No. 19A-_____

IN THE
Supreme Court of the United States

IN RE ASACOL ANTITRUST LITIGATION

UNITED FOOD & COMMERCIAL WORKERS UNIONS AND EMPLOYERS MIDWEST HEALTH BENEFITS FUND, ET AL.,
Plaintiffs,

TEAMSTERS UNION 25 HEALTH SERVICES & INSURANCE PLAN, ET AL.,
Applicants,

v.

WARNER CHILCOTT LIMITED, ET AL.,
Respondent.

ZYDUS PHARMACEUTICALS USA, INC., ET AL.,
Defendant.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPLICATION FOR A 60-DAY EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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April 3, 2019

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Applicants Teamsters Union 25 Health Services & Insurance Plan, NECA-IBEW Welfare Trust Fund, Wisconsin Masons' Health Care Fund, and Minnesota Laborers Health and Welfare Fund have no parent corporations, and no publicly held company owns ten percent or more of any individual applicant's stock.

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TO: The Honorable Stephen Breyer, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the First Circuit

1. Applicants Teamsters Union 25 Health Services & Insurance Plan, NECA-IBEW Welfare Trust Fund, Wisconsin Masons' Health Care Fund, and Minnesota

Laborers Health and Welfare Fund respectfully request an extension of 60 days from April 23, 2019, to and including June 22, 2019, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

2. The petition for a writ of certiorari is currently due on April 23, 2019. The First Circuit issued its initial opinion on October 15, 2018. The plaintiffs timely filed a petition for rehearing en banc and the First Circuit denied the petition on January 23, 2019. This application is being filed on April 3, 2019—more than 10 days from the date on which the petition for certiorari is due absent an extension. *See* S. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1). Copies of the First Circuit's opinion and order denying rehearing are attached.

3. This case presents an issue that "strikes at the heart of the competing considerations" in class actions: "the proper treatment of uninjured class members at the class certification stage." Op. at 19. The plaintiffs filed their antitrust class action against Warner Chilcott, alleging that Warner Chilcott engaged in a product switch scheme to prevent generic versions of a drug from coming to market. On November 9, 2017, the district court certified the class under Federal Rule of Civil Procedure 23(b)(3), finding that the possibility that a small number of class members may not have been injured did not preclude certifying the class because any potentially uninjured class members could be identified and removed in later proceedings. Op. at 3.

4. In reaching this conclusion, the district court concluded that, "prior to judgment, it will be possible to establish a mechanism for distinguishing the injured from

the uninjured class members." Op. at 21. Following the approach taken in other similar cases, that mechanism involved having a court-appointed claims administrator evaluate and approve claims forms (along with relevant data and documentation) submitted by class members. *Id.*

5. The First Circuit reversed. In its view, there was no "administratively feasible" way for deciding "who [] suffered no injury" and so no mechanism for adjudicating individualized issues that would be "protective of defendants' Seventh Amendment and due process rights." Op. at 24–25. In so ruling, the court rejected the district court's proposed approach. Although the defendant in this case claimed a right to contest the claims forms of each class member, the panel held that the "claims process" failed to guarantee the defendant a "meaningful opportunity to contest whether an individual would have, in fact," been injured. Op. at 25. And the panel concluded that the plaintiffs could not rely on either a rebuttable presumption of injury (where the gap in evidence was attributable to the defendant) or "class-wide" proof of injury. Op. at 26. In the panel's view, nothing in antitrust laws allowed for either. Op. at 25, 30 (holding that, under the antitrust laws, "we have no such presumption" and the use of aggregate evidence at the class certification stage would deny the defendant "the opportunity to challenge each class member's proof that the defendant is liable to that class member"). Ultimately, the panel held that the plaintiffs' inability to prove individualized injury was "fatal" to predominance and reversed the district court's decision certifying the class.

6. The panel acknowledged that its approach for addressing "the treatment of uninjured putative class members" conflicted with other circuits. Op. at 32. (noting the

"divergence evident in the manner in which our sister circuits have addressed" the issue); *see also* Op. at 38–39 (Barron, J., concurring) (noting that the circuits have "struggled to develop a uniform mode of analyzing" this "vexing" issue). Both the Seventh and Ninth Circuits, for instance, have held that the existence of some potentially uninjured class members does not bar a district court from certifying a class. *See Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009) (noting that it's "almost inevitable" that a class will include uninjured members, and affirming certification); *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 (9th Cir. 2016) (explaining that the possibility of "non-injury to a subset of class members does not necessarily defeat certification of the entire class, particularly as the district court is well situated to winnow out those non-injured members at the damages phase of the litigation, or to refine the class definition").

7. And the panel barely tried to reconcile its ruling with recent decisions of this Court. In *Halliburton Co. v Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014), this Court held that plaintiffs "could satisfy" a reliance requirement at the class certification stage "by invoking a presumption" of reliance even while a defendant may rebut this presumption on an individual basis. *Id.* at 2408. Doing that, this Court explained, would have "the effect of leaving individualized questions of reliance in the case." *Id.* at 2412. But no matter: The possibility of "individualized rebuttal does not cause individual questions to predominate." *Id.* In this case, however, the First Circuit held that the possibility of individualized rebuttal was "fatal" to predominance. Op. at 24. And whereas this Court has held that plaintiffs may use representative proof "to fill an evidentiary gap created by [a defendant's] failure" to follow the law—and that it is

"premature" even at the *trial phase* to ask whether the plaintiffs have "demonstrated any mechanism for ensuring that uninjured class members do not recover damages," *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1047–50 (2016)—the First Circuit panel held the opposite. It allowed the defendants, at the certification stage, to reap the benefits of their own antitrust violations by faulting the plaintiffs for the "fatal gap in the evidence" that those violations created (foreclosing generic entry). Op. at 24.

8. Applicants respectfully request a 60-day extension of time to file a petition for a writ of certiorari seeking review of the First Circuit's ruling and submits that there is good cause for granting the request. Counsel with primary responsibility for drafting the petition have a number of other professional obligations that will prevent them from preparing an adequate petition absent the requested extension.

CONCLUSION

For the foregoing reasons, applicants respectfully request that the Court extend the time within which to file a petition for a writ of certiorari in this matter to and including June 22, 2019.

Dated: April 3, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

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In compliance with Supreme Court Rules 29.3 and 29.5, I, Matthew W. H. Wessler, counsel of record for the applicant and a member of the Bar of this Court, hereby certify that on April 3, 2019, a copy of the accompanying Application for a 60-Day Extension of Time Within Which to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit, filed in the above-captioned manner, was sent by commercial carrier and by electronic mail to:

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All parties required to be served have been served.

April 3, 2019

Matthew W. H. Wessler
Counsel for Applicant

APPENDIX