No. 22-80116

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IN RE HIV ANTITRUST LITIGATION

On Appeal from the United States District Court for the Northern District of California, Case No. 3:19–cv–02573–EMC The Honorable Edward M. Chen, United States District Judge

MOTION FOR LEAVE OF NATIONAL ASSOCIATION OF MANUFACTURERS, PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, AND WASHINGTON LEGAL FOUNDATION TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS' RULE 23(f) PETITION

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DISCLOSURE STATEMENTS PURSUANT TO RULES 26.1 AND 29

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, counsel for *amici curiae* states that the National Association of Manufacturers, Pharmaceutical Research and Manufacturers of America, and Washington Legal Foundation are non-profit, tax-exempt organizations that have issued no stock, that none of them have parent corporations, and that no publicly held company has 10% or greater ownership in an of them.

Pursuant to Rule 29(a)(4)(E), counsel for *amici curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Counsel for *amici curiae* states that all parties consented to the filing of the accompanying brief.

MOTION FOR LEAVE

Amici curiae are the National Association of Manufacturers (NAM), Pharmaceutical Research and Manufacturers of America (PhRMA), and Washington Legal Foundation (WLF). They respectfully file this motion for leave to file a brief as *amici curiae* in support of the Rule 23(f) petition. All parties have consented to this motion. Under the Federal Rules, motions for leave to file *amicus* briefs must state "the movant's interest" and "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(a)(3) (*amicus* brief during consideration of case on merits); 29(b)(3) (*amicus* brief during consideration of whether to grant rehearing).

Movant's interest: The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12.5 million men and women, contributes $2.77 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM's members include manufacturers, designers, and sellers of products in California.

PhRMA is a voluntary, nonprofit association comprised of the leading biopharmaceutical research and technology companies. PhRMA members produce innovative medicines, treatments, and vaccines that save and improve the lives of countless individuals every day. Since 2000, PhRMA members have invested more than $1.1 trillion in the search for new treatments and cures, including an estimated $102.3 billion in 2021 alone.[1] PhRMA advocates for public policies that encourage the discovery of life-saving and life-enhancing new medicines.

WLF is a nonprofit, public-interest law firm and policy center with supporters nationwide, including many in California. WLF promotes free enterprise, individual rights, limited government, and the rule of law. For decades, WLF has appeared as an *amicus curiae* in important class actions to combat the abuse of Rule 23 and the class mechanism. At the root of much class litigation is the plaintiffs' bar's resistance to a basic truth: some claims simply aren't amenable to class treatment. That is no tragedy. On the contrary, Rule 23's high bar for class certification reflects a deep commitment to due process and the rule of law.

Amici have a strong interest in the outcome of the Petition given their dedication to ensuring that pharmaceutical manufacturers facing class actions are

[1] *See* PhRMA, *Research and Development Policy Framework*, https://phrma.org/policy-issues/Research-and-Development-Policy-Framework#:~:text=Research%20%26%20Development%20Policy%20Framework&text=Since%202000%2C%20PhRMA%20member%20companies,%24102.3%20billion%20in%202021%20alone.

guaranteed their procedural and constitutional protections. *Amici* have grave concerns about the legal and healthcare ramifications of expansive class action rulings that artificially inflate the size and scope of litigation. If the Petition is denied and the underlying rulings stand, *amici*'s members would be adversely impacted. The lower court's rulings could lead to even more speculative class actions being certified based on the same manifest errors.

Why an amicus brief is desirable and relevant: "Even when a party is very well represented, an amicus may provide important assistance to the court." *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 132 (3d Cir. 2002). "Some friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group." *Id*. (cleaned up).

In this case, the *amici*'s proposed brief fulfills all three of these functions. They have "particular expertise" in the manufacturing and pharmaceutical industries, antitrust class litigation, and expansive liability theories more broadly. Their insights maybe especially useful during consideration of a Rule 23(f) petition, where the Court must consider whether a decision is of sufficient practical importance to warrant immediate review. *Amici*'s brief discusses how the District Court's reasoning is out-of-step with the Supreme Court's efforts to ensure class

certifications are properly tailored to concrete claims and a majority of district courts in the Ninth Circuit that would not have certified these claims under Article III or Rule 23. It also discusses the potential consequences of the District Court rulings on this and potentially future cases following the same reasoning.

Second, *amici* argue "points deemed too far-reaching for emphasis by a party intent on winning a particular case." *Id.* (cleaned up). Whereas the parties focus on the facts of this case, *amici* make general arguments about the broad significance of the District Court's rulings. These arguments are relevant in deciding whether to exercise the discretionary authority to grant a Rule 23(f) petition.

Third, *amici* "explain the impact a potential holding might have on an industry or other group." *Id*. (cleaned up). As previously described, *amici* have the capability to describe how the District Court's opinion, if followed by other courts, will affect other parties beyond the parties currently before the Court.

CONCLUSION

The motion for leave to file the accompanying *amici curiae* brief in support of the petition should be granted.

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Dated: October 18, 2022

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(b)(4) because it contains 852 words, excluding the parts of the motion exempted by Federal Rules of Appellate Procedure 32(f).

This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in Times New Roman 14- point font.

Dated: October 18, 2022

/s/ Philip S. Goldberg
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Counsel *for Amici Curiae*

CERTIFICATE OF SERVICE

I certify that on October 18, 2022, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

/s/ Philip S. Goldberg

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Pursuant to Rule 29(a)(4)(E), counsel for *amici curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Counsel for *amici curiae* states that all parties consented to the filing of this brief.

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INTEREST OF *AMICI CURIAE*

Amici curiae are the National Association of Manufacturers, Pharmaceutical Research and Manufacturers of America, and Washington Legal Foundation. They have a substantial interest in ensuring that pharmaceutical manufacturers facing class actions are guaranteed their procedural and constitutional protections. *Amici* have grave concerns about the legal and healthcare ramifications of expansive class action rulings that artificially inflate the size and scope of litigation. A statement of interest for each *amicus* is included in the motion for leave to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The District Court rulings at issue—where the court adopted minority positions that artificially enlarged the scope of this litigation—warrant this Court's immediate attention. First, the court improperly certified classes in numerous states where class representatives do not have Article III standing to assert claims; they were never injured in those states. Second, the court certified classes against Defendants for products they never sold; rather, the products were sold by *competitors* with no connection to Defendants. The resulting certifications have artificially inflated the scope and magnitude of this litigation in ways that are clearly out-of-step with the Supreme Court's efforts to ensure class certifications are properly tailored to concrete claims and a majority of district courts in the Ninth Circuit that would not have certified these claims under Article III or Rule 23.

For years, the Supreme Court has responded to expansive class certification rulings by cabining the reach of the federal judiciary and Rule 23 to ensure that aggregating litigation does not distort outcomes that would have otherwise occurred had litigants filed individually. The Court reiterated last year that class plaintiffs do not have Article III standing to assert class claims where they have not suffered concrete injuries from defendants' alleged misconduct. *See TransUnion v. Ramirez*, 141 S. Ct. 2190, 2200 (2021). The Court has also repeatedly stated that federal courts are not to apply Rule 23 expansively; class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979). Rule 23 imposes "stringent requirements for certification that in practice exclude most claims." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013).

Most courts in this Circuit have properly applied this guidance to reject the types of claims here, making the District Court's rulings outliers. They have found that classes should not survive a motion to dismiss, let alone be certified, where there are only a handful of named plaintiffs and none has alleged injury in the majority of states at issue. *See Stewart v. Kodiak Cakes*, LLC, 537 F. Supp. 3d 1103 (S.D. Cal. 2021). A single plaintiff alleging injury in a single state under that state's law should not be able to represent class members from thirty other states asserting claims under those states' laws. But here, end-purchaser plaintiffs bought Complera in one state,

Atripla in three states, and Truvada in eight states, yet the District Court certified classes asserting state antitrust claims in *31 states*.

In addition, it has long been the rule in this Circuit that courts are not to certify classes based on products sold by the defendants' arm's-length *competitors*. A competitor's pricing is subject to "numerous factors" and certifying classes based on a damages theory that relies on such prices would be "conjectural and speculative." *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1339 (9th Cir. 1982). Most courts have applied this precedent to bar this damages theory. Yet the District Court set this precedent aside and certified direct-purchaser classes that included those who bought products only from Defendants' arm's-length competitors. These purchasers should have been excluded. Without them, the claims would not have been numerous enough to warrant class treatment.

Rule 23(f) was developed to provide review in cases like this one, where a district court diverges from accepted class-action principles and issues manifestly wrong certification rulings. The Supreme Court recognized that in many cases, waiting for final judgment to access appellate review would be too late to correct an injustice. Such certifications were having an *in terrorem* effect; increasing defendants' liability exposure so much that many defendants settled and abandoned meritorious defenses. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). These types of dynamics are present here. Plaintiffs seek $10 billion in damages,

which could be subject to trebling if the case reaches final judgment. There is "no reason for [defendants] to endure the costs of litigation when a certification decision is erroneous and inevitably will be overturned" if they risked taking the case to trial. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005).

Amici respectfully urge the Court to grant the Petition. The federal judiciary remains a single court system. These classes should not have been certified.

ARGUMENT

The benefit of Rule 23 is efficiency: it allows courts to resolve concrete disputes involving numerous similarly situated plaintiffs in a more efficient manner than if each plaintiff brought his or her own claim. *See Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156 (1982). Rule 23 cannot be used to "abridge, enlarge or modify any substantive right." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 613 (1997). Artificially enlarging class actions by allowing the named representatives to bring claims in states where they do not reside and were never injured, and for products Defendants never sold, as the District Court has done here, does not create efficiency. It distorts the ability of courts to reach proper outcomes.

I. THE TRIAL COURT'S CLEARLY ERRONEOUS CLASS CERTIFICATION RULINGS SIGNIFICANTLY INFLATED THE SCOPE AND SIZE OF THIS LITIGATION

The District Court made two different determinations that do not comport with Article III or Rule 23. Both diversions from the law require this Court's attention.

First, the court stated "whether a plaintiff can bring claims on behalf of unnamed plaintiffs under the laws of states in which the plaintiff does not reside or was injured is a matter of typicality, adequacy and predominance under Rule 23, not Article III standing." This statement is manifest error. "Courts in the Ninth Circuit have consistently held that a plaintiff in a putative class action lacks standing to assert claims under the laws of states other than those where the plaintiff resides or was injured." *Jones v. Micron Tech., Inc.*, 400 F. Supp. 3d 897, 908 (N.D. Cal. 2019). "Plaintiffs must show they have standing for each claim they raise, and Plaintiffs do not have standing to bring claims under the law of states where they have alleged no injury, residence, or other pertinent connection." *Id.* at 909; *see also Stewart*, 537 F. Supp. 3d at 1125 ("Plaintiffs lack standing to bring claims under the law of the states where they do not reside or did not purchase the at-issue products.").

The Supreme Court has been clear that plaintiffs seeking to represent a class must have standing to bring each claim asserted. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). Standing is a threshold inquiry setting the constitutional boundaries of the federal courts' jurisdiction over a claim by defining the legal and geographic "scope of the controversy [the plaintiff] is entitled to litigate." *Melendres v. Arpaio*, 784 F.3d 1254, 1261 (9th Cir. 2015). When a plaintiff files a putative class action under multiple state laws, it is invoking different legally protected interests in each state. A plaintiff who suffers an encroachment of an

interest protected by California law cannot assert standing in Maine, New York or any other state because California law is the only law that protects that interest. The end-purchaser Plaintiffs here have no standing to raise claims in any state other than where they bought the products at issue, and the District Court had no Article III authority to certify a class covering those other states. *Cf. Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (An "Article III court must be sure of its own jurisdiction before getting to the merits."). The court should have dismissed the claims.

In addition to correcting this error, the Court should grant the Petition to decide a division among district courts in this Circuit on whether this standing inquiry must be addressed at the motion to dismiss stage or can "be deferred until after class certification." *Steward*, 537 F. Supp. 3d at 1123. Courts have observed a "growing trend" to dismiss claims "under the laws of states in which no plaintiff resides or has purchased products" on the pleadings. *Schertzer v. Bank of Am., N.A.*, 445 F. Supp. 3d 1058, 1072 (S.D. Cal. 2020). However, they have noted that "it is perhaps surprising that there is no Ninth Circuit precedent specifically deciding this question." *In re Carrier IQ, Inc.*, 78 F. Supp. 3d 1051, 1068 (N.D. Cal. 2015). The Court should rectify this situation and clarify that district courts must address these jurisdictional issues as a matter of standing early in the litigation.

Class counsel should be required to do the constitutional minimum and, in each jurisdiction, seek to represent actual people who can allege a concrete injury

from the defendants' alleged misconduct. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (calling injury the "irreducible minimum" for standing). Twenty years ago, a well-known class action lawyer said he had "the greatest practice of law" because he had "no clients." Jeffrey Toobin, *The Man Chasing Enron*, New Yorker, Sept. 9, 2002 (quoting Bill Lerach). The Court should not allow class actions to be artificially inflated by adding a multitude of jurisdictions where no named plaintiff has retained a lawyer to assert actual harms. "In an era of frequent litigation [and] class actions . . . courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011).

Second, the trial court artificially inflated the number of plaintiffs pursuing claims in the litigation by including those who bought products from Defendants' arm's-length *competitors*. The damages theory the court allowed to cover these plaintiffs—that purchasers of competitors' products paid more for those products under the higher "price umbrella" the defendants allegedly created—has long been discredited by this Court. *See Petroleum Prods.*, 691 F.2d at 1339. The Court explained that when it comes to products priced and sold by such arm's-length competitors, "defendants received none of the illegal gains and were uninvolved in their competitors' pricing decisions," causation would be "necessarily conjectural and speculative," and the theory could lead to "ruinous" liability. *Id.* at 1335-39.

The District Court misapplied the Court's clear precedent here, distinguishing *Petroleum Products* solely because Defendants were alleged to engage in different antitrust misconduct. The concerns about not receiving the allegedly illegal gains, the lack of involvement in competitors' pricing decisions, the speculative nature of causation, and the potential for ruinous recoveries, though, are no different here than in *Petroleum Products*. Companies are simply not their competitors' keepers and should not own the liability for products that others have sole decision-making authority to price and sell. Courts in this Circuit should continue to be "dissuaded from engaging in speculation about what damages *might* have resulted from anti-competitive conduct." *Antoine L. Garabet, M.D., Inc. v. Autonomous Techs. Corp.*, 116 F. Supp. 2d 1159, 1168 (C.D. Cal. 2000).

Here, there were only 25 direct purchasers of Complera, and the District Court properly concluded this number was insufficient to satisfy Rule 23's numerosity requirement. If competitors' purchasers were removed from the Truvada and Atripla direct purchaser classes, the same conclusion would likely have been reached. The Court should grant the Petition to clarify that an "umbrella damages" theory cannot be used to artificially inflate the number of plaintiffs to justify class certification.

II. THE PETITION SHOULD BE GRANTED TO GUARD AGAINST ARTIFICIALLY ENLARGED CLASS ACTIONS THAT COULD LEAD TO *IN TERROREM* SETTLEMENTS

The practical result of the District Court's erroneous rulings is to create highly speculative, sprawling, and novel class litigation, much of which is untethered to the named Plaintiffs' claims and Defendants' products. Rule 23(f) was adopted to address these dynamics, where manifestly wrong certifications change the nature of class litigation. *See Marcus v. BMW of N. Am.*, 687 F.3d 583, 591 n.2 (3d Cir. 2012) ("As a practical matter, the certification decision is typically a game-changer, often the whole ballgame for plaintiffs and plaintiffs' counsel."). Granting Petitions like this one protects courts and defendants from prolonged, expensive litigation, as well as abusive, *in terrorem* settlements driven by defendants' risk aversion, not justice.

The Supreme Court has long expressed concern that forcing defendants to litigate overly expansive class actions "may so increase the defendant's potential damages liability and litigation costs that he may feel it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand*, 437 U.S. at 476; *accord Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975). Defendants are placed in an untenable position. Defense costs can run into the tens of millions of dollars, and these actions can drag on for years. When litigation costs and risks are exceedingly high, taking a case to trial may not be a viable option.

Many defendants may "settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23(f), note (Advisory Comm. 1998). This pressure exists even when the outcome is likely to be favorable for defendants—particularly in antitrust claims because damages can be trebled. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("[D]efendants will be pressured into settling questionable claims."); *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 459 (2015) (antitrust inquiries produce "notoriously high litigation costs and unpredictable results"); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018) (same). As a result, erroneous antitrust class certifications would never be corrected without a Rule 23(f) petition.

Indeed, class litigation in the United States has exploded in large part due to these illegitimate tactics. Overall class litigation costs totaled $3.37 billion in 2021, continuing a rising trend. *See* Carlton Fields, *Class Action Survey* 7 (2022). About 57.9% of major companies are engaged in class actions, with the average number of class matters per company rising from 4.4 in 2013 to 8.9 in 2021. *See id.* Prospective classes are lured by the notion that filing such an action will allow them to leverage inefficiencies of the litigation system, evade difficult individualized questions of causation and damage, and foreclose traditional defenses. These actions do not provide "access to justice;" they open the courthouse to unprincipled litigation.

Finally, the context of these claims is important. Truvada was developed by Gilead; Atripla was the result of a joint venture between Gilead and Bristol-Myers Squibb; and Complera was the result of a collaboration between Gilead and Janssen. In this case, Plaintiffs are targeting traditional non-compete clauses in joint ventures and Hatch-Waxman settlements between manufacturers of branded and generic drugs—both of which have important healthcare benefits. When courts certify such antitrust claims over these mechanisms based on novel, widely-rejected liability theories, there can be significant adverse healthcare consequences.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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Dated: October 18, 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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2. **This brief contains 2,553 words,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).
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I certify that on October 18, 2022, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

/s/ Philip S. Goldberg