homelessness or otherwise barely hanging on to their lives, navigating the objection process in federal court is simply impossible.

Amici are perfect examples. None objected formally. But all are concerned about the settlement's

omission of any protection for the non-cognitive symptoms of living CTE sufferers. *Amici* are typical of many other class members who were forced to make individual decisions based on imperfect information and without knowing what the future will bring.

The determination of whether to object or opt out in a complicated case like this is difficult. As Judge Becker explained, future-injury class members often "lack adequate information to properly evaluate whether to opt out of the settlement" because of the "difficulty in forecasting what their futures hold." *Georgine*, 83 F.3d at 631, 633. That difficulty is compounded here because diagnosis and treatment of CTE remains a developing science. Class members were put in the impossible position of guessing what their futures will bring. All the more reason, as we discussed above, to have included back-end opt-out rights, a more limited release, or a realistic method of incorporating scientific developments into the settlement. There was no need for anyone to be guessing about the future here.

This case is not about second-guessing the bargain struck below. The problem here is that absent class members did not receive the required protections which lead directly to an unfair bargain. Injured class members, such as *Amici*, should not have been required to give up their rights for nothing in return. The settlement below is flawed and the Third Circuit should have rejected it.

CONCLUSION

For the foregoing reasons, the Armstrong Petition for writ of certiorari should be granted.

Respectfully submitted,

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October 31, 2016

APPENDIX A

The following former players are appearing as *Amici* in support of Petitioners' Brief:

Derrick Alexander

Jason Allen

Jimmy Arnold

Darryl Ashmore

Nathaniel Bell

Michael Bishop

Ryan Boschetti

Donald Brady

Bobby Brooks

Reggie Brown

Tony Bryant

James Burgess

Donald Caldwell

Dexter Carter

Je'Rod Cherry

Charlie Clemons

Scott Cloman

Tay Cody

Ben Coleman

Arthur Cook

Shawn Crable

Henri Crockett

Zack Crockett
Eric Curry
Kenneth Davidson
Shockmain Davis
Arrion Dixon
Dedrick Dodge
Ray Donaldson
Matthew Dorsett
Kelvin Dorsett
Mario Edwards
Jamar Enzor
Dwan Epps
John Eskridge
Ricky Feacher
Michael Finn
Anthony Fieldings
Victor Floyd
William Floyd
Elliott Fortune
Corey Fuller
Michael Gaines
Tony Gaiter
Ernest Givins
Quinn Gray
Cleveland Green

D. Jacquez Green
Damacio Green
Eric Green
Randall Gregory
David (Kris) Haines
Anthony Hamlet
Greg Harrell
Samuel Harrell
Kelvin Harris
Nic Harris
Larry Hart
Robert Hewko
Joe Horn
Kevin House
Allen Hughes
Jeff Hunter
Sedrick Irvin
Alonzo Jackson
Roger Jackson
Tim Jacobs
James Johnson
Ken Johnson
Marquis Johnson
Ralph Ken Johnson
Tim Johnson

Aaron Jones
Larry Jones
LaCurtis Jones
John Keith
Kelvin Kight
Marc Lillibridge
John Lee
Ronald Lewis
Robert Lyles
Alfonso Marshall
Leonard McDowell
Mark McMillian
Willie Middlebrooks
Frank Middleton
Cleo Miller
Patrick Miller
Leonard Mitchell
Sankar Montoute
Clarence Moore
Tobiath Myles
Jamie Nails
Gus Otto
Billy Owens
Thomas Parks
Robert Pennywell

Tommy Polley

Nate Poole

Ken-yon Rambo

Gregory Randall

Patrick Riley

Adrian Robinson

Tyrone Rogers

James Rouse

Stuart Schweigert

Tracy Scroggins

Bill Searcey

Leon Searcy

Chris Shelling

Tracy Simien

Corey Simon

Jermaine Smith

Shevin Smith

Tony Smith

Rose Stabler on behalf of her ex-husband, Kenny Stabler

Walter Stanley

Ray Sydnor

Santonio Thomas

Anthony Thompson

Tarlos Thomas

Tamarick Vanover
Ron Warner
Larry Webster
Donald Westbrook
Gerald Willhite
Chris Williams
Michael Williams
Steve Williams
Upton Tyrone Williams
Wally Williams
Warren Williams
Robert Wilson
Mark Word
Floyd Young