No. 19-56514

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OLEAN WHOLESALE GROCERY CO-OP, *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
The Honorable Janis L. Sammartino, U.S. District Judge

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION, AND THE INTERNET ASSOCIATION IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* the Chamber of Commerce of the United States of America states that it is a non-profit 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.

The Software & Information Industry Association states that it is a nonprofit corporation. It has no parent corporation, and no corporation owns more than ten percent of its stock.

Internet Association states that it is a trade association representing leading global internet companies on matters of public policy. Internet Association does not have any parent corporation and does not issue stock.

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TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. A Class Definition That Is Known to Sweep in Identified Uninjured Class Members Is Improper 7

II. A De Minimis Rule Is Appropriate if the Parties Have Not Identified Specific Uninjured Class Members, but There Is a Logical Possibility That Some Small Portion of the Class May Be Uninjured 14

III. Plaintiffs Bear the Burden to Show That There Is a Manageable Way to Resolve Disputed Questions of Standing and That Rule 23's Stringent Predominance Is Satisfied Before Any Class Is Certified 20

CONCLUSION 26

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

Cases

Adashunas v. Negley,
626 F.2d 600 (7th Cir. 1980) 9, 12

Allen v. Wright,
468 U.S. 737 (1984) 8

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) ..... *passim*

AT&T Mobility LLC v. Concepcion,
563 U.S. 333 (2011) 25

Atl. Richfield Co. v. USA Petroleum Co.,
495 U.S. 328 (1990) 8

Avritt v. Reliastar Life Ins. Co.,
615 F.3d 1023 (8th Cir. 2010) 8, 12

Califano v. Yamasaki,
442 U.S. 682 (1979) 7, 16

Campbell v. City of Los Angeles,
903 F.3d 1090 (9th Cir. 2018) 23

Castillo v. Bank of Am., NA,
980 F.3d 723 (9th Cir. 2020) 13

Comcast Corp. v. Behrend,
569 U.S. 27 (2013) ..... *passim*

Cordoba v. DIRECTV, LLC,
942 F.3d 1259 (11th Cir. 2019) 11, 17

Davis v. FEC,
554 U.S. 724 (2008) 8

Denney v. Deutsche Bank AG,
443 F.3d 253 (2d Cir. 2006) 8, 9, 12

E. Tex. Motor Freight Sys., Inc. v. Rodriguez,
431 U.S. 395 (1977) 18

Ellis v. Costco Wholesale Corp.,
657 F.3d 970 (9th Cir. 2011) 3

Epic Sys. Corp. v. Lewis,
138 S. Ct 1612 (2018) 24

Epstein v. MCA, Inc.,
179 F.3d 641 (9th Cir. 1999) 17

Flecha v. Medicredit, Inc.,
946 F.3d 762 (5th Cir. 2020) 10, 11

Gen. Tel. Co. of Sw. v. Falcon,
457 U.S. 147 (1982) 20

Georgine v. Amchem Prods., Inc.,
83 F.3d 610 (3d Cir. 1996) 10

Halvorson v. Auto-Owners Ins. Co.,
718 F.3d 773 (8th Cir. 2013) 9, 15

In re Asacol Antitrust Litig.,
907 F.3d 42 (1st Cir. 2018) 15, 23

In re Lamictal Direct Purchaser Antitrust Litig.,
957 F.3d 184 (3d Cir. 2020) 14

In re New Motor Vehicles Canadian Exp. Antitrust Litig.,
522 F.3d 6 (1st Cir. 2008) 13, 23

In re Nexium Antitrust Litig.,
777 F.3d 9 (1st Cir. 2015) 16, 21

In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869,
725 F.3d 244 (D.C. Cir. 2013) 15

In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869,
934 F.3d 619 (D.C. Cir. 2019) 22

Kohen v. Pac. Inv. Mgmt. Co.,
571 F.3d 672 (7th Cir. 2009) 15

Leyva v. Medline Indus. Inc.,
716 F.3d 510 (9th Cir. 2013) 14

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992) 7, 15

Mazza v. Am. Honda Motor Co.,
666 F.3d 581 (9th Cir. 2012) 9, 19

Moore v. Apple Inc.,
309 F.R.D. 532 (N.D. Cal. 2015) 12

Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
259 F.3d 154 (3d Cir. 2001) 24

Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC,
993 F.3d 774, (9th Cir.),
reh'g en banc granted, 5 F.4th 950 (9th Cir. 2021) 11, 13, 15

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999) 10

Ruiz Torres v. Mercer Canyons Inc.,
835 F.3d 1125 (9th Cir. 2016) 16

Schlesinger v. Reservists Comm. to Stop War,
418 U.S. 208 (1974) 18

Sutton v. St. Jude Med. S.C., Inc.,
419 F.3d 568 (6th Cir. 2005) 8

Tardiff v. Knox Cty.,
365 F.3d 1 (1st Cir. 2004) 13

Taylor v. Sturgell,
553 U.S. 880 (2008) 6

TransUnion LLC v. Ramirez,
141 S. Ct. 2190 (2021) 7, 8, 9, 15

True Health Chiropractic, Inc. v. McKesson Corp.,
896 F.3d 923 (9th Cir. 2018) 17

Tyson Foods, Inc. v. Bouaphakeo,
577 U.S. 442 (2016) 8, 15

Unger v. Amedisys, Inc.,
401 F.3d 316 (5th Cir. 2005) 16

Valley Forge Christian Coll.
v. Ams. United for Separation of Church & State, Inc.,
454 U.S. 464 (1982) 7

Vega v. T-Mobile USA, Inc.,
564 F.3d 1256 (11th Cir. 2009) 21

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) ..... *passim*

Wisc. Dep't of Revenue v. William Wrigley, Jr., Co.,
505 U.S. 214 (1992) 21

Yokoyama v. Midland Nat'l Ins. Co.,
594 F.3d 1087 (9th Cir. 2010) 13

Statute & Rule

28 U.S.C. § 2072(b) 19

Fed. R. Civ. P. 23(b)(3) 3

Other Authorities

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Carlton Fields, 2020 Class Action Survey (2020) 24

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Joseph A. Grundfest, *Why Disimply?*, 108 Harv. L. Rev. 727 (1995) 25

Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97 (2009) 18, 24

INTEREST OF *AMICI CURIAE*[1]

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, like this one, that raise issues of concern to the nation's business community.

The Software & Information Industry Association ("SIIA") is the principal trade association for the software and digital information industries. SIIA's membership includes more than 600 software companies, search engine providers, data and analytics firms, information service companies, and digital publishers that serve nearly

[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 of this brief; and no person except amici, their members, or their counsel contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

every segment of society, including business, education, government, healthcare, and consumers. SIIA's members have been defendants in class action litigation involving bare statutory violations and claimed statutory damages, making it nearly impossible to defend even meritless suits after the certification stage.

The Internet Association ("IA") represents more than 40 of the world's leading technology companies, from social networking services and search engines to travel sites and online marketplaces. IA's mission is to foster innovation, promote economic growth, and empower people through a free and open internet.

The proper application of Federal Rule of Civil Procedure 23's class-action requirements is of particular concern to amici. Amici have a strong interest in ensuring that courts undertake the rigorous analysis required by Rule 23 before they allow a case to proceed as a class action, rather than after (or indeed not at all). They also have a strong interest in ensuring that, consistent with Supreme Court precedent, trial courts do not certify class actions that improperly sweep in significant numbers of uninjured class members.

INTRODUCTION AND SUMMARY OF ARGUMENT

The panel properly vacated the district court's order certifying a class that included many uninjured claimants with no conceivable claim against defendants. All three judges correctly recognized that the district court, not a jury, must resolve factual disputes bearing on predominance. *See* Fed. R. Civ. P. 23(b)(3) (permitting a class action to be maintained only if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members"). All three correctly concluded that a district court's "rigorous analysis" of whether a putative class has satisfied Rule 23's stringent requirements should apply a preponderance of the evidence standard. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011). And all three correctly held that the question for the district court is not whether common issues *could* predominate at trial, but whether they in fact do, and that that determination must be made *before* certifying the class. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). The en banc Court should apply the same reasoning and reach the same result.

Where one member of the panel parted company with the others, however, was over whether the district court must find that, at most, only

a "de minimis" number of class members are uninjured before certifying a class. Every Court of Appeals to consider this issue has found that a more than de minimis number of uninjured members precludes class certification, and this Circuit should do the same. A party not injured by defendants' conduct has no claim for damages and, indeed, no Article III standing. Tossing those uninjured parties into a class action does not transmute them into injured parties with valid claims. The panel correctly rejected the district court's loose determination that, in effect, any uninjured parties included in the class are *the sort* of entities that *could* have suffered injury *if the facts were different*. As courts have consistently recognized, that type of certify-now-worry-later approach is improper. 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.

In addition, the en banc Court should clarify when, if at all, it is appropriate to apply a de minimis rule. A class cannot, consistent with Rule 23 and the Constitution, sweep in *identified*, uninjured class members. A court has no constitutional authority to adjudicate claims

brought by uninjured parties, and when standing is lacking, it cannot use the class action device to circumvent Article III limits on jurisdiction. Thus, a court may not certify a class when the possible number of as-of-yet unidentified class members who may not be injured is more than de minimis or the process of identifying (even those few) uninjured members will spawn substantial individualized issues.

Those limitations are driven by and consistent with both Rule 23(b)(3)'s predominance and Article III's standing requirements. A court has no constitutional authority to adjudicate claims brought by uninjured parties, and when standing is lacking, it cannot use the class action device to circumvent Article III limits on jurisdiction. As a result, the de minimis rule may apply, if at all, only when the plaintiff has met its burden at the class certification stage to establish injury on the part of the proposed class members such that the prospect of unidentified specific uninjured class members is merely hypothetical. If that hypothetical nevertheless remains a realistic possibility, a court may proceed with class certification only if the court finds that the number of as-of-yet unidentified, uninjured class members is de minimis and that plaintiffs have satisfied their burden under Rule 23(b)(3) of identifying

an appropriate and manageable method to resolve disputed issues of standing as the case progresses. For that reason, the majority's approximation of a 5 to 6 percent outer limit cannot be a hard-and-fast rule because there may be circumstances where even that percentage is too much.

Accordingly, this Court should decertify the class for the same reasons identified by the panel.

ARGUMENT

Rule 23's requirements provide crucial safeguards, grounded in constitutional due process principles, that must be satisfied before plaintiffs may take advantage of the class-action device. *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008). Accordingly, 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 seeking to certify a class under Rule 23(b)(3) 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*, 569 U.S. at 34.

I. A Class Definition That Is Known to Sweep in Identified Uninjured Class Members Is Improper

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast*, 569 U.S. at 33 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). As such, courts cannot (and indeed should not) bend the law to favor class actions.

One of the most important legal requirements is plaintiffs' obligation to demonstrate injury-in-fact, 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). As the party invoking federal jurisdiction, plaintiffs bear the burden of proving that they have standing, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992), and nothing in Rule 23 absolves plaintiffs of that burden.[2] *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207–08 (2021);

[2] Nor is antitrust law an exception to that constitutional requirement. 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.*,

Allen v. Wright, 468 U.S. 737, 750 (1984) (discussing standing requirement in class action context); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263 (2d Cir. 2006) (same).

The constitutional standing requirement is especially important in class actions. *Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 570 (6th Cir. 2005). "[A] named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves." *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010); *see also Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not."). Precisely because "standing is not dispensed in gross," every class member must have Article III standing to recover individual damages, *TransUnion*, 141 S. Ct. at 2208, and each class member must maintain a personal interest in the dispute at all stages of litigation. *See, e.g., Davis v. FEC*, 554 U.S. 724, 732–33 (2008).

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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.").

Although the Supreme Court in *TransUnion* did not need to address in the first instance "whether every class member must demonstrate standing *before* a court certifies a class," its reasoning makes clear that, at a minimum, the potential presence of uninjured parties in a certified class raises serious questions under Article III. 141 S. Ct. at 2208 n.4, 2214 (remanding for district court to consider "whether class certification is appropriate in light of our conclusion about standing"). Accordingly, appellate courts, including this one, have repeatedly observed that "no class may be certified that contains members lacking Article III standing." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) (quoting *Denney*, 443 F.3d at 264)); *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013) ("In order for a class to be certified, each member must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision."); *Denney*, 443 F.3d at 264 (same); *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980) (affirming denial of a plaintiff class because the class definition was "so amorphous and diverse" that it was not "reasonably clear" that the proposed class members each had standing); 7 AA Charles Alan Wright, Arthur R.

Miller, & Mary Kay Kane, Federal Practice and Procedure Civ. § 1785.1 (3d ed.) ("[T]o avoid a dismissal based on a lack of standing, the court must be able to find that both the class and the representatives have suffered some injury requiring court intervention."); *cf. Flecha v. Medicredit, Inc.*, 946 F.3d 762, 768 (5th Cir. 2020) (expressing skepticism that Article III permits certification of a class where "[c]ountless unnamed class members lack standing.").

The Supreme Court has reminded courts that they should first decide whether a proposed class satisfies Rule 23 before deciding whether it satisfies Article III because a determination that a case cannot proceed as a class action under Rule 23 moots the question of whether absent class members have standing. *See Amchem*, 521 U.S. at 612 ("'The class certification issues are dispositive'; because their resolution ... is logically antecedent to the existence of any Article III issues, it is appropriate to reach them first." (quoting *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 623 (3d Cir. 1996))); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (noting petitioners' argument that "exposure-only" class members lack an injury-in-fact and acknowledging need for Article III standing, but turning to "logically antecedent" class certification issues first). But that

prudential order of inquiry does not mean that courts should certify class actions where the defined class is *known* to include identified, uninjured class members. To the contrary, whether absent class members can establish standing is "exceedingly relevant to the class certification analysis required by [Rule 23]." *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1273–77 (11th Cir. 2019) (vacating class certification where district court failed to address the fact that "unnamed class members' standing pose[d] a powerful problem under Rule 23(b)(3)'s predominance factor").

The panel decision followed that well-reasoned approach. It noted that class actions should be no different from individual actions when it comes to standing requirements and expressed skepticism that Article III permits certification of a class where "[c]ountless unnamed class members lack standing." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774, 791 n.7 (9th Cir.), *reh'g en banc granted*, 5 F.4th 950 (9th Cir. 2021) (quoting *Flecha*, 946 F.3d at 768). It nonetheless declined to reach the constitutional issue because class certification failed under Rule 23(b)(3). *Id.*

To comply with both Rule 23 and constitutional standing requirements, a class should not be certified if it is known to include

identified, uninjured class members. The de minimis requirement comes into play (if at all) only when there is a possibility that a small number of class members may be uninjured, but those class members have not yet been identified. *Moore v. Apple Inc.*, 309 F.R.D. 532, 542 (N.D. Cal. 2015) ("[T]he inclusion of class members whom, by definition, could not have been injured is ... indicative of the individualized inquiries that would be necessary to determine whether a class member has suffered any injury in the first place."). In those circumstances, it is enough that plaintiffs have met their burden at this stage of the litigation to establish that anyone within it presumptively has standing and that Rule 23's other requirements are satisfied. *Denney*, 443 F.3d at 264; *Avritt*, 615 F.3d at 1034 (citing *Denney*, 443 F.3d at 263–64); *Adashunas*, 626 F.2d at 603 ("In order to state a class action claim upon which relief can be granted, there must be alleged at the minimum (1) a reasonably defined class of plaintiffs, (2) all of whom have suffered a constitutional or statutory violation (3) inflicted by the defendants.").

Plaintiffs cannot meet their burden by simply defining the class in terms of the injury—that is, to include in the class only those members who have a defective model, or were discriminated against, or suffered

whatever injury is at issue because that leads to so-called "fail-safe" classes. Such classes, whose membership can be ascertained only *after* the entire suit has been litigated and which effectively put off the determination of predominance to another day, are equally inconsistent with Rule 23's stringent requirements. 1 Newberg on Class Actions § 2:3 (5th ed.).

The partial dissent's contention that in other cases, courts have held that the "potential existence of individualized damage assessments" does not undercut class certification does not compel a different result. *Olean Wholesale Grocery Coop., Inc.*, 993 F.3d at 795 (Hurwitz, J., concurring in part and dissenting in part) (quoting *Yokoyama v. Midland Nat'l Ins. Co.*, 594 F.3d 1087, 1089 (9th Cir. 2010)). That contention conflates the ability to prove the extent of damages with the ability to prove the existence of any injury at all. *Castillo v. Bank of Am., NA*, 980 F.3d 723, 730 (9th Cir. 2020); *Tardiff v. Knox Cty.*, 365 F.3d 1, 6–7 (1st Cir. 2004); *see also In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008). While in some circumstances the potential for individualized damages may not defeat class certification, *see Leyva v. Medline Indus. Inc.*, 716 F.3d 510 (9th Cir. 2013), the law is

clear that "every plaintiff must be able to show antitrust injury through evidence that is common to the class." *In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 194–95 (3d Cir. 2020); *see also id.* ("We have consistently distinguished [antitrust] injury from damages."). A court cannot make these individualized issues of basic liability disappear by claiming that most of the class suffered injury when many others did not.

II. A De Minimis Rule Is Appropriate if the Parties Have Not Identified Specific Uninjured Class Members, but There Is a Logical Possibility That Some Small Portion of the Class May Be Uninjured

To satisfy both Article III and Rule 23(b)(3)'s predominance requirement, the de minimis rule should apply, if at all, only to those cases in which the parties have not identified specific, uninjured class members, but where (a) there is nonetheless a possibility that a de minimis portion of the class may be uninjured, and (b) the process of identifying those uninjured class members will not spawn substantial individualized issues.

As a general matter, plaintiffs must demonstrate standing "with the manner and degree of evidence required at the successive stages of the litigation." *TransUnion*, 141 S. Ct. at 2208 (quoting *Lujan*, 504 U.S.

at 561). At the outset of the case, many of the members of a putative class may be unknown, or even if they are known, the facts bearing on their claims may not be. *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009). Nevertheless, if a substantial number of class members "in fact suffered no injury," the "need to identify those individuals will predominate" and prevent class certification. *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53 (1st Cir. 2018); *see Halvorson*, 718 F.3d at 779. Accordingly, if injury cannot be proved or disproved through common evidence, then "individual trials are necessary to establish whether a particular [class member] suffered harm from the [alleged misconduct]," and class treatment under Rule 23 is inappropriate. *In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869*, 725 F.3d 244, 252 (D.C. Cir. 2013); *see also Tyson Foods*, 136 S. Ct. at 1045.

Consistent with those principles, the panel majority concluded that while the mere potential presence of some non-injured class members does not always defeat predominance, the number of those hypothetically uninjured class members must be de minimis. *Olean Wholesale Grocery Coop., Inc.*, 993 F.3d at 793; *see also In re Nexium Antitrust Litig.*, 777 F.3d 9, 25 (1st Cir. 2015) (finding that "a certified class may include a de

minimis number of potentially uninjured parties"); *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1138 (9th Cir. 2016) (same).

The partial dissent contended that such a limitation was atextual and inconsistent with Rule 23. Not so. Certifying a class that contains a more than de minimis number of potentially uninjured plaintiffs cannot be squared with Rule 23's predominance requirement. As noted above, 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," that raise "important due process concerns" for both defendants and absent class members. *Califano*, 442 U.S. at 700–01; *Unger v. Amedisys, Inc.*, 401 F.3d 316, 320–21 (5th Cir. 2005). Doubts should be resolved against class certification, and 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 a rigorous analysis before certification because certifying an overbroad class risks holding defendants liable to plaintiffs 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. Accordingly, 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).

Chief among those protections is the requirement that when seeking to certify a class under Rule 23(b), a named plaintiff must "affirmatively demonstrate" that common questions predominate over individual ones. *Comcast*, 569 U.S. at 33 (quoting *Wal-Mart*, 564 U.S. at 350). Standing is a key part of that predominance analysis. *See Cordoba*, 942 F.3d at 1274–75 ("When this standing question is added to the mix, individualized questions may predominate over common issues susceptible to class-wide proof"). 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) (emphasis added) (quoting *Schlesinger v. Reservists Comm. to Stop War*, 418 U.S. 208, 216 (1974)). Merely pleading "a violation of the same provision of law" and labeling it a common question is not enough, because "'[a]ny competently crafted class complaint literally raises common questions.'" *Wal-Mart*, 564 U.S. at 349–50 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131–32 (2009)). 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 predominance, 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* Nagareda, 84 N.Y.U. L. Rev. at 131–32.

Certifying a class action, as the district court did, on the rationale that 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*, 666 F.3d at 594. 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). Class adjudication cannot proceed in the name of "efficiency," bypassing a defendant's right to litigate individualized defenses.

Accordingly, a class cannot, consistent with Rule 23 and the Constitution, sweep in identified, uninjured individuals. Thus, a class may not be certified if there is a possibility of more than a de minimis number of uninjured class members or if the process of identifying (even those few) uninjured members will spawn substantial individualized issues.

III. Plaintiffs Bear the Burden to Show That There Is a Manageable Way to Resolve Disputed Questions of Standing and That Rule 23's Stringent Predominance Is Satisfied Before Any Class Is Certified

Even if this Court were to agree with the majority that, in some limited circumstances, a class may be certified containing a hypothetical, but de minimis number of uninjured individuals, this Court should reaffirm certain baseline limitations to prevent district courts from improperly shifting the burden to the defendants or postponing difficult questions of predominance.

First, the burden of satisfying Rule 23(b)(3)'s predominance requirement falls squarely on plaintiffs. That obligation is part and parcel of their larger burden of identifying a proposed class that meets the requirements of Rule 23. *Wal-Mart*, 564 U.S. at 350. In meeting that burden, "actual, not presumed, conformance" with the rule is "indispensable." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982). Accordingly, a "party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart*, 564 U.S. at 350.

Second, what counts as a "de minimis" deviation "from a prescribed standard must, of course, be determined with reference to the purpose of the standard." *Wisc. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 232 (1992). The purpose of the predominance standard is to promote economy and uniformity of decision without sacrificing procedural fairness. *See Amchem*, 521 U.S. at 615. To further that purpose, the panel majority properly defined "de minimis" in functional terms, not, as the partial dissent suggests, as a bright line rule. The panel majority's conclusion that 5 to 6 percent represents the outer limits of a de minimis presence recognizes that there may be instances in which a lower limit is required, particularly because all uninjured class members must be excluded as the litigation proceeds.

In assessing whether a class can be certified, courts should bear in mind that if common issues "truly predominate over individualized issues in a lawsuit, then the addition or subtraction of any of the plaintiffs to or from the class [should not] have a substantial effect on the substance or quantity of evidence offered." *In re Nexium Antitrust Litig.*, 777 F.3d at 30 (quoting *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1270 (11th Cir. 2009)). For example, in *In re Rail Freight Fuel Surcharge*

Antitrust Litigation-MDL No. 1869, 934 F.3d 619, 623 (D.C. Cir. 2019), the D.C. Circuit assessed a damages model that could "reliably show injury and causation for 87.3 percent of the class" and concluded that it was 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.

Third, even if a class may include a de minimis number of uninjured members, plaintiffs must meet their burden to identify an appropriate and administratively feasible method of excluding any such consumers going forward. Plaintiffs cannot evade Rule 23(b)(3)'s predominance requirement by a proposal to certify now, resolve standing issues later. Thus, if the class definition includes even a de minimis number of hypothetically uninjured individuals, plaintiffs must identify before certification a means by which such individuals can be excluded from the litigation without spawning individualized issues, running afoul of Article III, or violating 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 at 625. As the First Circuit 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." *Asacol*, 907 F.3d at 53.

Fourth, both of these determinations—that there are at most a de minimis number of potentially uninjured class members and that they can be excluded from the class without vitiating the protections of Rule 23 or the Constitution—must be done *before* certification, not after. *In re New Motor Vehicles Can. Exp. Antitrust Litig.*, 522 F.3d at 28 (requiring the district court to evaluate a proposed model for proving fact of injury prior to certification). The partial dissent would allow courts to delay answering those essential questions. But that is flatly inconsistent with Supreme Court case law that precludes plaintiffs from either postponing or putting off entirely paying the Rule 23 piper.[3] *Wal-Mart*, 564 U.S. at 350.

There are good policy reasons for the Supreme Court's position. "With vanishingly rare exception[s], class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing

[3] That approach is also inconsistent with this and other courts' rejection of the Lusardi method in the FLSA collective action context. *Campbell v. City of Los Angeles,* 903 F.3d 1090, 1112 (9th Cir. 2018).

of the plaintiffs' case by trial." Nagareda, 84 N.Y.U. L. Rev. at 99. In 2019, companies reported settling 60.3 percent of class actions, and an even higher 73 percent of class actions the year before. *See* Carlton Fields, 2020 Class Action Survey, at 35 (2020) (*available at* https://classactionsurvey.com/pdf/2020-class-action-survey.pdf).

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) (cleaned up; emphasis added); 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. That is particularly true in antitrust cases given the threat of treble damages. "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).

The partial dissent's proposal that certification can proceed now, so long as the uninjured class members are winnowed out later, ignores those pressures, which 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 en banc Court should decertify the class.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

This brief complies with the length limitations of Fed. R. App. P. 29(a)(5) and Ninth Circuit Rule 32-1 because this brief contains 4,994 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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