Nos. 14-1521, -1522 (cons.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

IN RE NEXIUM ANTITRUST LITIGATION

ASTRAZENECA AB, ET AL.,

Appellants,

v.

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

Appellees.

On Appeal from the United States District Court for the District of Massachusetts (MDL No. 12-2409) (Hon. William G. Young)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL OF THE DECISION BELOW

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation, representing three hundred thousand direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations. Among its members are companies and organizations of every size, in every industry sector, and from every region of the country. The Chamber represents its members' interests by, among other activities, participating as *amicus curiae* in cases raising issues of concern to the nation's business community.

The proper application of Federal Rule of Civil Procedure 23's class-action requirements is of particular concern to the Chamber and its members. The Chamber has a strong interest in ensuring that courts undertake the proper analysis required under Rule 23 before permitting a case to proceed as a class action. To that end, the Chamber has filed amicus briefs in cases presenting significant class-

[1] No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no person except *amicus*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief. All parties consent to the filing of this brief.

action issues, including both *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). *See also* http://www.chamberlitigation.com/cases/issue/classactions.

INTRODUCTION AND SUMMARY OF ARGUMENT

The class certification requirements of Federal Rule of Civil Procedure 23 are not mere conveniences for streamlining litigation, but crucial safeguards grounded in fundamental due-process concerns. *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008). Before the named plaintiffs may take advantage of the class-action device, they must prove that class members possess claims presenting at least one "common question[]" that, if adjudicated on a classwide basis, "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). In addition, the named plaintiffs must satisfy the "far more demanding" requirement of proving that such common questions "predominate" over individual ones. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997); *see also Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013).

If a question is not truly "common," attempting to adjudicate it on a classwide basis will not work, because the resulting finding will not actually apply to the entire class. Nor can a district court take a shortcut and impose a finding on the entire class that does not actually

apply classwide. If the finding went against most of the class, applying it to class members whose claims raise different issues would violate those absent class members' rights to litigate their own, different claims. Conversely, if the finding went against the defendants in favor of most of the class, applying it to the rest of the class — for the sake of "efficiency" — would violate the defendants' rights. Either way, the court would be modifying a party's substantive rights in order to make class treatment "work," precisely what the Rules Enabling Act forbids. *See* 28 U.S.C. § 2072(b).

In this case, the district court repeatedly acknowledged that the class it certified included a non–*de minimis* number of uninjured members. It is not clear why the court believed it was appropriate to certify a class that included plaintiffs who suffered no injury and thus had no conceivable claim. Even before *Wal-Mart* and *Comcast*, this Court held that an antitrust damages class cannot be certified unless the named plaintiffs show that the "fact of injury" can be established through common, classwide proof. *See In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 19–23 (1st Cir. 2008). The

district court ignored that holding, failing even to cite this binding precedent despite defendants' heavy reliance on it.

Perhaps the district court believed that it was sufficient if the class, viewed as a whole, suffered an injury in the aggregate, even though certain class members did not. But that loses sight of the fundamental nature of a class action. A class is not a plaintiff; it possesses no claim in its own right. It is instead simply a collection of its members. An individual who was not injured by the defendant's conduct has no claim for damages — the only relief at issue here. Indeed, such a would-be claimant does not even have Article III standing. Putting uninjured would-be claimants into a class cannot change that reality. The core premise justifying class-action litigation is that the claims of the named plaintiff are valid proxies for the claims of all absent class members, so that litigating the named plaintiff's claims in effect litigates all claims belonging to those in the class. *Wal-Mart*, 131 S. Ct. at 2551. An uninjured class member has no claim and cannot acquire one by being aggregated with other, dissimilarly situated claimants; the claims of an injured plaintiff are not a proxy for the nonexistent claims of uninjured class members.

The district court did not even attempt to grapple with these concerns. Instead, it took a certify-now, worry-later approach that is flatly inconsistent with governing precedent from the Supreme Court as well as this Court. Certifying classes that do not satisfy Rule 23 threatens to permit serious abuse in the form of coerced settlements untethered to the merits of the underlying claims. This Court should reaffirm its holdings in *New Motor Vehicles* that predominance requires the fact of injury to be capable of classwide proof and that the presence of uninjured class members by definition precludes the possibility of classwide proof of injury. Adhering to these holdings requires reversal of the district court's certification decision.

ARGUMENT

I. The Class Certified By The District Court Does Not Satisfy Rule 23(b)(3)'s Predominance Requirement.

Plaintiffs seeking access to the class-action device must "affirmatively demonstrate" their compliance with Rule 23. *Comcast*, 133 S. Ct. at 1432 (quoting *Wal-Mart*, 131 S. Ct. at 2551). Plaintiffs here have not satisfied that burden. In particular, plaintiffs cannot satisfy Rule 23(b)(3)'s predominance requirement: as the district court correctly recognized, the class includes uninjured entities and

individuals, meaning that plaintiffs cannot prove the fact-of-injury element of their claims on a classwide basis.

A. Predominance Is A Demanding Requirement That Plaintiffs Must Affirmatively Demonstrate.

Rule 23's essential prerequisites protect the rights of both defendants and absent class members, ensuring that the innovation of aggregating claims and dispensing with individual litigation is deployed only where it is consistent with the rights of all concerned. *Taylor*, 553 U.S. at 901 (Rule 23's "procedural protections" are "grounded in due process"); *Unger v. Amedisys Inc.*, 401 F.3d 316, 320–21 (5th Cir. 2005) (there are "important due process concerns of both plaintiffs and defendants inherent in the certification decision"). Aggregating individual claims for resolution in one stroke is impermissible if it endangers the right of absent class members to press their distinct interests or the right of defendants "to present every available defense." *Cf. Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). Class actions under Rule 23 therefore constitute a carefully policed "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).

As the Supreme Court recently stressed, plaintiffs must "affirmatively demonstrate" their compliance with Rule 23 to be entitled to litigate their claims through the procedural device of a class action. *Comcast*, 133 S. Ct. at 1432 (quoting *Wal-Mart*, 131 S. Ct. at 2551). The Supreme Court directs district courts to "conduct a 'rigorous analysis' to determine whether" Rule 23 has been satisfied, "even when that requires inquiry into the merits of the claim." *Id.* at 1433 (quoting *Wal-Mart*, 131 S. Ct. at 2551–52).

No aspect of Rule 23 has tested the due-process constraints on class actions more than Rule 23(b)(3), the "most adventuresome" class certification provision. *Amchem*, 521 U.S. at 614. The drafters of that provision "were aware that they were breaking new ground and that those effects might be substantial." Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. Pa. L. Rev. 1439, 1487 (2008). Rule 23(b)(3) thus imposes special "procedural safeguards," including the requirement that courts take a "close look" to ensure that common issues predominate over individual ones. *Comcast*, 133 S. Ct. at 1432. The drafters added those essential protections to avoid having "their new experiment . . . open the

floodgates to an unanticipated volume of litigation in class form." John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 401–02 (2000).

Rule 23(b)(3)'s requirement that common questions predominate over individual ones is a "demanding" standard. *Amchem*, 521 U.S. at 624. The predominance requirement works in tandem with Rule 23(a)'s commonality requirement to ensure that "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 623. Such cohesion exists when all class members "possess the same interest and suffer the same injury." *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (internal quotation marks omitted). Merely pleading "a violation of the same provision of law" and labeling it a common question is not enough, for "any competently crafted class complaint literally raises common questions." *Wal-Mart*, 131 S. Ct. at 2551 (internal quotation marks omitted). The need to prove predominance by establishing a common, classwide injury protects consumers by ensuring "sufficient unity so that absent

members can fairly be bound by decisions of class representatives." *Amchem*, 521 U.S. at 620–21.

To satisfy the predominance requirement, plaintiffs must offer "a theory of liability that is . . . capable of classwide proof." *Comcast*, 133 S. Ct. at 1434. Otherwise, a liability finding with respect to a named plaintiff does not decide "in one stroke" whether defendants are liable to the entire class, and liability cannot be deemed a "common" issue. *Wal-Mart*, 131 S. Ct. at 2551. As a result, dissimilarities within the proposed class may defeat class certification even when some degree of commonality exists. *See* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131–32 (2009).

B. Predominance Is Lacking When A Putative Class Includes Members Who Suffered No Injury.

Plaintiffs contend that they paid higher prices for Nexium because a generic version was unavailable due to an allegedly collusive settlement between the brand-name manufacturer and generic manufacturers. They seek to litigate not only their own damages claims, but also the claims of a class of consumers and third-party payors who "purchased and/or paid for some or all of the purchase price for Nexium in twenty-four States and the District of Columbia." *See*

Appellants' Br. 3. But as the district court itself acknowledged, some entities and individuals who "purchased and/or paid for some or all of the purchase price for Nexium" were not injured by the alleged antitrust violation. Add. to Appellants' Br. ("Add.") 20a. And there is no way to tell which class members were in fact injured without examining their individual circumstances. Given this reality, the fact of injury cannot be established through common proof, individual issues predominate, and the district court's certification order should be reversed.

When determining whether common questions predominate, courts are required to consider "the elements of the underlying cause of action" and the proof needed to establish each element. *See Erica P. John Fund, Inc. v. Halliburton*, 131 S. Ct. 2179, 2184 (2011) (internal quotation marks omitted). The antitrust claims at issue here require a plaintiff to prove three elements: (1) anticompetitive conduct, (2) an injury suffered as a result of that anticompetitive conduct, and (3) an estimated measure of damages. *New Motor Vehicles*, 522 F.3d at 19 n.18. Predominance is lacking if the second element — the "fact of injury" — cannot be "established through common proof." *Id.* at 20, 19

n.18 (internal quotation marks omitted). That is because this element, like the first, speaks to the defendant's *liability*. *Id.* at 19 n.18.

Plaintiffs in this case cannot satisfy the requirement of establishing a classwide injury through common proof. Their putative class, as the district court repeatedly recognized, contains "more than a *de minimis* number" of class members who suffered no injury from the alleged anticompetitive conduct. Add. 20a; *see, e.g.*, *id.* ("[C]ertain class members were not actually injured . . . ."); *id.* at 26a ("It is . . . reasonably clear . . . that a number of the proposed class members suffered no actual injury whatsoever."); *id.* at 32a ("Defendants . . . argu[e] correctly that certain class members may not have suffered any injury from the generic foreclosure."). The district court was undoubtedly correct in this respect. Many members of the certified class never paid an inflated price for Nexium, including third-party payors who received rebates (and consumers who received coupons) that reduced their actual purchase price to amounts at or below what they would have paid had a generic been available; third-party payors with fixed-price contracts who would have paid the same contractual amounts regardless of whether a generic had been available; consumers

with fixed co-pay plans; and "brand loyalists" who would have purchased the brand Nexium even if a generic had been available. *See* Appellants' Br. 19–25.

Nonetheless, the district court believed that "the inclusion of uninjured class members" was "not fatal to class certification." Add. 27a. It thought predominance was satisfied because plaintiffs could demonstrate a "common antitrust impact." *Id.* at 24a. The district court's rationale is not entirely clear. To the extent it believed that there can be "impact" without individualized injury-in-fact, it was mistaken. The term "antitrust impact" may connote a certain kind of injury relevant to antitrust claims, but if the alleged impact consists of paying an overcharge, the plaintiff must prove that it actually paid an overcharge — not merely that it might have. *See* Appellants' Br. 15–16. And because injury-in-fact is the "irreducible minimum" for Article III standing to bring an antitrust claim in federal court, "antitrust impact" cannot be interpreted to eliminate the requirement of injury-in-fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992).

The district court's order could also be read to suggest that it believed that the class, viewed as a whole, suffered an injury and that it

did not matter that certain class members, as individuals, did not. *See* Add. 26a ("[I]t is reasonably clear that the foreclosure of a generic alternative to Nexium caused widespread impact among the proposed class members."); *id.* at 37a ("Perhaps, if liability is established, competent evidence may lead to a jury finding of the average amount of the supracompetitive overcharge on a capitation basis. It may then be appropriate to use this average as a baseline for further proceedings."). But that rationale fundamentally misconceives the nature of a class action. The class-action device does not permit named plaintiffs to bring a claim on behalf of individuals who have no claims of their own. Uninjured individuals lack Article III standing whether or not they are part of a class. *Cf. Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("That a suit may be a class action adds nothing to the question of standing.") (alterations and quotation marks omitted); *see also, e.g.*, *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 779 (8th Cir. 2013); Appellants' Br. 31–32 (collecting cases).

Certifying a class action on the rationale that *most* class members have suffered an injury — or that each class member, on average, suffered an injury — loses sight of the Rules Enabling Act, which

requires courts to interpret Rule 23 in a manner that does not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). A plaintiff who never suffered an injury could not pursue an antitrust claim through *individual* litigation. Such a plaintiff could not state a claim under substantive antitrust law. *See New Motor Vehicles*, 522 F.3d at 19 n.18; *see also Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 n.8 (1990) ("The antitrust injury requirement cannot be met by broad allegations of harm to the 'market' as an abstract entity."). Nor could she satisfy the injury-in-fact prong for Article III standing. *See Lujan*, 504 U.S. at 560.

Yet the liability class that the district court certified admittedly includes *uninjured* individuals. The certification order thus allows these class members to proceed, by proxy, with claims that they do not possess. This impermissibly "enlarge[s]" their substantive rights, 28 U.S.C. § 2072(b), and ignores basic standing requirements. Interpreting Rule 23 to permit the certification of such a class would result in a violation of the Rules Enabling Act. The district court's misapplication of the Rule to reach this result must be reversed for this reason alone. *See Amchem*, 521 U.S. at 613 ("Rule 23's requirements

must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act . . . .").

Nor does the district court's finding of a "common antitrust impact" to the class *as a whole* support certification. A class is not an independent entity with its own legal rights. *See* Martin H. Redish & Clifford W. Berlow, *The Class Action As Political Theory*, 85 Wash. U. L. Rev. 753, 796 (2007) ("Rule 23 . . . does nothing more than aggregate preexisting individual claims. This distinguishes claims of class members from claims brought by true entities, such as partnerships or trade unions."). In terms of substantive rights, a class is nothing more than the sum of its parts. *See* 28 U.S.C. § 1332(d)(1)(A) (defining "class," for purposes of jurisdiction, as "the class members in a class action"); 28 U.S.C. § 1711(1) (adopting the same definition for purposes of the Class Action Fairness Act); Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 Cal. L. Rev. 1573, 1597 (2007). Thus, a class cannot itself suffer an "injury" for purposes of Article III or antitrust law. *See* Paul R. Dubinsky, *Justice for the Collective: The Limits of the Human Rights Class Action*, 102 Mich. L. Rev. 1152, 1158

(2004) ("There is no entity separate from the class members, no disembodied collective that has sustained injury in its own right, an injury distinct from that suffered by individuals.").

The absence of injury to certain class members therefore cannot be swept aside on the rationale that, in the aggregate, the class was injured. If some class members lack standing to bring a claim, a class that includes those members cannot be certified without bringing Rule 23 into collision with the Rules Enabling Act. *See* Redish & Larsen, 95 Cal. L. Rev. at 1597 ("[T]he mystical transformation of these claims into entity-like group wide claims . . . would lawlessly transform a procedural aggregation device into its own source of substantive right.").

This conclusion is grounded in well-settled case law — most notably, this Court's *New Motor Vehicles* precedent. In that case, this Court held that putative class representatives must demonstrate that "*each* member of the class was in fact injured." *New Motor Vehicles*, 522 F.3d at 28 (emphasis added). The *New Motor Vehicles* plaintiffs presented a theory of antitrust injury remarkably similar to the one advanced here. They alleged that car manufacturers had conspired to

restrict the importation of cheaper cars from Canada, thus artificially inflating prices in the United States. *Id.* at 9–11. But the plaintiffs' evidence showed only that the manufacturers' alleged conduct increased the *average* price of cars — not the actual price that "*all* [class members]" paid. *Id.* at 29. Even absent the alleged anticompetitive activity, the price that some class members paid for their car might have been exactly the same. *Id.* The Court held that the certification order could not stand because the plaintiffs had not proven that "*each* member of the class was in fact injured." *Id.* at 28 (emphasis added). Defendants in this case relied heavily on this binding precedent, but the district court did not even cite it.

In the face of *New Motor Vehicles*, plaintiffs argue that their theory of predominance was sanctioned by this Court in *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 582 F.3d 156 (1st Cir. 2009). But *Average Wholesale Price* was not a predominance decision or even a class certification decision. Instead, it involved a due-process challenge to the calculation of damages *after* liability had already been determined. *See id.* at 191. And even in that context, this Court did not approve the idea of paying damages to class

members who were uninjured (let alone certifying a class with uninjured members in the first place). This Court found that the defendants had not sufficiently demonstrated that the class contained any uninjured class members, because defendants' arguments were waived or unsupported by the record. *See id.* at 198–99. Accordingly, *Average Wholesale Price* did not repudiate *New Motor Vehicles*' holding that the presence of uninjured class members defeats predominance. Nor could it have. *MaineGeneral Med. Ctr. v. Shalala*, 205 F.3d 493, 497 (1st Cir. 2000) (three-judge panels are bound by earlier panel decisions). *Average Wholesale Price* thus does not support plaintiffs' contentions.

Rather than following *New Motor Vehicles*, the district court relied on two out-of-circuit opinions for its conclusion that the presence of uninjured class members does not defeat predominance. *See* Add. 27a (citing *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010), and *Mims v. Stewart Title Guar. Co.*, 590 F.3d 298, 308 (5th Cir. 2009)). Those cases, however, represent a distinctly minority view among the circuits. Most circuits agree with this Court that the presence of uninjured class members defeats class certification. *New*

Motor Vehicles, 522 F.3d at 28–29; *see, e.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 253–55 (D.C. Cir. 2013); Appellants' Br. 18–19 (collecting cases).

The district court's reliance on *Mims* is even less persuasive because the Fifth Circuit subsequently clarified that *Mims* has no relevance in the predominance context, since "the issue [of predominance] was not before the *Mims* court." *See Benavides v. Chicago Title Ins. Co.*, 636 F.3d 699, 702–03 (5th Cir. 2011) ("All that *Mims* held . . . was that the class definition was appropriate; not that there were any common class-wide questions, that those questions would predominate trial, or that mere membership in the class was sufficient to establish liability en masse."). And *Mims* clearly did not overrule, *sub silentio*, an earlier Fifth Circuit decision that recognized that the presence of uninjured class members defeats predominance. *See Cole v. Gen. Motors Corp.*, 484 F.3d 717, 730 (5th Cir. 2007) (plaintiffs cannot "carry their burden of showing that common issues of law predominate" if some class members' recovery is likely to be precluded).

If any doubt remained, the Supreme Court's decisions in *Wal-Mart* and *Comcast* confirm this Court's analysis in *New Motor Vehicles*. The D.C. Circuit held precisely that last year. *See Rail Freight*, 725 F.3d at 255 (identifying *Stricklin* and *Mims* as relics of the pre-*Comcast* era, when "the case law was far more accommodating to class certification"). In *Wal-Mart*, the Court explained that "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the *same* injury.'" *Wal-Mart*, 131 S. Ct. at 2551 (emphasis added) (quoting *Gen. Tele. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). The named plaintiffs and absent class members could not have suffered the "same" injury if some class members suffered no injury at all.

Furthermore, as the Supreme Court explained in *Wal-Mart*, the plaintiffs' claims in a putative class action must depend on a "common contention" that is "capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims *in one stroke*." *Id.* (emphasis added). Only where the class members' claims all rise and fall together is litigation by representation permissible. But here, the claims of the named plaintiffs and the absent plaintiffs cannot be resolved together.

The fact of injury is inherently individualized, given the diversity of payment mechanisms used by the class members (and the inherently individualized question of whether a given class member would have bought Nexium out of "brand loyalty" despite the availability of a generic). *See* Appellants' Br. 19–25. Plaintiffs have thus failed to show that the injury element can be resolved for all class members "in one stroke." *Wal-Mart*, 131 S. Ct. at 2551.

The Supreme Court's more recent decision in *Comcast* applies the lessons of *Wal-Mart* to the antitrust context. There, the Court found it "uncontested" and "unremarkable" that predominance requires plaintiffs to prove "that the existence of individual injury resulting from the alleged antitrust violation (referred to as 'antitrust impact') [is] capable of proof at trial through evidence that [is] common to the class." *Comcast*, 133 S. Ct. at 1430–33 (internal quotation marks omitted).

The district court attempted to distinguish *Comcast* by relying on cases that discuss *damages* models. *See* Add. 30a–35a. But this confuses the amount of damages with the fact of injury — two separate elements that this Court's precedents treat differently for the purposes of predominance. As this Court has held, plaintiffs bear the burden of

proving that "each member of the class was in fact injured, even if the amount of each individual injury could be determined in a separate proceeding." *New Motor Vehicles*, 522 F.3d at 28. Even if predominance is not always defeated by "individual damages questions," it still demands that "liability [be] subject to common proof." *Id.*; *see also Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 799 (7th Cir. 2013) ("*Comcast* holds that a damages suit cannot be certified to proceed as a class action unless the damages sought are the result of the class-wide *injury* that the suit alleges.").[2]

II. Strong Policy Considerations Support The Rule That A Court May Not Certify A Class Containing Uninjured Members.

The district court was not concerned with certifying a class that included uninjured class members because it believed defendants could simply defeat those claims "at trial." Add. 24a. In so stating, the district court reiterated its strong preference for holding trials. *See id.* at 37a n.6 (citing *United States v. Massachusetts*, 781 F. Supp. 2d 1, 21–

[2] In fact, *Comcast* even casts doubt on the weaker proposition that plaintiffs can satisfy predominance despite the presence of individual questions about the *amount* of damages. *See Comcast*, 133 S. Ct. at 1433 (finding predominance lacking because "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class."); *Rail Freight*, 725 F.3d at 253.

26 (D. Mass. 2011) (opining that federal civil trials have become an "endangered species" and that "some judges will do almost anything to avoid deciding a case on the merits and find some procedural reason to get rid of it")). But the district court's statement cannot be reconciled with the dynamics of real-world class-action litigation.

"With vanishingly rare exception[s], class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Nagareda, 84 N.Y.U. L. Rev. at 99; *see also* Barbara J. Rothstein & Thomas E. Willging, Fed. Judicial Ctr., *Managing Class Action Litigation: A Pocket Guide for Judges*, at 9 (3d ed. 2010), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/classgd3.pdf/$file/classgd3.pdf. In fact, "[a] study of certified class actions in federal court in a two-year period (2005 to 2007) found that *all* 30 such actions had been settled." *Eubank v. Pella Corp.*, __ F.3d __, 2014 WL 2444388, at *2 (7th Cir. June 2, 2014) (Posner, J.) (citing Emery G. Lee III *et al.*, Fed. Judicial Ctr., *Impact of the Class Action Fairness Act on the Federal Courts*, at 2, 11 (2008)).

Class certification unleashes "hydraulic pressure" to settle because it threatens defendants with the prospect of losing millions of

cases simultaneously. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165, 167 & n.8 (3d Cir. 2001); *see also Eubank*, 2014 WL 2444388, at *2 ("Aggregating a great many claims (. . . occasionally millions) often creates a potential liability so great that the defendant is unwilling to bear the risk, even if it is only a small probability, of an adverse judgment."). And the stakes are particularly high in antitrust cases. Antitrust class actions are "arguably the most complex action[s]" to litigate, *In re Motorsports Merchan. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000), because they often involve "voluminous documentary and testimonial evidence, extensive discovery, complicated legal, factual, and technical (particularly economic) questions, numerous parties and attorneys, and substantial sums of money." Manual for Complex Litigation § 30, at 519 (4th ed. 2004); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007) (discussing the high costs of discovery in antitrust cases). The sheer complexity of antitrust litigation creates ample opportunities for plaintiffs to impose staggering costs on defendants and thereby exert powerful settlement pressure.

The Supreme Court itself has acknowledged these problems. It recognizes that certification "may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see also* Fed. R. Civ. P. 23(f) advisory committee's notes, 1998 Amendments (defendants may "settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability").

If the certification order here is not reversed, such pressures may lead defendants to settle with a sprawling class that includes entities and individuals who suffered no injury and thus have no claim. The resulting economic distortions would harm not only defendants but also consumers, who often end up bearing the costs of litigation and litigation avoidance in the form of higher prices. *See* Joseph A. Grundfest, *Why Disimply?*, 108 Harv. L. Rev. 727, 732 (1995).

CONCLUSION

Persons who have suffered no injury have no claim. They cannot acquire a claim by being made part of a class. And a class that includes members without a claim cannot prove liability on a classwide basis. Because common questions do not predominate, the district court's order granting class certification should be reversed.

Respectfully submitted,

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June 12, 2014

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(a)(7)(C), I certify that this brief complies with the length limitations set forth in Rule 32(a)(7)(B)(i) because it contains 5,071 words, as counted by Microsoft Word, excluding the items that may be excluded under Rule 32(a)(7)(B)(iii).

/s/ Jeffrey S. Bucholtz
Jeffrey S. Bucholtz

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25, I certify that on June 12, 2014, I filed this brief with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jeffrey S. Bucholtz
Jeffrey S. Bucholtz