No. 19-56514

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OLEAN WHOLESALE GROCERY COOPERATIVE, INC., et al.,
Plaintiffs-Appellees,
v.
BUMBLE BEE FOODS LLC, et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of California, No. 3:15-md-02670-JLS-MDD
Hon. Janis L. Sammartino

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANTS

Steven P. Lehotsky
Jonathan D. Urick
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062
(202) 463-5337

Ashley C. Parrish
Counsel of Record
Joshua N. Mitchell
KING & SPALDING LLP
1700 Pennsylvania Avenue NW
Washington, DC 20006
(202) 737-0500
aparrish@kslaw.com

Anne M. Voigts
Quyen L. Ta
KING & SPALDING LLP
101 Second Street, Suite 2300
San Francisco, CA 94105
(415) 318-1200

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

May 21, 2020

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The Chamber of Commerce of the United States of America respectfully moves for leave to file the accompanying *amicus curiae* brief in support of Defendants-Appellants. The Chamber sought consent from the parties to file this brief. Defendants-Appellants consented; Plaintiffs-Appellees did not.

The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size, in every industry, and from every region of the country. The Chamber represents its members' interests by, among other activities, filing *amicus curiae* briefs in cases implicating issues of concern to the nation's business community.

Many of the Chamber's members and affiliates are defendants in class actions. Accordingly, they have a keen interest in ensuring that courts rigorously analyze whether plaintiffs have satisfied the requirements for class certification when a class is certified.

The Chamber is especially concerned with protecting the due-process rights of both class defendants and absent class members in the

administration of Rule 23. Aggregate treatment of claimants' evidence may deprive both absent class members and class defendants of fundamental due-process rights.

The order in this case implicates a frequently litigated question in class-action law—whether common questions predominate among class members. Here, the district court failed to perform the necessary rigorous analysis of that essential prerequisite question, leaving it instead for the jury in a likely hypothetical trial.

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 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. *See* Fed. R. App. P. 29(a)(4)(E).

The Chamber's brief is timely because it is filed within seven days of the May 14, 2020 filing of Defendants-Appellants' principal brief. The brief complies with Federal Rule of Appellate Procedure 29(a)(5) because it contains fewer than 6,500 words—half the length authorized for Defendants-Appellants' principal brief.

Given its substantial interest in this case, the Chamber of Commerce of the United States of America respectfully seeks leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

/s/ Ashley C. Parrish

Ashley C. Parrish
Counsel of Record
Joshua N. Mitchell
KING & SPALDING LLP
1700 Pennsylvania Avenue NW
Washington, DC 20006
(202) 737-0500
aparrish@kslaw.com

Anne M. Voigts
Quyen L. Ta
KING & SPALDING LLP
101 Second Street, Suite 2300
San Francisco, CA 94105
(415) 318-1200

Counsel for Amicus Curiae

Steven P. Lehotsky
Jonathan D. Urick
U.S. CHAMBER
LITIGATION CENTER
1615 H Street NW
Washington, DC 20062
(202) 463-5337

Counsel for Chamber of Commerce of the United States of America

May 21, 2020

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Ashley C. Parrish
Ashley C. Parrish

Counsel for Amicus Curiae

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANTS

Steven P. Lehotsky
Jonathan D. Urick
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062
(202) 463-5337

Ashley C. Parrish
Counsel of Record
Joshua N. Mitchell
KING & SPALDING LLP
1700 Pennsylvania Avenue NW
Washington, DC 20006
(202) 737-0500
aparrish@kslaw.com

Anne M. Voigts
Quyen L. Ta
KING & SPALDING LLP
101 Second Street, Suite 2300
San Francisco, CA 94105
(415) 318-1200

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

May 21, 2020

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including class actions.

The proper application of the class-action requirements codified in Federal Rule of Civil Procedure 23 is of particular concern to the Chamber and its members. The Chamber has a strong interest in ensuring that courts undertake the rigorous analysis Rule 23 requires before they allow a case to proceed as a class action. It also has a strong interest in ensuring that, consistent with Supreme Court precedent, trial courts do not certify class actions based on statistical models that improperly sweep in significant numbers of uninjured class members.

INTRODUCTION AND SUMMARY OF ARGUMENT

Rule 23's requirements provide crucial safeguards, grounded in constitutional principles of due process, that must be satisfied before plaintiffs may take advantage of the class-action device. *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008). When plaintiffs seek to certify a class, they must prove that class members have claims that present at least one "common question[]" that, if adjudicated on a classwide basis, would "resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The named plaintiffs must then satisfy a "far more demanding" requirement: proving that the common questions they have identified "predominate" over individual ones. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622–24 (1997); *see also Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013).

The core, constitutionally required premise justifying class-action litigation is that the named plaintiffs' claims share common issues and relevant evidence with all absent class members, such that litigating the named plaintiffs' claims validly and conclusively resolves the common issues for *all* class members. If that premise does not hold, due process

does not allow any rulings regarding the named plaintiffs' claims to bind the class as a whole. If the trial court rules against the class, for instance, applying the court's findings to absent class members whose claims raise different issues would violate their constitutional rights. Likewise, it would equally offend due process if the trial court extended an adverse ruling against a defendant to the entire class despite individualized defenses to the claims of each class member. Either way, the court's ruling would violate the Constitution and modify substantive rights in violation of the Rules Enabling Act. 28 U.S.C. § 2072(b). Class adjudication cannot proceed in the name of "efficiency," bypassing a defendant's right to litigate individualized defenses.

The district court ignored this fundamental principle by certifying a class that includes many uninjured claimants with no conceivable claim against defendants. It is not enough to suggest, as the district court appears to have believed, that the class viewed as a whole suffered an aggregate injury, even though numerous individual class members did not. A party not injured by defendants' conduct has no claim for damages and, indeed, would not even enjoy Article III standing. Tossing those parties into a class action does not transmute those uninjured parties

into injured parties with valid claims. The district court's decision to certify the class reflects a judgment that, in effect, any uninjured parties included in it are *the sort* of entities *that could* have suffered injury *if the facts were different*. But that kind of "close enough" analysis has no proper place under the law.

The district court acknowledged that defendants' expert had shown problems with the economic model used by the direct-purchaser plaintiffs' expert, but it declined to identify a winner in that battle of the experts. ER19. Instead, it deferred any ruling on that question to the jury. ER19, 23. That certify-now-worry-later approach is flatly inconsistent with governing precedent from the Supreme Court and, if upheld, would create a conflict with the law of other Circuits. As courts have consistently recognized, certifying classes that do not satisfy Rule 23 opens the door to serious abuse—not least because the risks and costs associated with continued class-action litigation coerce defendants into settling regardless of the merits of the class members' underlying claims.

This Court should reverse the district court and decertify the class.

ARGUMENT

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

Plaintiffs seeking to use the class-action device must "affirmatively demonstrate" compliance with Rule 23. *Comcast*, 569 U.S. at 33 (quoting *Wal-Mart*, 564 U.S. at 350). Plaintiffs have not done so here because they cannot satisfy Rule 23(b)(3)'s predominance requirement. The district court's order relies on models that merely assume injury for numerous members of the purported class, sweeping away a key portion of the predominance inquiry.

A. Plaintiffs Must Affirmatively Demonstrate That Common Issues Predominate.

Class actions under Rule 23 are an "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties." *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979). Class actions remain an exception because they raise "important due process concerns" for both defendants and absent class members. *Unger v. Amedisys, Inc.*, 401 F.3d 316, 320–21 (5th Cir. 2005). As a result, district courts must "conduct a 'rigorous analysis' to determine whether" a proposed class satisfies Rule 23, "even when that requires inquiry into the merits of the claim." *Comcast*, 569 U.S. at 35 (citing *Wal-Mart*, 564 U.S. at 351).

Rule 23 requires such rigorous analysis because certifying an overbroad class risks holding defendants liable to plaintiffs that they have not harmed or against which they have strong individualized defenses. *See Wal-Mart*, 564 U.S. at 361–62; *True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 932 (9th Cir. 2018). Equally importantly, class adjudication risks extinguishing individualized claims that absent class members could otherwise press in individual litigation. Courts have an important responsibility to protect the due process rights of both defendants and absent class members. *See Epstein v. MCA, Inc.*, 179 F.3d 641, 648 (9th Cir. 1999).

Rule 23(b)(3), which "added to the complex-litigation arsenal class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded," is the "most adventuresome innovation" in the class-action amendments. *Amchem*, 521 U.S. at 614–15. The provision's drafters "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). As a result, Rule 23(b)(3) incorporates several important

"procedural safeguards." *Comcast*, 569 U.S. at 34. The drafters included these safeguards 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).

Chief among Rule 23's safeguards is its requirement that a named plaintiff "affirmatively demonstrate" that common questions predominate over individual ones. *Comcast*, 569 U.S. at 33 (quoting *Wal-Mart*, 564 U.S. at 350). In combination with Rule 23(a)'s commonality requirement, the "demanding" predominance requirement ensures that "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623, 624. That cohesion exists only when all class members "possess the same interest and suffer the same injury." *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (quotation marks omitted). Merely pleading "a violation of the same provision of law" and labeling it a common question is not enough, because "any competently crafted class complaint literally raises common questions." *Wal-Mart*, 564 U.S. at 349 (alteration and quotation marks

omitted). The need to prove predominance by establishing a common, classwide injury ensures "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*, 569 U.S. at 37. Otherwise, a liability finding with respect to a named plaintiff does not determine "in one stroke" whether defendants are liable to the entire class, and liability cannot be a "common" issue. *Wal-Mart*, 564 U.S. at 350. 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 Where a Putative Class Includes Many Uninjured Members.

Injury-in-fact is the "irreducible minimum" for Article III standing to sue in federal court. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). An uninjured antitrust plaintiff cannot pursue a claim through individual litigation because that plaintiff could not state a claim under substantive

antitrust law. *See Atl. 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.").

Certifying a class action on the rationale that aggregate evidence shows *most* class members have suffered an injury, or that the average class member has suffered an injury, gives a substantive right to uninjured class members that they otherwise would not have. *See Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) ("No class may be certified that contains members lacking Article III standing.") (alteration and quotation marks omitted). Moreover, certifying such a class, without accounting for the defendant's right to litigate individual defenses to plaintiffs' injuries, violates due process and the Rules Enabling Act, which mandates that courts interpret Rule 23 in a manner that does not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). When analyzing predominance, a district court must account for individualized defenses on injury—an element of liability, not merely a matter of damages. Accordingly, while courts may be able to apply a more lenient standard when measuring damages across a class, the law is clear that "every plaintiff must be able to show antitrust injury

that is common to the class." *In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 194–95 (3d Cir. 2020) (quotation marks omitted); *see also id.* ("We have consistently distinguished [antitrust] injury from damages."). A court cannot make these individualized issues disappear with aggregate evidence.

The evidence the district court accepted was not sufficient to clear Rule 23's hurdles because it "could [not] have been used to establish liability in an individual action." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1048 (2016). Plaintiffs and the district court instead relied on statistical models that merely *assumed* impact—namely, that defendants' alleged price-fixing caused each direct-purchaser class member, when buying packaged tuna fish, to suffer the same average overcharge. That assumption is improper as to both defendants and absent class members.

It is undisputed that the overcharges differed significantly because of the plaintiffs' differing relationships with the defendants. Within the direct-purchaser class, some claimants could directly negotiate more favorable prices due to their size and market penetration, while others lacked the same leverage. Within the indirect-purchaser class,

overcharges were similarly variable, and depended both on the degree to which the direct purchaser overpaid for tuna and the degree to which the direct purchaser then passed that overcharge on to the secondary purchaser, which was further affected by the degree to which the secondary buyer could negotiate with the direct purchaser to set their own prices. In short, the situation is comparable to that in *Wal-Mart*—where "the employees were not similarly situated, [and so] none of them could have prevailed in an individual suit by relying on" the asserted common evidence. *See Tyson Foods*, 136 S. Ct. at 1048.

The averaging performed by plaintiffs' experts, on which the district court relied, virtually guarantees that the classes contain a significant number of uninjured claimants. How many? As defendants pointed out, using the economic model direct-purchaser plaintiffs' expert proposed on an individual instead of classwide basis suggested that more than a quarter—28%—of the class suffered no injury. ER15. Even plaintiff's expert conceded that at least 5.5% of the class did not show an overcharge under his model. ER16.

But although the district court looked at the evidence from both sides, instead of making a decision, it pressed forward with class

certification. ER19 & ER23. That is, the district court did not even decide the actual proportion of uninjured class members—and thus did not take into account whether the individualized adjudication required to weed out these uninjured plaintiffs predominates over common issues. But the court must decide whether "any winnowing mechanism [for weeding out uninjured class members] [is] truncated enough to ensure that the common issues predominate, yet robust enough to preserve the defendants' Seventh Amendment and due process rights to contest every element of liability and to present every colorable defense." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 625 (D.C. Cir. 2019) (describing and endorsing the First Circuit's analysis in *In re Asacol Antitrust Litigation,* 907 F.3d 42, 54 (1st Cir. 2018)). The district court here put off that essential question for a trial that, precisely because the class certified is so sweeping, will likely never take place.

The court also reasoned that 61 of the direct-purchaser class members—entities for which plaintiffs' economic model lacked data to determine whether they were, in fact, injured—could simply use the model "as it pertains to similarly situated Class members as proof." ER17. The district court's opinion does not describe how those class

members should identify which other class members were "similarly situated," or discern whether the class contained any "similarly situated" class members for whom the model did find results.

Even if those fundamental problems could be set aside, the district court's approach amounts to a contention that a plaintiff in an individual lawsuit could point to evidence that the defendant harmed *someone else* as proof that the defendant harmed the plaintiff. *Cf. Tyson Foods*, 136 S. Ct. at 1048. That is inconsistent with not only logic and due process but also the plaintiff's burden of persuasion and basic rules of evidence. As certified, the class is sutured together not by predominant common questions capable of classwide proof but by circumstance, with numerous class members who could not rely on classwide proof to prevail in an individual suit. *See Tyson Foods*, 136 S. Ct. at 1048.

C. The District Court's Decision Conflicts with Decisions from Other Circuits.

Given the district court's departure from controlling Supreme Court precedent, it should come as no surprise that affirming the district court's judgment would create a conflict with the law of other circuits.

In *Asacol Antitrust Litigation*, the First Circuit rejected a contention similar to the one plaintiffs press here: that an expert's

"opinion that ninety percent of class members were injured [would be] both admissible and sufficient to prove that any given individual class member was injured." 907 F.3d at 54. As the First Circuit noted, the problems with that approach was "more than a statutory defense; rather, [it was] a challenge to a plaintiff's ability to prove an element of liability." *Id.* at 53.

Just so here: plaintiffs and the district court seek to put off until trial any determination on numerous claimants' "ability to prove an element of liability." As the First Circuit aptly noted, "[t]he fact that plaintiffs seek class certification provides no occasion for jettisoning the rules of evidence and procedure, the Seventh Amendment, or the dictate of the Rules Enabling Act." *Id.*

The D.C. Circuit reached a similar conclusion in *Rail Freight Fuel Surcharge Antitrust Litigation*, 934 F.3d at 623. There, the court assessed a damages model that found "only negative overcharges" for a significant number of claimants. *Id.* The court concluded that a damages model that could "reliably show injury and causation for 87.3 percent of the class" was nonetheless insufficient to prove classwide injury because

it "leaves the plaintiffs with no common proof of those essential elements of liability for the remaining 12.7 percent." *Id.* at 623–24.

There is no reason to open a conflict with these other courts. Particularly because class actions are supposed to be an exception to the usual rule of individual litigation, this Court should reverse and remand with instructions to decertify the class. Doing so would ensure that this Court's precedent remains consistent with controlling Supreme Court law and decisions from other Circuits.

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

The district court was not concerned about certifying a class that included uninjured class members because it believed defendants could simply use "[t]he tests … that purport to reject the [plaintiffs'] model … at trial." ER19. But that reasoning is irreconcilable with the realities of class-action litigation—realities that explain why federal courts have firmly rejected this kind of certify-now, worry-later approach.

"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. 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.*, 753 F.3d 718, 720 (7th Cir. 2014) (Posner, J.) (citing Emery G. Lee III & Thomas E. Willging, Fed. Jud. Ctr., *Impact of the Class Action Fairness Act on the Federal Courts*, 2, 11 (2008)).

Class certification inflicts "hydraulic pressure" on defendants to settle because it threatens them with the possibility of losing many cases at once. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165, 167 & n.8 (3d Cir. 2001), *as amended* (Oct. 16, 2001). As the Supreme Court has long recognized, class actions can "unfairly place pressure on the defendant to settle *even unmeritorious* claims." *Epic Sys. Corp. v. Lewis*, 138 S. Ct 1612, 1632 (2018) (alteration and quotation marks omitted; emphasis added); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (similar); Fed. R. Civ. P. 23(f), note (Advisory Comm. 1998) (defendants may "settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"). Indeed, the pressure exists even when the outcome is likely to be favorable for defendants, because a damages award would be disastrous: "Faced with even a small chance of a devastating loss, defendants will be

pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

If the certification order here is not reversed, those pressures may lead defendants to settle with a sprawling class that includes entities who suffered no injury and thus have no claim. The resulting economic distortions would harm not just defendants—but also the consumers who 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

The district court's order granting class certification should be reversed.

Respectfully submitted,

/s/ Ashley C. Parrish

Ashley C. Parrish
Counsel of Record
Joshua N. Mitchell
KING & SPALDING LLP
1700 Pennsylvania Avenue NW
Washington, DC 20006
(202) 737-0500
aparrish@kslaw.com

Anne M. Voigts
Quyen L. Ta
KING & SPALDING LLP
101 Second Street, Suite 2300
San Francisco, CA 94105
(415) 318-1200

Counsel for Amicus Curiae

Steven P. Lehotsky
Jonathan D. Urick
U.S. CHAMBER
LITIGATION CENTER
1615 H Street NW
Washington, DC 20062
(202) 463-5337

Counsel for Chamber of Commerce of the United States of America

May 21, 2020

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FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Ashley C. Parrish
Ashley C. Parrish

Counsel for Amicus Curiae