NOS. 14-1521 & 14-1522

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 AND EMPLOYERS MIDWEST HEALTH BENEFITS FUND, *et al.*,
Appellees.

On Appeal from a Class Certification Order of the
U.S. District Court for the District of Massachusetts, MDL No. 12-2409
(Honorable William G. Young)

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Public Citizen, Inc., is a nonprofit, nonstock corporation. Public Citizen has no parent corporation, and because it issues no stock, there is no publicly-held corporation that owns 10% or more of its stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. The District Court Has Jurisdiction Over This Class Action, Even If Some Class Members Were Not Injured by Defendants' Conduct. 6

II. A Damages Class May Be Certified Under Rule 23(b)(3) Even If It Contains Uninjured Members. 15

A. *Wal-Mart* and *Comcast* Do Not Hold That Individual Issues Predominate in a Class Containing Uninjured Members. 16

B. Defendants' Position on Predominance Is Contrary to the Plain Language of Rule 23. 20

C. Defendants' Position Would Force Plaintiffs to Choose Between a Class That Lacks Predominance and a Class That Is Insufficiently Defined. 21

CONCLUSION 23

CERTIFICATE OF COMPLIANCE 24

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES

Amchem Products, Inc. v. Windsor,
521 U.S. 591 (1997).....2

Amgen Inc. v. Connecticut Retirement Plans and Trust Funds,
133 S. Ct. 1184 (2013).....2, 18

Baker v. Carr,
369 U.S. 186 (1962).....13

Bates v. United Parcel Service, Inc.,
511 F.3d 974 (9th Cir. 2007) (en banc).....10

Bowsher v. Synar,
478 U.S. 714 (1986).....7, 14

City of Los Angeles v. Lyons,
461 U.S. 95 (1983).....13

Comcast v. Behrend,
133 S. Ct. 1426 (2013).....6, 15, 19, 20

Comfort v. Lynn School Committee,
418 F.3d 1 (1st Cir. 2005) (en banc), *abrogated in part by Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007).....8

Crosby v. Social Security Administration,
796 F.2d 576 (1st Cir. 1986).....22

DG ex rel. Stricklin v. Devaughn,
594 F.3d 1188 (10th Cir. 2010).....10, 11

Day v. Persels & Associates, LLC,
729 F.3d 1309 (11th Cir. 2013).....2

In re Deepwater Horizon,
739 F.3d 790 (5th Cir. 2014) 13

Denney v. Deutsche Bank AG,
443 F.3d 253 (2d Cir. 2008) 13

Devlin v. Scardelletti,
536 U.S. 1 (2002).....2

Director, Office of Workers' Compensation Programs v. Perini North River Associates,
459 U.S. 297 (1983).....7, 14

Federal Trade Commission v. Actavis, Inc.,
133 S. Ct. 2223 (2013).....3

Flast v. Cohen,
392 U.S. 83 (1968).....13

Horne v. Flores,
557 U.S. 433 (2009).....7, 14

International Brotherhood of Teamsters v. United States,
431 U.S. 324 (1977).....12

In re Katrina Canal Breaches Litigation,
628 F.3d 185 (5th Cir. 2010) 2

Kohen v. Pacific Investment Management Co. LLC,
571 F.3d 672 (7th Cir. 2009) 10, 12

Lewis v. Casey,
518 U.S. 343 (1996).....8, 9

In re New Motor Vehicles Canadian Export Antitrust Litigation,
522 F.3d 6 (1st Cir. 2008).....8, 9, 15

O'Shea v. Littleton,
414 U.S. 488 (1974).....8

In re Orthopedic Bone Screw Products Liability Litigation,
246 F.3d 315 (3d Cir. 2001) 2

In re Prudential Insurance Co. America Sales Practice Litigation Agent Actions,
148 F.3d 283 (3d Cir. 1998) 11

Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,
547 U.S. 47 (2006).....7, 14

Schlesinger v. Reservists Committee to Stop the War,
418 U.S. 208 (1974).....13, 14

Simon v. Eastern Kentucky Welfare Rights Organization,
426 U.S. 26 (1976).....8

Stearns v. Ticketmaster Corp.,
655 F.3d 1013 (9th Cir. 2011) 10

Susan B. Anthony List v. Driehaus,
_ S. Ct. __, 2014 WL 2675871 (2014) 7

U.S. Parole Commission v. Geraghty,
445 U.S. 388 (1980).....8

Village of Arlington Heights v. Metropolitan Housing Development Corp.,
429 U.S. 252 (1977).....7, 8, 14

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011).....2, 6, 15, 16, 17

Warth v. Seldin,
422 U.S. 490 (1975).....7, 8

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Drug Price Competition and Patent Term Restoration Act of 1984,
Pub. L. No. 98-417, 98 Stat. 1585 2

Federal Rule of Civil Procedure 23
23(a) 14
23(a)(2) 17
23(b)(2) 16
23(b)(3) 4, 15, 20, 21
23(c)(2)(B) 22

U.S. Constitution article III, § 2 7

MISCELLANEOUS

1966 Advisory Committee Notes, Federal Rule of Civil Procedure 23 21

INTEREST OF AMICUS CURIAE[1]

Founded in 1971, Public Citizen, Inc. is a non-profit consumer advocacy organization with more than 300,000 members and supporters nationwide. Public Citizen advocates before Congress, administrative agencies, and the courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen often represents members' interests in litigation and as amicus curiae.

Public Citizen believes that class actions are an important tool for seeking justice where a defendant's wrongful conduct has harmed many people and resulted in injuries that are large in the aggregate, but not cost-effective to redress individually. In that situation, a class action offers the best means for both individual redress and deterrence of wrongful conduct, while also serving the defendant's interest in achieving a binding resolution of the claims on a broad basis, consistent with due process.

At the same time, Public Citizen has long recognized that class actions may be misused, to the detriment of absent class members. Public Citizen attorneys have, in many cases, represented class members whose rights have been compromised by the improper certification of classes and the approval of

[1] This brief was not authored in whole or in part by counsel for a party. No person or entity other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief.

settlements that are not in their interests or that have been entered in violation of due process rights, such as the right of absent class members to receive notice and to opt out. *See, e.g.*, *Day v. Persels & Assocs., LLC*, 729 F.3d 1309 (11th Cir. 2013); *In re Katrina Canal Breaches Litig.*, 628 F.3d 185 (5th Cir. 2010); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315 (3d Cir. 2001).

The interests of both named and absent class members, defendants, the judiciary, and the public at large are best served by adherence to the principles incorporated in Federal Rule of Civil Procedure 23. Public Citizen has sought to advance this view by participating, either as counsel or amicus curiae, in many significant class actions, including *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013), *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), *Devlin v. Scardelletti*, 536 U.S. 1 (2002), and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

In addition, Public Citizen has a longstanding interest in protecting consumers' ability to obtain affordable prescription drugs. "Pay-for-delay" agreements such as the one at issue in this case are an obstacle to the fulfillment of the policies underlying the Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585, commonly referred to as the Hatch-Waxman Amendments, which sought to speed the introduction of generic competitors to brand-name drugs to benefit consumers by reducing prescription

drug prices. Public Citizen has advocated enforcement of the antitrust laws against pay-for-delay agreements, including by filing an amicus brief on behalf of Representative Henry Waxman in *Federal Trade Commission v. Actavis, Inc.*, 133 S. Ct. 2223 (2013), urging the Supreme Court to recognize that such agreements are subject to antitrust scrutiny.

In this case, Public Citizen's interests with respect to class actions and generic drugs converge. Permitting a class action in this case not only accords with Rule 23 principles, but also is essential to allowing effective private enforcement of antitrust laws against collusive arrangements between generic and name-brand drug manufacturers. Public Citizen accordingly submits this brief in the hope that it may assist the Court in considering the important questions raised by this appeal.

All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The plaintiffs in this antitrust class action allege that defendant AstraZeneca, the maker of a drug called Nexium, entered into "pay-for-delay" contracts with its competitors (also defendants), in violation of various states' antitrust laws. Under these contracts, AstraZeneca allegedly paid its competitors substantial amounts of money for the competitors' agreement to delay marketing of generic versions of the drug. These contracts allegedly resulted in higher prices to consumers and other end-payers, such as insurance companies, than otherwise would have resulted from

generic competition. The district court certified a damages class against defendants under Federal Rule of Civil Procedure 23(b)(3). The class includes individual consumers, third-party payers, union plan sponsors, and insurance companies that purchased or provided reimbursements for Nexium beginning in 2008. *See* Dist. Ct. Doc. 520, Dist. Ct. Certification Order at 4 (setting out complete class definition).

On appeal from the class certification order, defendants contend that the district court lacked jurisdiction over the action because some class members have no Article III standing to pursue claims against defendants. They also contend that certification of the class was improper because "questions of law or fact common to class members" will not "predominate over . . . questions affecting only individual members," contrary to Federal Rule of Civil Procedure 23(b)(3)'s "predominance" requirement.

Both of defendants' contentions rest on the assertion that some class members suffered no injury as a result of defendants' anticompetitive conduct. Defendants claim, for example, that some third-party payers were shielded from the impact of any anticompetitive prices because they received rebates for the purchase of Nexium or had contracts with pharmacies to pay a fixed price, regardless whether consumers purchased brand-name or generic versions of a drug. Defs.' Opening Br. at 20-21. Defendants also claim that some consumers were not

injured by any overcharges because they received coupons to purchase Nexium, paid copays that would have been the same even if a lower-priced generic alternative were available, or—due to brand loyalty—would actually have paid a higher price for brand-name Nexium had a generic alternative come to market. *Id.* at 23-24. The parties disagree on whether and to what extent the class includes members who are uninjured by defendants' conduct, what constitutes a cognizable injury under antitrust law, and the scope of the district court's factual findings. This brief does not address those arguments, which are thoroughly set forth in the briefs of the plaintiffs and other amici.

Public Citizen submits this amicus brief to address the point that, even assuming the presence of some uninjured members in a proposed class, a district court may still properly certify the class pursuant to Rule 23(b)(3) and exercise jurisdiction over it. First, so long as one plaintiff has Article III standing to pursue his claims against a given defendant, a court is presented with a case or controversy sufficient to invoke federal jurisdiction. Defendants' assertion that the named plaintiffs must not only allege but prove at class certification that all class members have Article III standing finds no basis in Supreme Court precedent and is at odds with the more considered view among the courts of appeals. Second, Rule 23(b)(3)'s predominance requirement does not turn on whether there exist any unnamed class members who were unharmed by the legal violation alleged.

Neither *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), nor *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), supports defendants' argument to the contrary. In fact, defendants' position is contrary to Rule 23(b)(3)'s plain language and would create a Catch-22 for plaintiffs, forcing them to define a class either in such a way that it lacks predominance or in a manner that renders the class definition too indefinite because the definition depends on individualized merits determinations of class members' claims.

ARGUMENT

I. The District Court Has Jurisdiction Over This Class Action, Even If Some Class Members Were Not Injured by Defendants' Conduct.

Defendants contend that the district court lacked Article III jurisdiction over the certified class action because, in defendants' view, the plaintiffs did not demonstrate at class certification that each class member had standing—that is, that each member suffered injury-in-fact from the defendants' unlawful conduct. Defs.' Opening Br. at 31-33; *see also* Chamber of Commerce Amicus Br. at 14-15. This contention is bottomed on defendants' assertion that some class members will not be entitled to any damages for their claims because—as a result of rebates, brand loyalty, or the like—they paid the same or less for Nexium than the amount they would have paid for either a generic alternative or for Nexium in the absence of defendants' alleged anticompetitive scheme. Because defendants fundamentally

misperceive the nature of the Article III standing requirement in the class action context, their argument should be rejected.

Under Article III of the Constitution, the jurisdiction of federal courts is limited to "Cases" and "Controversies." U.S. Const. art. III, § 2. The doctrine of standing imposes requirements that a plaintiff must satisfy to make "out a 'case or controversy' between himself and the defendant." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). A plaintiff may do so by showing "(1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Susan B. Anthony List v. Driehaus*, _ S. Ct. __, No. 13-193, 2014 WL 2675871, at *5 (2014) (internal quotation marks and alterations omitted).

The Supreme Court and this Court have held time and again that the presence of one party with standing to seek a particular form of relief ensures the presentation of a justiciable controversy to satisfy Article III. Under such circumstances, a court need not determine before exercising jurisdiction whether other plaintiffs seeking the same form of relief also have standing. *See, e.g.*, *Horne v. Flores*, 557 U.S. 433, 446-47 (2009); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *Dir., Office of Workers' Comp. Programs v. Perini N. River Assocs.*, 459 U.S. 297, 305 (1983); *Vill. of Arlington Heights v. Metro. Hous. Dev.*

Corp., 429 U.S. 252, 264 & n.9 (1977); *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 11 (1st Cir. 2005) (en banc), *abrogated in part on other grounds by Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

That general principle applies with equal force in the class action context, where, to determine whether a case or controversy exists for purposes of Article III, courts ask only whether one named plaintiff has standing. As a general rule, when none of the named plaintiffs can "demonstrate the requisite case or controversy between themselves personally" and the defendants, "none may seek relief on behalf of himself or any other member of the class." *Warth*, 422 U.S. at 502 (internal quotation marks omitted); *accord Lewis v. Casey*, 518 U.S. 343, 357 (1996); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).[2] In *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 522 F.3d 6 (1st Cir. 2008), for example, this Court held that a plaintiff class lacked standing to seek injunctive relief under federal antitrust laws based on the Court's observation that *none* of the named plaintiffs alleged a

[2] This general jurisdictional rule in the class action context is subject to limited exceptions not pertinent here. *See*, *e.g.*, *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 400-01, 404 (1980) (reviewing exceptions to this general rule and holding that "an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied").

concrete intention to buy or lease the good again in the future—implying that it would have sufficed if any *one* of them had. *Id.* at 13-15.

The Supreme Court has addressed indirectly the situation that defendants argue is presented here—that is, whether a plaintiff class may invoke federal jurisdiction where a named plaintiff has standing but some class members do not. In *Lewis v. Casey*, the Court held that no named plaintiff among a class of prisoners had demonstrated that he was deprived of his access to the courts—the legal violation alleged—based on his placement in lockdown or on his inability to speak English. 518 U.S. at 358. The Court thus held that no named plaintiff had standing to pursue a claim on those bases. It nevertheless concluded that one named plaintiff *did* have standing to pursue a deprivation claim based on his illiteracy, although the class was defined broadly to include "all adult prisoners who are or will be incarcerated by the State of Arizona Department of Corrections." *Id.* at 346, 358. Despite the fact that some class members—including other named plaintiffs—unquestionably lacked standing, the Supreme Court made clear that its holding did "*not* amount to a conclusion that the class was improper." *Id.* at 358 n.6 (internal quotation marks omitted). Nor did it suggest that the district court lacked jurisdiction over the action as a whole, even though the class definition obviously included both literate and illiterate prisoners. Rather, the

Supreme Court went on to consider the propriety of the district court's remediation order on the merits.

Numerous courts of appeals have held more explicitly what *Lewis* implies: So long as a named plaintiff establishes a case or controversy, there is no question as to Article III standing. In *Kohen v. Pacific Investment Management Co. LLC*, 571 F.3d 672 (7th Cir. 2009), for example, the Seventh Circuit considered a challenge to a class definition in a case involving claims under the Commodity Exchange Act, where the class consisted of persons who bought a certain type of futures contract during a set period of time on the Chicago Board of Trade. *Id.* at 673. The defendant claimed that the class definition was unsound because it included "persons who lack[ed] 'standing' to sue because they did not lose money" on the covered contracts. *Id.* at 676. The Seventh Circuit rejected the contention "that before certifying a class the district judge was required to determine which class members had suffered damages," concluding that such an inquiry would "put[] the cart before the horse." *Id.* Rather, "as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied." *Id.*; *see also Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011) (making clear that "'[i]n a class action, standing is satisfied if at least one named plaintiff meets the [standing] requirements'" (quoting *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc))); *DG ex rel.*

Stricklin v. Devaughn, 594 F.3d 1188, 1197 (10th Cir. 2010) (concluding, in the context of a Rule 23(b)(2) class seeking injunctive relief, that "only named plaintiffs in a class action seeking prospective injunctive relief must demonstrate standing by establishing they are suffering a continuing injury or are under an imminent threat of being injured in the future"); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 306-07 (3d Cir. 1998) (holding that "[o]nce threshold individual standing by the class representative is met, a proper party to raise a particular issue is before the court, and there remains no further separate class standing requirement in the constitutional sense" (internal quotation marks omitted)).

Despite the authorities discussed above, defendants urge this Court to adopt a more stringent Article III standard for class actions, in effect requiring plaintiffs to *prove* that *all* class members, even absent ones, have been injured and thus have standing, before a district court may exercise jurisdiction over the class. Defendants' position is not only unsupported by the case law, it would erect a jurisdictional barrier in the class action context that does not exist in other cases where multiple plaintiffs press the same claim for relief. Moreover, it would effectively preclude on Article III grounds the certification of any class in which plaintiffs' claims will face potential defenses that may reduce any one class member's damages to zero. In defendants' view, for example, the named plaintiffs

here would not only have to prove at class certification that all class members were exposed to supracompetitive prices as a result of defendants' unlawful conduct, but also that each and every class member suffered net damages after accounting for the impact of rebates, discounts, fixed-pricing contracts, and the like—all issues typically addressed at the merits or claims stage.

Likewise, in a Title VII pattern-or-practice discrimination case seeking damages, the named plaintiffs would have to demonstrate not only that the employer had a standard operating procedure of discrimination, such as a discriminatory test, but also that each member of the class was subject to an adverse employment decision that the employer had no lawful reason for taking. *See, e.g.*, *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 362 (1977) (describing the stages of a pattern-or-practice case). As the Seventh Circuit explained in *Kohen*, this type of member-specific showing is not required by Article III. Although some class members may fail to prove their injury at the merits stage, that possibility does not render a district court without jurisdiction. *Kohen*, 571 F.3d at 677. Rather, the claims of class members who suffer no harm will result in a merits judgment of no damages for those class members—a judgment that benefits defendants by binding those class members. *Id.*

Defendants rely on court of appeals decisions that have—seemingly contrary to *Kohen* and similar cases—applied a more stringent standard for assessing

whether a class has standing. But even the most stringent of these decisions do not require actual proof of injury for all class members at class certification. Rather, they require that a class "be *defined* in such a way that anyone within it would have standing." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2008) (emphasis added); *see also In re Deepwater Horizon*, 739 F.3d 790, 801 (5th Cir. 2014) (collecting cases in this area). That standard runs counter, however, not only to the authorities described above at pp. 10-11, but also to the purpose of the Article III standing doctrine. "[T]he emphasis in standing problems is on whether the party invoking federal court jurisdiction has a personal stake in the outcome of the controversy, and whether the dispute touches upon the legal relations of parties having adverse legal interests." *Flast v. Cohen*, 392 U.S. 83, 101 (1968) (internal quotation marks and citation omitted). Requiring that a plaintiff have a personal stake ensures a "'concrete adverseness which sharpens the presentation of issues' necessary for the proper resolution" of the plaintiff's claims. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). "This personal stake is what the Court has consistently held enables a complainant authoritatively to present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974). "Only

concrete injury presents the factual context within which a court, aided by parties who argue within the context, is capable of making decisions." *Id.*

Where a named plaintiff demonstrates a personal stake in the outcome of the case, he necessarily will be able to provide the factual context for the court to adjudicate the case or controversy, as required by Article III. There is no question that the parties are legally adverse under these circumstances, and the named plaintiff—not just his attorney—will have an incentive to press his claims before the court. And as the Supreme Court's jurisprudence makes clear, the possible presence in the litigation of *others* who might themselves lack standing does not negate the existence of jurisdiction. *See*, *e.g.*, *Horne*, 557 U.S. at 446-47; *Rumsfeld*, 547 U.S. at 52 n.2; *Bowsher*, 478 U.S. at 721; *Office of Workers' Comp. Programs*, 459 U.S. at 305; *Vill. of Arlington Heights*, 429 U.S. at 264 & n.9. Although there may be legitimate concerns in some cases about class definitions that are overly broad, sweeping in categories of members who plainly have not been injured, those concerns are not ones of constitutional import. Rather, they are properly addressed in a district court's Rule 23 analysis, asking, for example, whether the named plaintiffs' claims are typical of those of the class and whether the named plaintiffs will adequately represent the class's interest. *See* Fed. R. Civ. P. 23(a).

II. A Damages Class May Be Certified Under Rule 23(b)(3) Even If It Contains Uninjured Members.

To certify a class action seeking damages under Rule 23, plaintiffs must demonstrate, among other things, that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Defendants contend that to meet this predominance requirement, a "plaintiff must be able to prove, through common evidence, that each member of the class was in fact injured." Defs.' Opening Br. at 13 (internal quotation marks omitted); *see also* Chamber of Commerce Amicus Br. at 6-7. Defendants primarily rely on this Court's decision in *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 522 F.3d 6 (1st Cir. 2008), which plaintiffs' brief explains is no bar to certification here. As we shall explain, the Supreme Court's decisions in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), likewise do not support defendants' position. Moreover, defendants' position is at odds with the plain language of Rule 23 and would require plaintiffs, in order to avoid denial of certification for lack of predominance, to define their class in a way that renders the class definition too indefinite for certification.

A. *Wal-Mart* and *Comcast* Do Not Hold That Individual Issues Predominate in a Class Containing Uninjured Members.

1. Defendants and their amicus, the Chamber of Commerce, contend that after *Wal-Mart*, all members of a class must "'suffer[] the same injury'" to satisfy Rule 23(b)(3)'s predominance requirement. Defs.' Opening Br. at 17 (quoting *Wal-Mart*, 131 S. Ct. at 2551); Chamber of Commerce Amicus Br. at 21. Amicus also reads *Wal-Mart* to require that "[o]nly where . . . class members' claims all rise and fall together is litigation by representation permissible." Chamber of Commerce Amicus Br. at 21. In the view of defendants and their amicus, if all class members have not suffered an injury, then all class members cannot have suffered the *same* injury, nor can the class members' claims rise and fall together, as required by *Wal-Mart*.

Wal-Mart does not stand for these propositions. As an initial matter, *Wal-Mart* did not address Rule 23(b)(3)'s predominance requirement at all. Rather, it held that a class of workers alleging discrimination under Title VII was not properly certified under Rule 23(b)(2), which applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). *Wal-Mart* concluded that the plaintiffs had not demonstrated, as required for the certification of any class under

Rule 23, the existence of any "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). *See Wal-Mart*, 131 S. Ct. at 2557.

In addition, *Wal-Mart* did not hold that for common questions of law or fact to exist (or to predominate, as required by Rule 23(b)(3) for damages classes), all class members must suffer the *same* injury. Rather, it used the "same injury" language quoted by defendants in the course of holding that to satisfy Rule 23's commonality requirement, plaintiffs must rely on a common contention "of such a nature that it is capable of classwide resolution." *Id.* at 2551. Put another way, *Wal-Mart* required that the determination of a common contention's "truth or falsity" must "resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* Given the facts of the case, *Wal-Mart* focused on the plaintiffs' injury, stating that the plaintiffs must claim the same injury in the sense that they cannot rely on general assertions of harm—for example, that they were victims of Title VII violations.

Here, the determination whether the companies engaged in anticompetitive conduct and whether that conduct had an antitrust impact on the class can be determined in a single stroke using common proof. Should plaintiffs fail to prevail on this common proof, it would not necessitate individualized proof; rather, the plaintiffs would lose on the merits of their claim in one fell swoop. Accordingly, the plaintiffs have demonstrated the existence of common questions of law or fact

and, as the district court found, those common questions predominate. *See* Dist. Ct. Doc. 519, Dist. Ct. Op. at 35-36.

Wal-Mart also does not hold, as appellants' amicus contends, that Rule 23(b)(3) requires all class members' claims for damages to rest entirely on common proof. As discussed above, *Wal-Mart* does not even address Rule 23(b)(3)'s predominance requirement. Accordingly, it surely does not require common answers to *all* questions relevant to the class claims. It just requires that there be at least one central common question that can be decided for the class in a single stroke.

That *Wal-Mart* is more limited than defendants and their amicus contend was confirmed by the Supreme Court last year in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013). That case—unlike *Wal-Mart*—did consider whether a class met Rule 23(b)(3)'s predominance requirement. "[T]he focus of Rule 23(b)(3) is on the predominance of common *questions*," not common answers, among the class, the Court explained. *Id.* at 1195. And it emphasized that Rule 23(b)(3) "does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof." *Id.* at 1196 (internal quotation marks and alterations omitted). Thus, the contention that all class members' claims must rise and fall together in all their particulars finds no basis in *Wal-Mart*.

2. Defendants also contend that the Supreme Court's decision in *Comcast* made "clear that all class members must have suffered injury for class certification to be appropriate under Rule 23(b)(3)." Defs.' Opening Br. at 26. The lesson of *Comcast*, however, is not that all class members must be injured for common questions of law or fact to predominate, but that the theory of damages in a class action must measure the harm flowing from the common theory of liability.

In *Comcast*, a class of cable subscribers sued a service provider for antitrust violations. 133 S. Ct. at 1430. The plaintiffs advanced four separate theories of liability under the Sherman Act and offered expert testimony that measured the damages to the consumers from the four practices the plaintiffs identified. *Id.* at 1430-31. The district court found that only one of the four theories was capable of classwide proof. *Id.* at 1431. Although the plaintiffs' expert did not isolate the damages caused by the one theory of antitrust impact that the court determined to be capable of classwide proof, the district court certified the class and the Third Circuit affirmed. *Id.*

The Supreme Court reversed, explaining that, "at the class-certification stage (as at trial), any model supporting a plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation." *Id.* at 1433 (internal quotation marks omitted). Because the class was certified as to only one of four theories of liability, the class would be entitled

only to damages stemming from that theory. *Id.* And plaintiffs had not contested that they had to show that damages "were measurable on a class-wide basis through use of a common methodology." *Id.* at 1430 (internal quotation marks omitted). Because plaintiffs had never presented proof as to damages pertaining to the single theory of liability on which the class was certified, and because they conceded that on the facts of their case, predominance rested on the existence of a class-wide damages methodology, the Supreme Court determined that "[q]uestions of individual damage calculations w[ould] inevitably overwhelm questions common to the class." *Id.* at 1433. Accordingly, it determined that class certification was inappropriate under Rule 23(b)(3). *Id.* at 1435.

The plaintiffs here have presented three theories of antitrust impact arising from a single set of transactions, and their damages model accounts for those three theories, and those three theories only. Dist. Ct. Doc. 519, Dist. Ct. Op. at 29. Accordingly, *Comcast* poses no barrier here to certification of the class.

B. Defendants' Position on Predominance Is Contrary to the Plain Language of Rule 23.

Defendants' theory of predominance also runs counter to Rule 23(b)(3)'s express language. As described above, to certify a class under Rule 23(b)(3), a district court must determine that common questions of fact or law predominate over any individualized questions. It must also find that a "class action is superior to other available methods" for adjudicating the dispute. Fed. R. Civ. P. 23(b)(3).

The rule sets out four considerations relevant to Rule 23(b)(3)'s predominance and superiority findings: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." *Id*. These considerations are "non-exhaustive[]." 1966 Advisory Committee Notes, Fed. R. Civ. P. 23. Defendants' position here, however, would create a categorical rule precluding a finding of predominance where any class members may ultimately be unable to prove damages. That outcome is contrary to Rule 23(b)(3) because it would make dispositive a single question regarding injury, thereby reading out of Rule 23(b)(3) the four, non-exhaustive considerations identified as relevant.

C. Defendants' Position Would Force Plaintiffs to Choose Between a Class That Lacks Predominance and a Class That Is Insufficiently Defined.

The error in defendants' position that uninjured class members preclude a finding of predominance is also apparent from the perverse consequences it would create in terms of class definition. Under defendants' view, the named plaintiffs must essentially prove the merits of their claims—that defendants engaged in anticompetitive conduct and that the conduct injured every member of the class—

to certify the class. If they were unable to do that at the outset, they would need to define the class by reference to the ultimate merits of class members' claims—for example, by describing the class to include only those members who actually incurred damages as a result of defendants' unlawful behavior. But a Rule 23(b)(3) class must be capable of definition before a decision on the merits, as a district court is required to provide notice to the class of the suit. *See* Fed. R. Civ. P. 23(c)(2)(B). As this Court has recognized, where a standard used to describe a class "makes class members impossible to identify prior to individualized fact-finding and litigation, the class fails to satisfy one of the basic requirements for a class action under Rule 23"—that is, that it can be defined based on objective characteristics of its members. *Crosby v. Soc. Sec. Admin.*, 796 F.2d 576, 580 (1st Cir. 1986).

The district court here in fact noted that it had considered "defining the proposed class to include only members who actually suffered economic injury." Dist. Ct. Doc. 519, Dist. Ct. Op. at 26. But as it recognized, such a definition "would create an impermissible 'fail-safe' class—one in which it is virtually impossible for the Defendants ever to 'win' the case, with the intended class preclusive effects." *Id.*

By insisting that all class members must in fact have suffered harm for common issues to predominate, defendants in effect create a Catch-22 for

plaintiffs. Either plaintiffs define the class in such a way that it necessarily cannot meet Rule 23(b)(3)'s predominance requirement (as defendants view that requirement), or they define it to include only those class members who will ultimately prevail on their claims, thereby rendering the class members unidentifiable without individualized findings on the merits. Plaintiffs' "choice" would not result in a class that is either more efficient or more tightly drawn. It would result in no class at all, leaving plaintiffs like those here without any realistic recourse for the widespread harm they have suffered. That outcome is contrary to Rule 23's purpose and should be rejected.

CONCLUSION

For the foregoing reasons, this Court should affirm the order of the district court certifying the class.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) as follows: The type face is fourteen-point Times New Roman font, and the word count is 5,436.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I certify that on June 26, 2014, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in this case.

/s/ Scott L. Nelson
Scott L. Nelson