No. 19-70248

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE LOGITECH INC.,

Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO,

Respondent,

JAMES PORATH, individually and on behalf of all others similarly situated,

Real Party in Interest.

On petition for a writ of mandamus to the United States District Court for the Northern District of California, Case No. 3:18-cv-03091-WHA, Hon. William H. Alsup

PETITIONER'S REPLY IN SUPPORT OF THE PETITION FOR A WRIT OF MANDAMUS

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The statement in response to the petition does not dispute that this case satisfies four of the five factors warranting a writ of mandamus under *Bauman v. U.S. District Court*, 557 F.2d 650, 654 (9th Cir. 1977). *See* Pet. 22–24. The response disputes only whether the district court's standing order is clearly erroneous, and rests largely on the assertion that no decision has rejected an identical gag order. But the response identifies no similar practice among any other district court, and no decision approving such a practice. Indeed, an urgent basis for mandamus here is the practical impossibility of obtaining appellate review of an order prohibiting settlement and settlement discussions before class certification. *See* Pet. 22. By the time of any final judgment—or any settlement reviewable on appeal by an objector—an order prohibiting settlement will be moot.

The responsive statement in any event cannot explain how the district court's standing order can survive scrutiny either under Rule 23 and its underlying policies or under the Speech and Petition Clauses of the First Amendment. The response altogether overlooks the Petition Clause and sets forth hypotheticals (Resp. 4) about any settlement that might be reached before class certification proceedings here. Those speculations are necessarily groundless because the district court's gag order has kept it in

the dark by preventing negotiation and presentation of an actual settlement.

Contrary to the response's implication, Rule 23 provides district courts with ample authority to deal with proposed class action settlements that would be unfair to class members. Under Rule 23(e), a district court may (indeed, *must*) evaluate every classwide settlement for fairness. And when a proposed settlement is proffered before class certification, the district court *must* scrutinize whether the putative settlement class satisfies the requirements of Rules 23(a) and 23(b). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620–22 (1997). Under these provisions, district courts across the country routinely certify—or deny certification to—settlement classes proposed *before* class certification.

The district court here maintains that Rule 23 does not sufficiently protect absent class members from inappropriately "discounted" settlements, and that a court therefore is authorized to prohibit litigants from even discussing a class settlement before class certification. Resp. 4. But "[f]ederal courts … lack authority to substitute" their own sweeping restrictions for the process and standards enumerated in Rule 23. *See Amchem*, 521 U.S. at 622. And the First Amendment precludes the district court from imposing this gag rule, which is unnecessary to accomplish the

district court's stated goals and prevents litigants from seeking relief from the court that Rule 23 expressly authorizes. The petition for a writ of mandamus should be granted.

ARGUMENT

The statement in response maintains that the standing order raises no First Amendment concerns because it restricts only commercial speech, and no Rule 23 concerns because it is necessary to protect class members against improper, collusive settlements. Both positions are incorrect.

A. The Standing Order Violates The First Amendment.

1. As an initial matter, the district court does not address one of the standing order's two independent First Amendment problems: its infringement on the parties' right to petition. Pet. 17-19. Petitioning includes the right to use the courts to resolve disputes without being subjected to the impediment of unnecessary, laborious, and expensive procedures. The district court's violation of the Petition Clause is sufficient by itself to warrant correction through a writ of mandamus.

2. With respect to the content-based restrictions imposed on litigants' speech, the district court argues that the standing order regulates only "commercial speech" and hence is subject to a more lenient review than strict scrutiny. Resp. 6-7. But commercial speech "is no exception" to the

requirement of heightened scrutiny for content-based regulations. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429-30 (1993)).

Moreover, settlement discussions do not fall within the Supreme Court's narrow definition of "commercial speech": speech that "does no more than propose a commercial transaction" (*Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (internal quotation marks omitted)) and is "related solely to the economic interests of the speaker and its audience" (*Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980)).

A settlement is not a "commercial transaction"; no good or service is being bought or sold by either party. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (explaining that speech is more likely to be commercial when it is an "advertisement[]" or "refer[s] to a specific product"). Nor do settlement talks relate "solely" to the parties' economic interests, as this case demonstrates. Plaintiff alleges, among other things, that Logitech's conduct violated California's False Advertising Law and Unfair Competition Law—allegations of concern both to Logitech (which has a noneconomic interest in not being branded a lawbreaker) and to the state and people of California (which have a noneconomic interest in the enforcement

of consumer protection laws). The speech accordingly is not "commercial speech."

To be sure, a settlement may lead to money changing hands (though not all settlements do). But the mere fact that speech ultimately relates to a transfer of money, or that the speakers have "an economic motivation," is "clearly … insufficient by itself to turn [speech] into commercial speech." *Bolger*, 463 U.S. at 67. In order to be considered commercial speech, speech must do "no more" than propose a commercial transaction. *Va. State State Bd. of Pharmacy*, 425 U.S. at 762. Thus, speech that "does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services" is not commercial speech, even if it has an economic component. *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980).

Applying that standard, this Court has held that the street sale of merchandise by charitable and religious organizations is not commercial speech because, although it has a commercial component, it is intertwined with other "pure speech" on "'economic, political, or social issues.'" *Gaudiya Vaishnava Soc. v. City & Cty. of S.F.*, 952 F.2d 1059, 1064 (9th Cir. 1990) (quoting *Schaumburg,* 444 U.S. at 633). If that is so, settlement discussions

between litigants—which involve no sale of goods or services at all and similarly touch on issues beyond purely economic ones—are not commercial speech either.

In any event, even if settlement discussions between litigants *were* commercial speech, they would still enjoy "substantial protection" under the First Amendment. *Bolger*, 463 U.S. at 68. Regulation of such discussions would have to be shown to be no "more extensive than necessary to serve" the government's interest to be upheld. *Id.* at 69. The district court's standing order fails that test. As the petition explained (at 14-17), the order is unnecessary to accomplish the district court's stated goals, which would be equally well-served—without any speech restriction—by the district court exercising its duty under Rule 23 to review precertification settlements for fairness and compliance with "the Rule 23(a) and (b) class-qualifying criteria." *Amchem*, 521 U.S. at 621.

The district court contends that its own Rule 23 review is insufficient to "flush[] out" improper settlements because the parties do not litigate class certification adversarially once a settlement has been reached. Resp. 4. "Inquiries by the district judge," the court argues, "can rarely uncover [Rule 23] concerns as clearly as a litigated Rule 23 motion." *Id.* at 5. But the Supreme Court and this Court seemingly disagree, given that both have held

time and again that district courts have both the capability and the obligation to scrutinize class settlements under "Rule 23's certification criteria." *Amchem*, 521 U.S. at 622; *see id.* at 620 (instructing district courts to give "heightened[] attention" to class settlements). *See also*, *e.g.*, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025 (9th Cir. 1998) (noting a district court's "authority and discretion to protect the interests and rights of class members and to ensure its control over the integrity of the settlement approval process"). Indeed, this Court regularly scrutinizes class settlements itself. *See, e.g.*, *Koby v. ARS Nat'l Servs., Inc.*, 846 F.3d 1071, 1079 (9th Cir. 2017) (reversing determination that settlement was fair, adequate and reasonable); *Staton v. Boeing Co.*, 327 F.3d 938, 978 (9th Cir. 2003) (same).[1]

And no member of the Supreme Court in either *Amchem* or *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), so much as hinted that precertification settlement was categorically or presumptively inappropriate. Rather,

[1] Because Rule 23 authorizes the district court to scrutinize and disapprove any problematic settlement, the response's observation that "First Amendment rights may be 'subordinated' to other interests that arise during the pendency of litigation" is off point. Resp. 7 (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 n.18 (1984)). *Rhinehart* stated that First Amendment rights may be restricted in litigation "*where necessary*." 467 U.S. at 32 n.18 (emphasis added). Here, it is manifestly unnecessary to preemptively forbid the parties from discussing precertification settlements or submitting such settlements to the court.

in both cases, the Court addressed in detail the shortcomings of each settlement under different subsections of Rule 23(b). And the dissenting opinions in each case advocated for greater receptiveness to precertification settlement. *See Amchem*, 521 U.S. at 629–41 (Breyer, J., concurring in part and dissenting in part); *Ortiz*, 527 U.S. at 865–884 (Breyer, J., dissenting).

This Court should accordingly grant a writ of mandamus ordering the district court to stop imposing prior restraints at the outset of class actions.

B. The Standing Order Conflicts With The Letter And Spirit Of Rule 23.

The district court's standing order also cannot be squared with Rule 23. It violates the plain terms of the rule, which expressly indicate that parties may submit proposed settlement agreements for the district court's approval *before* class certification. *See* Fed. R. Civ. P. 23(e) (setting out procedures antecedent to court approval of settlement of "a class proposed to be certified for the purposes of settlement"). And the order undermines the policy behind the rule, which *favors* settlement of class litigation. Pet. 19-22.

The response addresses Rule 23 by insisting that the standing order protects class members by ensuring that their recovery will not be "discounted . . . based on possible unsuitability of the case for class certification." Resp. 4. As noted above, however, the settlement approval process set out in Rule 23 already provides district courts with ample authority to weed

out unfairly "discounted" settlements.[2] Under the district court's logic, a trial on the merits would be required to ensure that the settlement did not unfairly discount the likelihood of success on liability and the likely damages. The most likely effect of requiring the parties to litigate class certification before talking settlement is to *reduce* the number of class settlements—a result at odds with the district court's stated goal of making putative class members better off. And the side-effect of the standing order is unnecessarily increased congestion in the district court.

The responses on Rule 23 miss the mark. The statement first insists that, in cases where class certification is denied, the problem may be curable, allowing the class to be certified later and then settled. Resp. 5. But as the district court admits, the only situation in which class certification will

[2] And it is not clear *why* litigants, in settlement discussions, should be prohibited from accounting for the risk that class certification will be ultimately denied. To be sure, a settlement should not be discounted to the point that it violates Rule 23(e)(2)'s requirement that a settlement be "fair, reasonable, and adequate." But as long as that standard has not been violated, there is nothing improper about settling parties' taking the risk of class certification, along with all other litigation risks, into account. Indeed, Rule 23 expressly contemplates that they will do so. *See* Fed. R. Civ. P. 23(e)(2)(C)(i) (fairness inquiry takes into account "the costs, risks, and delay of trial and appeal"); *see also* Fed. R. Civ. P. 23 advisory committee note to 2009 amendment (explaining that the parties should "supply the court with information … about the risks that might attend full litigation").

succeed on the second try after failing on the first is when there are problems "peculiar to the named plaintiff." *Id.* And even then, delaying class certification until a new named plaintiff can be found is likely to reduce the putative class's recovery because the statute of limitations for class claims is not tolled while the original named plaintiff's claim is pending. *See China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1811 (2018).

The district court also argues that a defendant who is interested in settling early in a case can simply stipulate to certification—presumably for whatever class the complaint alleges—before discussions even begin. Resp. 4. But class certification is far more nuanced than that, and it would be exceedingly difficult for the parties in most class actions to agree on the proper scope of a stipulated class before engaging in discussions. Among other things, the class alleged in the complaint may be overbroad or otherwise inappropriate. Here, for example, while the plaintiff seeks to represent a class of *all* consumers nationwide who purchased the Logitech Z200 speakers, many consumers who bought the speakers were not exposed to the specific advertisements that plaintiff allegedly encountered on a particular website and challenges now. The parties might well agree that consumers who purchased from retailers that did not advertise the Z200 in that manner should not be included in the class or bound by any settlement.

To be sure, defendants often agree to certification of the plaintiff's proposed class—but only after consideration of the proper scope of the class as part of a final settlement that conclusively resolves the plaintiff's legal claims. No rational class-action defendant would stipulate to class certification—one of the most important issues in the case—*before* agreeing on the terms of a final settlement.

Finally, the responsive statement argues (at 7–9) that the gag order here is not quite as bad as the one rejected by a unanimous Supreme Court in *Gulf Oil v. Bernard*, 452 U.S. 89 (1981), as beyond the district court's authority under the Federal Rules. Just as clearly as in *Bernard*, the Federal Rules provide no authority to prevent parties from reaching—let alone discussing—precertification class-action settlements that the Rules explicitly contemplate and that the Supreme Court has recognized as legitimate. However beneficial the district court's intent to protect absent class members may be, good intentions do not provide authority to stop parties to class actions from discussing, negotiating, and submitting precertification settlements.

In short, the notion that class certification should always be resolved before settlement contradicts both the text of Rule 23 and "the general pol-

icies embodied in" it. *Bernard*, 452 U.S. at 99. Some precertification settlements are no doubt unfair, but many are not. The district court should use Rule 23 review to determine which settlements are which, rather than restricting litigants' constitutional and procedural rights.

CONCLUSION

The petition for a writ of mandamus should be granted.

Respectfully submitted,

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Dated: March 5, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for petitioner certifies that this reply:

(i) contains 2,533 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: March 5, 2019 /s/ *Dale J. Giali*

CERTIFICATE OF SERVICE

I hereby certify that that on March 5, 2019, I electronically filed the foregoing reply with the Clerk of the Court using the appellate CM/ECF system, which will effect service on all parties registered as CM/ECF users.

The district court has been provided with a copy of this reply via overnight delivery to:

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Dated: March 5, 2019 /s/ *Dale J. Giali*