NOS. 16-283 & 16-413

In the
Supreme Court of the United States

SCOTT GILCHRIST AND THE ESTATE OF CARLTON CHESTER "COOKIE" GILCHRIST,

Petitioners,

RAYMOND ARMSTRONG, et al.,

Petitioners,

v.

NATIONAL FOOTBALL LEAGUE AND NFL PROPERTIES LLC,

Respondents,

v.

KEVIN TURNER AND SHAWN WOODEN, et al.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

This case concerns the settlement of claims reached between the National Football League and a class of more than 20,000 retired NFL players. That historic settlement provides real, substantial, and immediate benefits to all class members, including an uncapped monetary fund through which any retired player who is diagnosed with a qualifying neurocognitive or neuromuscular impairment or condition can receive a financial award. All told, the settlement is expected to fund nearly $1 billion in financial awards to eligible class members. Only 1% of class members exercised their right to opt out of that settlement—a remarkable number given the large number of class members who were individually represented and the unprecedented publicity the settlement received. Yet now, a handful of players, all of whom could have opted out but chose not to do so, ask this Court to undo the settlement because they disagree with the lower courts' unanimous conclusions that the parties assiduously abided by this Court's decisions in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), in reaching this hard-fought compromise.

The question presented is:

Did the Third Circuit err in concluding that the parties' settlement abides by this Court's precedents and satisfies Rule 23(e)'s requirement that a class-action settlement be "fair, reasonable, and adequate"?

PARTIES TO THE PROCEEDING

Respondents National Football League and NFL Properties LLC were defendants in the District Court and appellees in the proceedings below. Respondents Kevin Turner* and Shawn Wooden were class representatives in the District Court and were plaintiffs-appellees below.

In No. 16-283, petitioner Scott Gilchrist, individually and on behalf of the Estate of Carlton Chester "Cookie" Gilchrist, was an objector in the District Court and appellant in No. 15-2290.

In No. 16-413, petitioners Raymond Armstrong, Larry Barnes, Larry Brown, Drew Coleman, Kenneth Davis, Dennis DeVaughn, William B. Duff, Kelvin Mack Edwards, Sr., Phillip E. Epps, Gregory Evans, Charles L. Haley, Sr., Mary Hughes, James Garth Jax, Ernest Jones, Michael Kiselak, Dwayne Levels, Darryl Gerard Lewis, Gary Wayne Lewis, Jeremy Loyd, Lorenzo Lynch, Tim McKyer, David Mims, Clifton L. Odom, Evan Ogelsby, Solomon Page, Hurles Scales, Jr., Barbara Scheer, Kevin Rey Smith, George Teague, and Curtis Bernard Wilson, were objectors in the District Court and appellants in No.

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* On April 18, 2016, following Kevin Turner's death, the Third Circuit substituted Paul Raymond Turner in place of his deceased son pursuant to Rule 43(a)(1) of the Federal Rules of Appellate Procedure. Because Kevin Turner's death occurred after the Third Circuit heard oral argument, the panel determined that it was "unnecessary to substitute a new class member as subclass representative" for "purposes of deciding th[e] appeal," and the panel elected to "continue to refer to Kevin Turner as the subclass representative." Armstrong.App.20a.

15-2272 below. Petitioner Willie T. Taylor was an objector in the District Court and appellant in No. 15-2294 below.

Other objectors in the District Court and appellants in the consolidated proceedings below were: Craig Heimburger and Dawn Heimburger (15-2206); Cleo Miller, Judson Flint, Elmer Underwood, Vincent Clark, Sr., Ken Jones, Fred Smerlas, Jim Rourke, Lou Piccone, and James David Wilkins, II (15-2217); Curtis L. Anderson (15-2230); Darren R. Carrington (15-2234); Liyongo Patrise Alexander, Charlie Anderson, Charles E. Arbuckle, Cassandra Bailey (as Representative of the Estate of Johnny Bailey), Ben Bronson, Curtis Ceaser, Jr., Larry Centers, Darrell Colbert, Harry Colon, Christopher Crooms, Jerry W. Davis, Tim Denton, Michael Dumas, Corris Ervin, Doak Field, Baldwin Malcolm Frank, Derrick Frazier, Murray E. Garrett, Clyde P. Glosson, Roderick W. Harris, Wilmer K. Hicks, Jr., Patrick Jackson, Gary Jones, Ryan McCoy, Jerry James Moses, Jr., Anthony E. Newsom, Rance Olison, John Owens, Robert Pollard, Derrick Pope, Glenell Sanders, Thomas Sanders, Dwight A. Scales, Todd Scott, Frankie Smith, Jermaine Smith, Tyrone Smith, and James A. Young, Sr. (15-2273); Jimmie H. Jones, Ricky Ray, and Jesse Solomon (15-2291); Andrew Stewart (15-2292); Alan Faneca, Roderick "Rock" Cartwright, Jeff Rohrer, and Sean Considine (15-2294); and James Mayberry (15-2305). Alvin Harper, Michael McGruder, and Nathaniel Newton, Jr., were also objectors in the District Court and appellants in No. 15-2272 below, but they are not petitioners here.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent National Football League states that it is an unincorporated association with no corporate parents and that no publicly held company possesses an ownership interest of ten percent or more in the National Football League or in any NFL member club. Respondent NFL Properties LLC states that it is not directly owned by any parent corporation, that it is a wholly owned subsidiary of the Delaware limited partnership NFL Ventures, L.P., and that no publicly held companies possess an ownership interest of ten percent or more in NFL Properties LLC.

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INTRODUCTION

As class counsel correctly explains in its brief in opposition, this case does not satisfy any of this Court's traditional criteria for certiorari. Indeed, the decision below is eminently correct. Far from departing from any of this Court's precedents, the decisions below reflect a sound and painstakingly detailed application of that settled law to the unique facts of this case.

In insisting otherwise, petitioners distort the settlement actually at the heart of this case. In fact, the NFL and a class of retired NFL players reached a historic settlement that is estimated to provide nearly $1 billion in financial awards to eligible class members. The settlement fund is uncapped and ensures that every member of the more than 20,000-person class will receive a financial award if he is ever diagnosed with a qualifying neurocognitive or neuromuscular impairment or condition. And a retired player may recover without establishing that his qualifying diagnosis actually resulted from injuries *in the NFL*, as opposed to college, high school, or other organized football, or other sports or non-sports activities—a difficult showing that each and every player would have had to prove had he litigated his case to final judgment. Equally important, the settlement provides substantial financial and diagnostic benefits *now*, not after years of litigation with an uncertain outcome.

And the sources of uncertainty were hardly limited to the difficulties of proving causation. The NFL had strong arguments that the retired players' claims were preempted by federal labor law, and the

retired players' claims faced statute-of-limitations, assumption-of-the-risk, and contributory and comparative negligence defenses as well. Unsurprisingly, then, only about 1% of the class members exercised their right to opt out of the settlement. That rate is strikingly low given that more than 5,000 class members were separately represented in the litigation and that the settlement is one of the most publicly scrutinized in history. Moreover, more than a dozen retired players who initially chose to opt out have sought and received the District Court's authorization to rejoin the settlement since final approval.

Yet now, a mere handful of objectors ask this Court to blow up the settlement entirely—even though doing so will delay compensation and put all 20,000 class members at very real risk of recovering nothing. This Court should reject that extraordinary invitation. As both courts below concluded after exhaustive review, the parties' settlement is the product of hard-fought and arm's-length negotiations. It is supported by extensive factual findings, and the District Court was exceptionally vigilant in ensuring that the settlement was fair, reasonable, and more than adequate. In fact, far from rubber-stamping the settlement, the court repeatedly sent the parties back to the negotiating table to hammer out an agreement that provided greater benefits to the class. The parties' negotiations were also closely supervised by a retired United States district judge and a Special Master. And the end result is a historic settlement that provides real, substantial, and immediate financial benefits to retired NFL players suffering

from serious neurocognitive conditions—regardless of whether those conditions can be traced to NFL play.

In unanimously affirming the District Court's approval of that settlement, the Third Circuit emphasized that it "is the nature of a settlement that some will be dissatisfied with the ultimate result." Armstrong.App.58a. But as the court observed, a handful of objectors should not be permitted to "risk making the perfect the enemy of the good." *Id.* This settlement, like any settlement, may not be "perfect," but it certainly "is fair," which is the relevant legal question. *Id.* And it was the product of assiduous adherence to this Court's precedents governing the settlement of class-action claims. Accordingly, petitioners identify no legal or factual error—let alone any basis for this Court's review.

STATEMENT OF THE CASE

A. The Initial Litigation

Roughly five years ago, 73 retired NFL players filed the first concussion-related lawsuit in the Superior Court of California. Armstrong.App.5a. The players alleged that the NFL, as well as sports-equipment manufacturer Riddell, failed to take reasonable actions to protect them from the risks of head injuries in professional football.

The NFL removed the case and similar lawsuits to federal court on the ground that the suits were completely preempted by the Labor Management Relations Act (LMRA) because the retired players' claims arose from the terms of collective-bargaining agreements that governed their employment with the NFL. The District Court denied the players' request to remand, agreeing with the NFL that the players'

claims were "inextricably intertwined with and substantially dependent upon an analysis of certain CBA provisions imposing duties on the clubs with respect to medical care and treatment of NFL players." Order at 1, *Maxwell v. Nat'l Football League*, No. 2:11-cv-08394 (C.D. Cal. Dec. 8, 2011), ECF No. 58. The NFL then moved to dismiss the lawsuits on numerous grounds, including LMRA preemption, failure to state claims, and statutes of limitations.

Around the same time, another group of retired players filed a putative class action against the NFL in Pennsylvania federal court. The NFL moved the Judicial Panel on Multidistrict Litigation to consolidate all the concussion-related suits for pretrial proceedings. Armstrong.App.6a. The panel agreed, consolidated the pending suits as a multidistrict litigation, and assigned the proceedings to District Judge Anita Brody in the Eastern District of Pennsylvania. Following consolidation, more than 5,000 retired players filed over 300 lawsuits alleging concussion-related claims against the NFL. Judge Brody then appointed co-lead class counsel, a steering committee, and an executive committee. The steering committee was responsible for pretrial tasks, and the smaller executive committee was responsible for coordinating the proceedings. To streamline the hundreds of cases, the court ordered the plaintiffs to submit a Master Administrative Long-Form Complaint and a Master Administrative Complaint. These complaints became the operative pleadings and superseded the numerous complaints filed by individual players.

The master complaints alleged that professional football in the NFL placed the retired players at risk for concussive injuries during games and practices. Armstrong.App.7a. The complaints alleged that the NFL had a duty to provide players with rules and information to protect them from the health risks of brain injury from football. The players alleged that the NFL's conduct caused them to suffer a variety of injuries and conditions, including Alzheimer's disease, dementia, depression, deficits in cognitive functioning, loss of memory, mood swings, sleeplessness, and a recently identified brain pathology called chronic traumatic encephalopathy (CTE). The retired players and their estates alleged negligence, medical monitoring, fraudulent concealment, fraud, negligent misrepresentation, negligent hiring, negligent retention, wrongful death and survival, and loss of consortium, seeking damages and injunctive relief.

The retired players' claims faced significant legal obstacles at the outset. First, the NFL had a strong argument that the claims must be dismissed in their entirety because they were preempted by section 301 of the LMRA. As this Court held nearly 40 years ago, "'when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract,' the plaintiff's claim is pre-empted by §301," and the plaintiff may seek relief only pursuant to the terms of the collective-bargaining agreement. *Int'l Bhd. of Elec. Workers, AFL-CIO v. Hechler*, 481 U.S. 851, 852-53 (1987). Here, the collective-bargaining agreements between the players and the NFL govern player safety, and they allocate responsibilities for

safety among the NFL, the member clubs, and the players' union. For instance, under those agreements, the member clubs and their physicians, not the NFL, bear responsibility for player medical care. That includes responsibility for treating player injuries, deciding when players are healthy enough to return to play after injury, and informing players about medical risks associated with continued play.

Accordingly, multiple courts (including the district dourt in *Maxwell*, the first set of cases filed) had found nearly identical state-law claims preempted by the LMRA. *See, e.g.*, Order at 2, *Maxwell*, No. 2:11-cv-08394 (C.D. Cal. Dec. 8, 2011); *Smith v. Nat'l Football League Players Ass'n*, No. 4:14-cv-01559, 2014 WL 6776306, at *9 (E.D. Mo. Dec. 2, 2014); *Duerson v. Nat'l Football League, Inc.*, No. 12-cv-02513, 2012 WL 1658353, at *9 (N.D. Ill. May 11, 2012). As the *Maxwell* court put it, the "physician provisions" of the collective-bargaining agreements "must be taken into account in determining the degree of care owed by the NFL." Order at 2, *Maxwell*, No. 2:11-cv-08394 (C.D. Cal. Dec. 8, 2011). Under a straightforward application of *Hechler*, the claims are therefore preempted.

LMRA preemption was just one of many legal hurdles that the retired players faced. The players also had to establish both general and specific causation—*i.e.*, both that head trauma can cause the diseases that they alleged, and that each individual player's disease was the product of playing NFL football, not playing football elsewhere, or something else entirely. Moreover, many plaintiffs faced daunting statute-of-limitations, assumption-of-the-

risk, and contributory and comparative negligence defenses.

B. The Settlement Proceedings

The District Court heard extensive arguments on the NFL's preemption defense. But rather than definitively resolve the issue, Judge Brody ordered the parties to mediate under the supervision of a retired United States district judge. In the meantime, Judge Brody "agreed to withhold" her ruling, which "might have sent the litigation to arbitration." Armstrong.App.69a.

Mediation began in July 2013. According to the mediator, the parties proceeded to conduct "arm's-length, hard-fought negotiations" under his supervision. Turner.App.46a. The mediator met with both sides together and independently, and the parties also held "extensive negotiations" on their own pursuant to his directives. *Id.* Negotiations were "contentious," and they continued "almost every day" over a two-month period. Turner.App.46a-47a.

The mediator also emphasized that early in the negotiations, the retired players chose "to create two proposed separate subclasses, each represented by separate counsel." Turner.App.47a. One subclass consisted of retired players displaying compensable neurocognitive impairments, and the second subclass consisted of retired players not currently displaying such impairments. The mediator explained that this was essential "to ensure the adequate and unconflicted representation" of all proposed class members. *Id.* Each subclass was represented by separate subclass counsel throughout the negotiations.

Counsel for the parties were "highly experienced" and "aggressively asserted their respective positions on a host of issues." Turner.App.46a-47a. The mediator found it "evident throughout the mediation process that Plaintiffs' counsel were prepared to litigate and try these cases, and face the risk of losing with no chance to recover for their labor or their expenses, if they were not able to achieve a fair and reasonable settlement result for the proposed class." Turner.App.49a. The parties hired "well-qualified medical experts" to "help determine the merits of the case," and the mediator observed that those experts were "extremely well-versed in the medical literature." Armstrong.App.70a; Turner.App48a. The parties also retained "economists and actuaries" to help model "the likely disease incidence and adequacy of the funding provisions" in any proposed fund. Turner.App.48a. And the parties "had access to considerable information" about the retired players to help inform their judgments, including "biographical information about the vast majority of the former players" and "the number of seasons played," as well as "information about the current cognitive impairment of over 1,500" retired players. Armstrong.App.70a.

After two months of negotiations and more than 12 full days of formal mediation, the parties signed a term sheet agreeing to a settlement in principle. Armstrong.App.9a. Four more months of negotiations followed before the parties reached an agreement. That proposed settlement provided $675 million in financial benefits for the retired players, along with several other categories of benefits.

In January 2014, class counsel filed a class-action complaint, sought preliminary class certification, and requested preliminary approval of the settlement. Armstrong.App.9. Within a week, Judge Brody sua sponte denied the motion because of concerns about whether the capped $675 million fund would be sufficient to compensate all retired players who might manifest serious injuries in the future. *In re Nat'l Football League Players' Concussion Injury Litig.*, 961 F. Supp. 2d 708, 715 (E.D. Pa. 2014). Judge Brody sent the parties back to the negotiating table and assigned a Special Master to supervise their efforts to reach a revised settlement.

Under the Special Master's supervision, the parties negotiated for six more months. Both sides agreed to financially restructure the original settlement agreement to address the District Court's concern that "all Retired NFL Players" diagnosed with a qualifying ailment at any time would "be paid." *Id.* Ultimately, the NFL agreed to an uncapped award fund, guaranteeing that no class member who became eligible for compensation in the future would risk losing out on any compensation due to draining of the fund by earlier claimants. Armstrong.App.9a.

Class counsel once again sought preliminary class certification and preliminary approval of the proposed settlement agreement. On July 7, 2014, the District Court conditionally certified the class, preliminarily approved the settlement, and scheduled a final fairness hearing. *In re Nat'l Football League Players' Concussion Injury Litig.*, 301 F.R.D. 191 (E.D. Pa. 2014). The District Court concluded that

there were no obvious deficiencies casting doubt on the agreement's fairness, that the settlement appeared to be "the product of good faith, arm's length negotiations," that class counsel possessed "adequate information concerning the strengths and weaknesses" of the claims against the NFL, and that the settlement did not appear "to provide undue preferential treatment to any individual Settlement Class Member or Subclass." *Id.* at 198-99.

The preliminarily certified class consisted of "all living NFL football players who … retired … from playing professional football with the NFL or any Member Club," as well as their representative and derivative claimants. *Id.* at 204. The proposed class contained two subclasses based on whether a retired player had a qualifying diagnosis on the date of preliminary approval of the settlement. The first subclass consisted of retired players who had not received a diagnosis for a qualifying impairment before July 7, 2014. Armstrong.App.14a. In other words, this subclass consisted of retired players who did not currently have a condition that would be compensable under the settlement. The second subclass consisted of retired players who *had* received a diagnosis for a qualifying impairment before July 7, 2014. This second subclass included players who *did* have a condition that would be immediately compensable under the settlement.

The District Court gave class members 90 days to object to or opt out of the settlement agreement. *In re Nat'l Football League Players' Concussion Injury Litig.*, 301 F.R.D. at 206 (E.D. Pa. 2014). At the end of the opt-out period, and after receiving

briefing from all concerned parties, the District Court held a day-long fairness-hearing. Armstrong.App.10a. Judge Brody "heard argument from class counsel, the NFL, and several objectors who voiced concerns against the settlement." *Id.*

Judge Brody, however, still was not completely satisfied. After the fairness hearing, she proposed several changes to benefit class members. These changes included ensuring that players receive credit for time spent playing in overseas NFL affiliate leagues and ensuring that all retired players would receive a neurological assessment. The parties renegotiated and submitted an amended settlement agreement to address the court's concerns.

C. The Settlement Agreement

The final settlement agreement provides several benefits to the class in exchange for releasing all claims and actions against the NFL and related entities "'arising out of, or related to, head, brain and/or cognitive injury, as well as any injuries arising out of, or relating to, concussions and/or sub-concussive events.'" Armstrong.App.15. First, at the heart of the settlement is an uncapped monetary-award fund for retired players with a qualifying diagnosis. Second, the settlement establishes a $75 million formal baseline-assessment program to provide class members with free neuropsychological and neurological evaluations. Third, the settlement creates a $10 million education fund to promote safety and injury prevention among football players of all ages. Armstrong.App.11a.

1. The uncapped monetary-award fund

The settlement establishes an uncapped monetary-award fund to guarantee compensation to all players who manifest serious neurocognitive or neuromuscular impairments during their lifetimes. This inflation-adjusted fund will exist for 65 years, sufficient time for every player who is now, or later becomes eligible, to receive an award. A class member becomes eligible for an award by submitting proof of one of six qualifying medical diagnoses: (1) level 1.5 neurocognitive impairment, (2) level 2 neurocognitive impairment, (3) Parkinson's disease, (4) Alzheimer's disease, (5) amyotrophic lateral sclerosis ("ALS"), and (6) death with CTE, if the death occurred before final approval of the settlement. Critically, to be eligible for an award, a retired player need not show that his career in the NFL is connected in any way to his qualifying diagnosis. Instead, the diagnosis alone suffices.

Although most of the qualifying diagnoses are ones that must be made during the player's lifetime, the final one—death with CTE—is designed solely for players who died before the final settlement was approved. That special category is the product of factors unique to CTE, in particular the conceded reality that CTE can be diagnosed only in the deceased. CTE is a pathology associated with the build-up of abnormal tau proteins in the brain. Armstrong.App.7a. The study of CTE is in its infancy. As of now, the pathology "is only diagnosable post-mortem" by "examining sections of a person's brain under a microscope." *Id.* It is

therefore impossible for scientists to say whether a living person has a brain with CTE. Moreover, by the time of final approval of the settlement, scientists had identified only 200 cadavers with brains displaying CTE. Accordingly, right now, very little is known about the causes or effects of CTE, including whether it "is associated with … symptoms" in living persons. Armstrong.App.155a. While it may be that CTE causes serious neurocognitive or other impairments, it may also be that someone could have CTE without manifesting any serious symptoms at all.

For those reasons, the parties agreed that the settlement would not treat the CTE pathology as a qualifying diagnosis. Instead, the parties designed the qualifying diagnoses to ensure that players will be compensated if they manifest serious neurological impairments that some believe may be associated with CTE during their lifetimes, regardless of whether CTE or some other pathology ultimately proves to be the underlying cause. That approach was consistent with the basic design of the settlement, which was to compensate retired players for manifested neurocognitive and neuromuscular impairments, not for pathologies that may or may not have any discernable impact on their lives. It also ensures that retired players will be compensated for serious neurocognitive impairments that might result from CTE when those symptoms manifest, instead of being forced to wait on a diagnosis that will come only once it is too late for that compensation to benefit the players themselves.

The parties made an exception, however, for the small number of retired players who died before the settlement became final and were diagnosed with CTE post-mortem. While some of those deceased players had received a qualifying diagnosis during their lifetimes, others never had the opportunity to seek one. Accordingly, there was concern that some of those class members may have suffered not just from the pathology of CTE, but from serious neurocognitive impairment, yet it was too late to determine whether that was actually the case. To ensure that the families of those deceased players would not be disadvantaged by the problem that the player did not know during his lifetime that he should seek a qualifying diagnosis, the parties agreed to treat a post-mortem diagnosis of CTE as a proxy for a qualifying diagnosis for players who died before final approval of the settlement. No such proxy was needed for *living* players, however, because the settlement entitled them to free neuropsychological and neurological evaluations through which they would receive a qualifying diagnosis if they manifested serious neurocognitive impairments that may be associated with CTE. *See infra* pp.26-28.

A retired player who receives a qualifying diagnosis is eligible for a maximum monetary award of: $1.5 million for level 1.5 neurocognitive impairment, $3 million for level 2 neurocognitive impairment, $3.5 million for Parkinson's disease, $3.5 for Alzheimer's disease, $5 million for ALS, and $4 million for death with CTE. Each potential award is subject to a downward adjustment (1) as the age at which a retired player is diagnosed increases; (2) if a class member played fewer than five eligible seasons;

(3) if the player suffered a severe traumatic brain-injury or a stroke unrelated to NFL play; and (4) in certain circumstances involving players who have not already received a qualifying diagnosis, if the player refused to participate in the settlement's baseline-assessment program. Armstrong.App.12a. If a player receives a monetary award but later receives a more serious qualifying diagnosis, the player is eligible for a supplemental monetary award.

Class members can collect from the fund by registering with the settlement's claims administrator within 180 days of the date on which the administrator provides supplemental notice to the class of the various deadlines, including the registration deadline. The claims administrator can extend this deadline for good cause. Armstrong.App.12a. A retired player must then submit a claims package to the administrator within two years of receiving a qualifying diagnosis or two years of the date on which supplemental notice is posted on the settlement website, whichever is later. The administrator can extend this deadline as well for substantial hardship. A player seeking an award must include in his claims package information about both his qualifying diagnosis and his NFL career. The claims administrator must then notify the player within 60 days whether he is entitled to an award.

Both a class member and the NFL have the right to appeal the claims administrator's award determination. To discourage appeals that lack merit, settlement class members pay a $1,000 fee to file an appeal, but that fee is fully refunded if the appeal is successful, and it can also be waived for

financial hardship. The settlement permits the NFL to appeal an award determination only in good faith.

2. The baseline-assessment program

Under the settlement, no retired player need forgo neurological testing because of inability to pay. The settlement guarantees every class member who has played at least a half of an eligible season free baseline neuropsychological and neurological evaluations. This program guarantees class members access to both a detailed, standardized neuropsychological evaluation and a neurological examination. Although the settlement allocates $75 million for the baseline-assessment program, every class member eligible to participate in the program is guaranteed free evaluations.

The baseline-assessment program serves several important purposes. First, retired players may use their evaluations to determine whether they have a qualifying diagnosis and thus qualify for a monetary award. Second, players may use the results of their evaluations in conjunction with the results of future evaluations to determine whether their neurocognitive functions have deteriorated. Third, even if a retired player does not have a qualifying diagnosis but does exhibit level 1 neurocognitive impairment, the baseline-assessment program guarantees supplemental medical benefits including potential treatment, counseling, and pharmaceutical coverage. Fourth, if a retired player consents, his medical data may be used in medical research to improve safety for future football players.

3. The preservation of benefits under collective-bargaining agreements

The settlement provides retired players with generous financial benefits without prejudice to their ability to obtain additional compensation and medical or disability benefits under their collective-bargaining agreements. Those preserved benefits are substantial and include: (1) medical benefits that reimburse certain costs related to dementia, ALS, and Parkinson's up to $88,000 per year; (2) neurocognitive disability benefits of $1,875 to $3,500 for 180 months or until a player's 55th birthday; (3) total and permanent-disability benefits of $50,000 to $250,000 per year, depending on the injury; (4) line-of-duty disability benefits for players with substantial, permanent disabilities resulting from NFL play ($2,000 per month for 90 months); (5) a player-insurance plan and health-reimbursement account, which provides benefits for 60 months after retirement and provides as much as $350,000 in health credits; (6) long-term-care insurance with premiums paid by the NFL; and (7) health plans offering access to comprehensive neurological exams at leading facilities, a credit of $120 per month toward supplemental Medicare insurance, a discounted-prescription-drug benefit, and an assisted-living benefit.

4. The education fund

Finally, the settlement also establishes a $10 million education fund to promote safety and injury prevention in football. Armstrong.App.14a. The fund supports safety-related initiatives in youth football, and also educates class members about their

substantial and preexisting medical and disability benefits under their collective-bargaining agreements.

D. The District Court's Decision

On April 22, 2015, the District Court issued a rigorous opinion certifying the class and approving the settlement agreement. *See* Armstrong.App.60a-212a. Judge Brody grounded her decision in the massive record, which included: two declarations from the retired judge who served as the mediator; more than 50 scholarly works about brain science; the declarations of 20 medical experts; hundreds of pages of actuarial and economic reports and underlying data; multiple versions of the settlement agreement; letters and declarations from several retired players; scores of news articles and press releases about NFL football and the settlement; declarations from various counsel for the class and the NFL; affidavits of subclass representatives Kevin Turner and Shawn Wooden; and the day-long fairness hearing.

First, Judge Brody determined that the proposed class and subclasses satisfied the requirements of Rule 23. The District Court also found that the settlement provided sufficient notice to the class and adequately apprised class members of their rights: the notice "clearly described" of the terms of the settlement "and the rights of Class Members to opt out or object." Armstrong.App.123a. The District Court accordingly determined that the "requirements of Rule 23 and due process are satisfied." *Id.*

In evaluating the fairness of the settlement, the District Court remained mindful both that

settlements "are private contracts reflecting negotiated compromises" and that the court was a "fiduciary who must serve as a guardian of the rights of absent class members." Armstrong.App.124a-25a.

Analyzing the substantive and procedural fairness of the settlement, Judge Brody held that the settlement "is a fair, reasonable, and adequate compromise." Armstrong.App.128a. The District Court emphasized that the settlement under review provided "up to $5 million for serious medical conditions associated with repeated head trauma" and that the settlement ensured that players "receive the maximum possible compensation for their symptoms." Armstrong.App.143a-144a. Moreover, the settlement promised "currently suffering" retired players awards that would be "promptly available." Armstrong.App.144a. And because the monetary fund was uncapped, the settlement ensured that all eligible class members would "receive compensation." *Id.* Judge Brody concluded that the settlement was fair because it compensated "the key harm alleged—the long term effects of repeated concussive hits"—through the baseline-assessment program and cash awards. Armstrong.App.145a.

Judge Brody also explained at length why the settlement was fair in compensating certain serious neurological conditions but not other mood and behavioral symptoms. Surveying the extensive scientific record, she explained that excluding "mood and behavioral symptoms" was "reasonable" because the settlement "only provides compensation for serious, objectively verifiable" impairments "with an established link to repetitive head injury."

Armstrong.App.157a-58a. Other mood and behavioral symptoms, by contrast, "are commonly found in the general population and have multifactorial causation." Armstrong.App.158a.

The District Court also underscored the substantial problems that the class would have faced had it proceeded to litigate the retired players' claims. The court noted that the NFL's motion to dismiss remained pending and had the "potential to eliminate all or a majority of" the claims in the litigation. Armstrong.App.133a. Beyond this problem, the retired players also faced the burden of causation—even "if general causation could be proven, an even more daunting question of specific causation would remain." Armstrong.App.128a. And "in addition to preemption and causation risks," class members also faced "other legal barriers to successful litigation, such as affirmative defenses and risks establishing damages." Armstrong.App.141a. These other defenses included "the relevant state's statute of limitations" and the "state's comparative fault or contributory negligence regime," as football is both a "violent sport and a voluntary activity." *Id.* Protracted litigation would mean not only that "[c]ompensation would be uncertain," but also that retired players with manifested neurocognitive symptoms "would continue to suffer while awaiting relief." Armstrong.App.114a.

E. The Third Circuit's Decision

Of the more than 20,000 class members, roughly a quarter of whom were represented by their own counsel, only 95 joined appeals objecting to the final approval of the settlement. The objectors ultimately

submitted 11 separate briefs totaling some 500 pages. In a unanimous decision, a Third Circuit panel consisting of Judges Ambro, Hardiman, and Nygaard rejected all the objectors' arguments and affirmed Judge Brody's decision in full. *See* Armstrong.App.2a-59a.

Writing for the court, Judge Ambro emphasized that the District Court examined all of the relevant factors "in great detail" before concluding that "the terms of the settlement were fair, reasonable, and adequate." Armstrong.App.39a. And the court found no error—let alone any abuse of discretion—in Judge Brody's analysis. Like Judge Brody, the Third Circuit found that "the expense" of protracted litigation weighed "strongly in the settlement's favor." *Id.* The court also observed that the NFL's unresolved preemption defense "had the capability of denying relief to the majority of class members." *Id.* at 42a. Weighing the risks and rewards of a complex trial, the court determined that the "settlement represents a fair deal for the class when compared with a risk-adjusted estimate of the value of plaintiffs' claims." *Id.* at 45a. And the court noted that the vast majority of the class appeared to agree, as, despite the unprecedented publicity that the settlement received, "only approximately 1% of class members objected and approximately 1% of class members opted out." *Id.* at 40a.

The Third Circuit also considered and rejected the objectors' contention that the settlement's treatment of CTE was procedurally or substantively unfair. The court recognized that retired players cannot be compensated for a diagnosis of CTE during

their lifetimes because the "only way currently to diagnose CTE is a post-mortem examination of the subject's brain." Armstrong.App.46a. But as the court explained, that did not lead the parties to ignore CTE. Instead, they crafted the settlement to ensure that serious purported neurocognitive "*symptoms* associated with CTE" would be "compensated by the existing" qualifying diagnoses, because those diagnoses compensate for symptoms *regardless of* what underlying pathology may cause them. Armstrong.App.46a-47a (emphasis added). The Third Circuit also agreed with Judge Brody that the settlement was "reasonable" in not compensating "[m]ood and behavioral symptoms" such as "aggression" and "depression" because such "symptoms are common in the general population." Armstrong.App.47a. The court further explained why compensating players for death with CTE if death occurred before final approval of the settlement was a reasonable and fair way to deal with the unique complication that those players may not have known that they should seek a qualifying diagnosis during their lifetimes. As the court thus recognized, "this compensation for deceased players is a proxy" for qualifying diagnoses that "a retired player could have received while living." Armstrong.App.47a-48a.

Ultimately, the Third Circuit recognized the settlement for what it was: a hard-fought "bargain struck by the parties, negotiating amid the fog of litigation." Armstrong.App.51a. The panel explained that "settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *Id.* And it affirmed the final approval of the settlement as fair, reasonable, and adequate

because it "will provide significant and immediate relief to retired players," including those players "suffering from some of the symptoms associated with CTE." *Id.*

The Third Circuit denied two petitions for rehearing en banc, with no judge dissenting from denial. Armstrong.App.224a-25a.

REASONS FOR DENYING THE PETITION

The two petitions in this case, joined by only a miniscule number of objectors out of a class of more than 20,000, thousands of whom had separate counsel, principally argue that the decision below conflicts with *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999), because the class involved "present and future claims." But both lower courts exhaustively considered petitioners' objections based on *Amchem* and *Ortiz* and found them wanting. Those case-specific conclusions, involving a settlement that is unusual—primarily in terms of the substantial compensation provided by an uncapped settlement fund and the unusually high number of class members represented by independent counsel—hardly merits this Court's review. What is more, class counsel, subclass counsel, the mediator, and the District Court, were all acutely sensitive to the reality that the settlement addressed both current and future injuries, and indeed bent over backwards to eliminate even the slightest risk that the settlement might benefit present or near-term claimants at the expense of those who become eligible for relief down the line. As a result, the Third Circuit

concluded, the simply reality is that "this case is not *Amchem*." Armstrong.App.29a.

Petitioners' continuing disagreement with that factbound conclusion does not provide a basis for this Court's review. And petitioners' efforts to conjure a circuit split from the fact that the Second Circuit has rejected some class action settlements on *Amchem* grounds just underscores that neither *Amchem* nor *Ortiz*—nor any other decision—creates a bright-line rule for a settlement that resolves both existing and future claims. Instead, the question is whether the settlement and the process that produced it eliminated the concerns identified in *Amchem* and *Ortiz*. All four federal judges to examine this particular settlement have correctly answered that factbound question in the affirmative, and there is no reason to believe that the Second Circuit would have reached a different conclusion.

The *Gilchrist* petitioners fare no better in their effort to identify a certworthy issue concerning the fact that the District Court did not make a *Daubert* determination concerning expert evidence here. Of course, the principal reason the District Court did not make such a determination is that no party, including the *Gilchrist* petitioners, asked the court to do so. The argument is thus forfeited. It is also not remotely certworthy. There is no authority, let alone a split of authority, that requires a District Court to conduct a *Daubert* inquiry before approving a settlement. The fairness inquiry is directed to the judge, not to a jury, so the whole notion of a *Daubert* inquiry to protect the jury from false experts is misplaced.

In the end, then, petitioners do not present any legal question in need of this Court's resolution. Instead, they simply complain about the lower courts' application of settled law to the unique facts of this case. But as the 5,700-page record confirms, the lower courts did not err—let alone abuse their discretion—in rejecting petitioners' complaints. As those courts recognized, settlements are negotiated compromises that involve a yielding of highest hopes in exchange for certainty and resolution. Rule 23 thus wisely does not require a settlement to be perfect; instead, it need only be "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). This settlement easily satisfies that standard. The settlement is the product of a hard-fought compromise, with considerable judicial oversight, negotiated by parties who were acutely aware of the very real risk that litigation would have produced no recovery at all. This Court accordingly should reject petitioners' invitation to allow a miniscule number of objectors to destroy a settlement that provides real, substantial, and immediate benefits to the more than 20,000 retired players who want and need those benefits now.

I. This Settlement Is Entirely Consistent With *Amchem* And Provides Substantial Benefits To All Class Members.

A. The Settlement's Differing Treatment of Differently Situated Claimants Only Underscores Its Adherence to *Amchem*.

While petitioners attempt to couch their pleas for this Court's review in broader legal terms, their principal argument boils down to an attack on the

Third Circuit's factbound conclusion that "this case is not *Amchem*." Armstrong.App.29a. Although that factbound question would not merit this Court's review in any event, as the Third Circuit correctly recognized, the differences between this case and *Amchem* are patently obvious.

In *Amchem*, the parties' settlement "achieved a global compromise" of present and future claims alike "with *no* structural assurance of fair and adequate representation for the diverse groups and individuals affected." 521 U.S. at 627 (emphasis added). Here, by contrast, the class "took *Amchem* into account by using the subclass structure to protect the sometimes divergent interests of the retired players." Armstrong.App.29a. Subclass counsel represented each subclass independently during the settlement negotiations. Moreover, the active roles played by the mediator, the special master, and Judge Brody herself "helped guarantee that the Parties did not compromise some Class Members' claims in order to benefit other Class Members." Armstrong.App.101a. Petitioners' mere disagreement with those findings provides no basis for this Court's review.

Petitioners protest that the interests of future claimants *must* not have been represented because the settlement compensates for death with CTE, but does "not compensate" for "future CTE claims." Armstrong.Pet.25, 29. That contention ignores the practical limitations on diagnosing CTE in the living and rests on a profound misconception of what the settlement does and does not do. First, while petitioners are correct that the settlement does not compensate for CTE itself, they ignore the fact that

"the Settlement *does* compensate the cognitive *symptoms* allegedly associated with CTE." Armstrong.App.149a (emphasis added). The settlement does so by "compensat[ing] *all* objectively measureable neurocognitive decline, *regardless of underlying pathology*." Armstrong.App.155a-56a (emphasis added). Accordingly, the only way in which a retired player diagnosed with CTE after death (which, right now, is the only time it can be diagnosed) would have been ineligible for compensation during his lifetime would be if he did not exhibit the requisite neurocognitive decline. The settlement's failure to compensate that fortunate, asymptomatic individual is no oversight; instead, it is an intentional effectuation of the settlement's goal of compensating for *impairments*, not for particular pathologies—especially when pathologies do not necessarily lead to any serious neurocognitive or neuromuscular impairments.[1]

The situation is different for the very small number of players who died and were diagnosed post-mortem with a CTE pathology before the settlement and its benefits and incentives were finalized. But that is not because the parties wanted to compensate CTE *for its own sake* in those unusual circumstances. Instead, it is because a retired player who died before

[1] The parties' decision to compensate serious neurocognitive impairments also explains why the settlement is reasonable in not compensating for mood and behavioral symptoms, such as depression. As both the District Court and the Third Circuit explained, these symptoms are common in the general population. Moreover, it is commonplace for settlements to provide benefits based on the relative strengths of various claims. *See* Armstrong.App.47a, 157a-58a.

the settlement became final did not have either the mechanisms or the incentives to secure a definitive diagnosis provided by the settlement. Under those unique circumstances, the parties agreed to treat death with CTE as a *proxy* for the qualifying diagnosis that such a player would have been able to obtain during his lifetime had he exhibited those serious symptoms. Of course, "there no longer is a need" for death with CTE "to serve as a proxy" for a qualifying diagnosis for *living* retired players because the settlement provides all such players with free neuropsychological and neurological evaluations to determine whether they are *in fact* manifesting serious neurocognitive impairment. And if they are, then they will receive a qualifying diagnosis and become eligible for compensation now, which "is surely preferable to waiting until they die to pay their estates for a CTE diagnosis." Armstrong.App.48a-49a. Beyond this, any retired player with a qualifying diagnosis who develops a more serious condition is eligible for a supplemental financial award. And a retired player is at zero risk of having his compensation diminished by the claims of deceased players who received a diagnosis of death with CTE before the settlement was approved because the monetary fund is uncapped.

As both courts below thus correctly found, the parties had a perfectly reasonable—and eminently fair—justification for compensating a diagnosis of death with CTE only for the small group of players who died before the settlement became final: because those players were not similarly situated to other class members for purposes of determining whether they suffered from compensable neurological or

neuromuscular impairment during their lifetimes. If anything, then, the settlement's treatment of CTE only underscores the great lengths to which the parties went to take into account the varying circumstances of differently situated class members. Far from raising an *Amchem* problem by benefiting one subgroup at the expense of another, the settlement was carefully crafted to ensure that it would compensate *all* class members who suffer from serious neurocognitive impairment during their lifetimes, no matter what the cause may be. In short, "this case is not *Amchem*." Armstrong.App.29a.

B. Petitioners' Claims Faced Considerable Legal Obstacles.

Petitioners' efforts to blow up the settlement in hopes of obtaining a more favorable one ignore the lower courts' thorough assessment of the settlement's fairness and adequacy and the considerable obstacles facing any plaintiff opting to forge ahead with litigation. Indeed, those obstacles presumably explain petitioners' decision to forgo the option that Rule 23(b)(3) gives to those who question the fairness of a settlement, *viz.*, the right to opt out.

"[P]ublic policy," this Court has noted, "wisely encourages settlements." *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215 (1994). In keeping with that principle, Rule 23 of the Federal Rules of Civil Procedure authorizes district courts to approve class-action settlement agreements when they are "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). All four federal judges below exercised their responsibility to evaluate the final settlement for fairness, and all four concluded that the settlement

provided the class with good, certain value in light of the uncertain expected value of forging ahead with litigation that faced substantial obstacles. The court below reached that judgment by applying a nine-factor test, which underscores the fact-intensive nature of the settlement approval process.

Petitioners never acknowledge the reality that class members may well have recovered nothing had they continued to litigate their claims. As the Third Circuit explained, the class members faced "stiff challenges surmounting the issues of preemption and causation." Armstrong.App.42a. Most federal courts to have considered preemption found that retired players' claims are preempted by federal labor law. The panel below determined that the NFL's preemption defense "had the capability of denying relief to the majority of class members," for it might well have caused many "of the class members' claims [to be] dismissed." *Id.*

Causation, too, posed a daunting problem if litigation ensued. Retired players could not prevail unless they established both general causation—"that repetitive head trauma is capable of causing ALS, Alzheimer's, and the like"—and specific causation—"that the brain trauma suffered by a particular player in fact caused his specific impairments." Armstrong.App.42a. As for general causation, nascent scientific research suggest that brain trauma "is associated with" neurocognitive impairments, but science has not yet established a causal link. *Id.* Furthermore, proving specific causation "would be even more troublesome because a player would need to distinguish the effect of hits

he took during his NFL career from the effect of those he received in high school football, college football, or other contact sports." Armstrong.App.43a. It would also be difficult for retired players to show that neurocognitive decline resulted from football at all, rather than from aging, poor health, or other injuries. The settlement obviates this problem by conferring benefits on all class members without requiring any proof whatsoever of causation.

And preemption and causation were hardly the only hurdles. Many class members faced dispositive statute-of-limitations problems. The claims of others likely would have failed due to assumption-of-the-risk defenses, as professional football is inherently a violent and voluntary activity. Still other claims would be subject to the doctrines of contributory and comparative negligence.

Even assuming class members could overcome these obstacles, moreover, continued litigation would have been complex, expensive, and time-consuming. As the Third Circuit noted, litigating the claims of more than 5,000 retired players alleging a "multi-decade fraud" would "have been an enormous undertaking." *Id.* at 39a. Discovery alone could have lasted years, all while some retired players endured neurocognitive impairments. Class counsel also may have encountered difficulty in maintaining class certification throughout the trial. As Judge Brody found, "the uncertainty of maintaining class certification favors settlement" because "class certification is subject to review and modification at any time during the litigation."

Armstrong.App.142a. And because the retired players' cases were consolidated only for pretrial proceedings, retired players would have found themselves in different district courts around the country once the time came for trial.

What is more, the class members and class counsel had a full appreciation of the merits of the class claims before negotiating the settlement. The parties conducted vigorous mediation. By the time of settlement, class counsel had reviewed a comprehensive database of the symptoms of thousands of retired players, and class counsel had also retained experts in a variety of fields to advise on the strengths of their claims. The Third Circuit recognized that "[w]hat matters is … whether" class counsel "had developed enough information about the case to appreciate sufficiently the value of the claims." *Id.* at 41a. That was certainly the case here, as class counsel had substantial time—several years, in fact—between the filing of the initial lawsuits and negotiating the settlement to inform themselves as to the strength of their case. And as they pursued settlement negotiations, class counsel remained, as Judge Brody noted, "intimately aware of the potential limitations of their case with respect to two dispositive issues"—namely, the NFL's unresolved preemption defense and the great difficulty for the players of proving causation at trial. Armstrong.App.135a.

All in all, the settlement is undoubtedly fair, reasonable, and adequate in light of both the best possible recovery and all attendant risks of litigation. It is true enough that successful state-law tort claims

might have provided the retired players with non-trivial recovery. But, as noted above, the risks of "pressing forward with the case" were colossal. Armstrong.App.44a. The NFL's preemption defense, successful before other federal courts in the past, along with its other defenses could very well have left the class members "with no recovery at all." Armstrong.App.45a. Despite these risks, the settlement not only provides the class members with good value—but provides them with that value *now*. The immediacy of relief is a substantial benefit to the class given the age and circumstances of many of its members.

It is little wonder, then, that the class reacted overwhelmingly favorably to the settlement. The class consisted of more than 20,000 retired players, a quarter of whom were represented by independent counsel. Over 90% of the class members learned about the settlement through direct mail and other media placements. As of 10 days before the fairness hearing, more than 5,200 class members had signed up to receive additional information about the settlement, and the settlement website had more than 64,000 unique visitors. Armstrong.App.40a. Despite unprecedented national media coverage of the settlement, "only approximately 1% of class members objected," and only "approximately 1% of class members opted out." *Id.*

That not only underscores that the vast majority of the more than 20,000 class members have found the settlement reasonable, fair, and adequate, but also confirms that any class members who disagree are free to opt out and run the risks attendant to

litigating their claims to final judgment. But the mere handful of retired players—now, just 33 class members out of over 20,000—who insist on making the perfect the enemy of the good should not be permitted to blow up a settlement that provides real, substantial, and immediate benefits to retired players who want and need those benefits now.[2]

II. This Case Does Not Present Any Cert-Worthy *Daubert* Issue.

The Gilchrist petitioners alternatively contend that the settlement is flawed because the District Court did not hold a *Daubert* hearing to evaluate the expert evidence on CTE. Gilchrist.Pet.23-27. The District Court did not conduct such a hearing for at least one very obvious reason: No one, including the

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[2] Petitioners' amici press a host of issues that petitioners themselves chose not to raise and that are therefore not properly before this Court. Public Citizen, for instance, contends that the settlement was unreasonable in not compensating mood and behavioral symptoms and in adjusting financial awards for factors like age. Public.Citizen.Br.6-7. And the Brain Injury Association of America complains that the settlement fails to compensate for "emotional and behavioral difficulties," and that the settlement considers whether a retired player has had a stroke or a lengthy NFL career. BIAA.Br.12, 20-21. Petitioners have abandoned those arguments for good reason: because both the Third Circuit and the District Court exhaustively considered and rejected all of them. As the courts below recognized, insisting on compensation for a broad array of symptoms that can be caused by any number of factors, and eliminating all consideration of factors that likely contributed to a qualifying diagnosis, are the kinds of terms that would have worked such a fundamental change in the parties' agreement as to risk destroying *any* prospect of settlement. And the courts below also recognized that each potential downward adjustment to the monetary awards had scientific support.

Gilchrist petitioners, asked the District Court to conduct such a hearing. This issue is thus forfeited, as the Third Circuit correctly held. Armstrong.App.49a.

But even if the Gilchrist petitioners had timely made such a request, the District Court would have been well within its discretion to deny such a hearing. The Gilchrist petitioners point to no authority, let alone a split of authority, for the proposition that a District Court must hold a *Daubert* hearing before approving a class-action settlement under Rule 23(e). Indeed, because the fairness determination is made by the district court judge, the whole idea of holding a hearing designed to keep flawed experts from unduly influencing the jury seems misplaced. The Third Circuit accordingly concluded that this argument, even if not forfeited, was meritless. *See* Armstrong.App.49a.

In lieu of any on-point authority, the Gilchrist petitioners just cite a variety of cases acknowledging that district courts have considerable discretion in deciding whether to hold a *Daubert* hearing. Moreover, most of these cases deal with *Daubert* issues in the context of whether to *certify* a class; petitioners, by contrast, seem to be making the novel argument that the District Court could not approve the settlement as *fair* without first deciding whose side of the case the science better supported. Of course, demanding that kind of inquiry would largely defeat the purpose of settlement, which is to allow parties to resolve a case *before* the court reaches "definitive conclusions," Gilchrist.Pet.10, about those kinds of core merits questions. That perhaps

explains why petitioners identify not a single case in which a court has mandated that kind of *Daubert* inquiry before a settlement may be approved.

In all events, not only did the District Court record contain more than 50 scholarly works about brain science and the declarations of 20 medical experts, but Judge Brody's opinion confirms that she rigorously reviewed all this material. *See, e.g.*, Armstrong.App.128a, 138a-141a, 149a-163a. The Gilchrist petitioners' argument thus not only is forfeited, but finds no support in law or fact.

* * *

This settlement represents a hard-fought compromise expected to provide a billion dollars in benefits to retired players who want and need those benefits now. The settlement provides substantial compensation for serious neurocognitive and neuromuscular impairments. Moreover, it ensures that retired players can receive the assessments they need to determine whether they are suffering from such impairments, and any needed treatment. The monetary fund is uncapped to ensure that no retired player stands to benefit at the expense of another. And the settlement also funds educational efforts to support safety and injury-prevention programs for football players of all ages. Predictably, less than 2% of a 20,000-member class either opted out of, or objected to, this historic and well-publicized settlement. As the vast majority of the class recognized, it is the nature of compromise that no settlement is perfect. But as both courts below concluded after faithfully applying this Court's

precedents, this settlement is fair, reasonable, and more than adequate.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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