No. 19-56514

IN THE 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

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Public Citizen is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it.

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a nonprofit consumer advocacy organization with members and supporters nationwide. Public Citizen advocates before Congress, administrative agencies, and 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 its 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, which is present in many antitrust conspiracies, a class action offers the best means for both individual redress and deterrence, while also serving the defendants' interest in achieving a binding resolution of claims on a broad basis, consistent with due process. Public Citizen has often participated

[1] Public Citizen has moved for leave to file this brief, with the consent of all parties. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund preparation or submission of this brief. No person or entity other than amicus made a monetary contribution to preparation or submission of this brief.

as amicus curiae in cases involving arguments that, if accepted, would impair the utility of class actions, and accordingly it submitted an amicus brief in this case before the panel with the consent of all parties.

Public Citizen submits this amicus brief supporting rehearing en banc because it is concerned that the panel majority's holding that a class may not be certified if it comprises more than a de minimis number of uninjured members conflicts with precedents of this Court and the Supreme Court, would unnecessarily require resolution of merits issues at the certification stage, and would create practical difficulties in the administration of Federal Rule of Civil Procedure 23.

SUMMARY OF ARGUMENT

In this antitrust class action based on an admitted price-fixing conspiracy, the panel majority vacated the district court's certification of three plaintiff classes because the district court had not "resolved factual disputes concerning the number of uninjured parties in each proposed class before determining predominance" under Federal Rule of Civil Procedure 23(b)(3). Slip. op. 34–35. The premise of the majority's ruling is that Rule 23(b)(3) categorically forbids certification of a class with more than a de minimis percentage of uninjured class members: In the

majority's view, common issues *cannot* predominate in such a class. *See id*. at 31–32. Here, the plaintiffs had offered expert testimony that all or substantially all class members were injured. The defendants, however, took the position that the plaintiffs' analysis, taken at face value, would establish that 5.5% of class members were uninjured, and they presented their own expert testimony that the plaintiffs' data could not show injury for up to 28% of the class. *See* slip op. at 30.[2] The panel majority ruled that the district court must resolve this factual dispute before ruling on certification because, in its view, a finding that common issues predominate would be impermissible if the defendants' position were correct.

Rehearing en banc is warranted because the panel's decision is inconsistent with this Court's precedents, which hold that the inclusion of uninjured members in a class neither violates Article III limits on the courts' powers nor defeats certification under Rule 23(b)(3). Rather, certification is permissible if a case otherwise presents common issues that predominate over individual ones and it is possible to exclude

[2] These figures refer to one of the classes, the direct-purchaser class. The panel treated them as illustrative, and this brief does so as well.

uninjured class members from sharing in any ultimate recovery without defeating the efficiencies that make a class action the superior method of adjudicating the common issues. *See Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir.), *cert. granted*, 141 S. Ct. 972 (2020); *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125 (9th Cir. 2016). This Court's prior recognition that the presence of *large numbers* of class members with no claim of injury *may* defeat predominance, *see Torres*, 835 F.3d at 1136, is flatly inconsistent with the panel majority's ruling here that anything more than a de minimis number of uninjured members *necessarily* defeats predominance.

This Court's Rule 23 precedents are fully consistent with Article III principles that permit a court to exercise jurisdiction over an action if any plaintiff has standing, while precluding courts from granting remedies to persons who have not suffered injury. The Supreme Court's holding in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), confirms that if, at the conclusion of a case, some members of the class as originally defined prove to be uninjured, their exclusion at that point satisfies the requirements of both Article III and Rule 23.

This case is not one, moreover, where resolution of a factual dispute over the number of uninjured class members is necessary to conclude that that common issues predominate or that a class action is the superior method of adjudication. The circumstances here are not comparable to those in cases from other circuits that have denied certification of classes involving large numbers of uninjured members. Rather, the plaintiffs presented evidence that, if credited by the ultimate finder of fact, would be sufficient to support relief to the *entirety* of the classes—and that, if not fully credited, would allow any class members found to be uninjured to be excluded from the class and from the scope of relief, while still satisfying Rule 23's requirements of predominance and superiority. Certification in such circumstances is entirely proper under this Court's precedents.

ARGUMENT

I. The panel majority's de minimis standard conflicts with this Court's precedents applying Article III and Rule 23 principles.

A. The panel majority's suggestion that certification of classes with more than de minimis numbers of uninjured members raises Article III concerns, slip op. at 29–30 n.7, is contrary to this Court's precedents.

In its en banc decision in *Bates v. UPS, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007), the Court held that, "[i]n a class action, standing is satisfied it at least one named plaintiff meets the requirements." In *Torres*, the Court reiterated that proof of injury to one named plaintiff suffices at the time of certification and that Article III does not require that the class consist entirely of members who "did suffer injury, or that they must prove such injury at the certification phase." 835 F.3d at 1137 n.6. It is enough that the class be defined to encompass persons "exposed to" the defendants' allegedly unlawful and injurious conduct. *Id*. Thus, the possibility of "non-injury to a subset of class members does not necessarily defeat certification of the entire class, particularly as the district court is well situated to winnow out those non-injured members at the damages phase of the litigation, or to refine the class definition." *Id*. at 1137.

The critical point by which uninjured class members (if any) must be excluded from the class or from receiving a share of a damages award is not certification, but judgment on the merits. As this Court held in *Ramirez*, "although only the representative plaintiff need allege standing at the motion to dismiss and class certification stages," "each member of a class certified under Rule 23 must satisfy the bare minimum of Article

III standing at the final judgment stage of a class action in order to recover monetary damages in federal court." *Ramirez*, 951 F.3d at 1023. *Ramirez* explains that this consequence flows from a fundamental limitation on the power of the federal courts under Article III: They may provide monetary relief only to persons who have suffered an injury. *See id*. As *Ramirez* expressly recognizes, this limitation on the Court's ultimate remedial authority does not "alter the showing required at the class certification stage or other early stages of a case," which "focuses on the representative plaintiffs." *Id*. at 1023 n.6. To be sure, a court that certifies a class ultimately "will need a mechanism for identifying class members who lack standing at the damages phase," *id*., but it need not do so at certification.[3]

The Supreme Court's decision in *Tyson Foods* supports this Court's rule that inclusion of uninjured members at the time of certification is not impermissible. Tyson's petition for certiorari argued that a class may not be certified it if contains uninjured members, but its merits brief

[3] The Supreme Court granted certiorari in *Ramirez* and heard argument in March. Its decision in the case, which is likely by the end of June, may have a bearing on this Court's decision whether to grant rehearing en banc in this case.

"concede[d] that '[t]he fact that federal courts lack authority to compensate persons who cannot prove injury does not mean that a class action (or collective action) can never be certified in the absence of proof that all class members were injured.'" 136 S. Ct. at 1049. The Supreme Court held that because Tyson had abandoned the argument, "the Court need not, and does not address it." *Id.* Had the possible presence of uninjured class members presented an Article III jurisdictional barrier to adjudication, however, Tyson's concession would not have obviated the need to address it, because a party's failure to contest standing does not eliminate a federal court's "obligation to assure [itself] of litigants' standing under Article III." *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019) (citations omitted). The Supreme Court's statement in *Tyson Foods* that it need not address the argument thus reflects the Court's conclusion that the question does not go to Article III jurisdiction.

That conclusion is consistent with longstanding Article III principles. The Supreme Court has held repeatedly that an Article III "case or controversy" exists when one plaintiff has standing. *See, e.g.*, *Horne v. Flores*, 557 U.S. 433, 446–47 (2009); s*ee generally* 13B Charles Alan Wright, *et al.*, *Federal Practice & Procedure* § 3531.15 (3d ed. 2008).

Accordingly, "as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied." *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 676 (7th Cir. 2009); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 31 (1st Cir. 2015); *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 359–60 (3d Cir. 2015); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1197 (10th Cir. 2010). Jurisdiction over a class action depends on whether "any named plaintiff has alleged [injuries] that are sufficiently concrete and particularized to support standing." *Frank*, 139 S. Ct. at 1046.

B. The arguable presence in a class of members who are uninjured or may be unable to demonstrate elements of a cause of action, such as "antitrust injury" or compensable damages, likewise does not preclude maintenance of a class action under Rule 23(b)(3). Rule 23 does not require resolution of the *merits* question of whether substantially all class members can demonstrate the injuries necessary to recover for the statutory or common-law claims the class asserts. Such a requirement would "put the cart before the horse" by conditioning certification on the plaintiffs "first establish[ing] that [they] will win the fray." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 460 (2013). "Merits

questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* at 466. "[T]he office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the method best suited to adjudication of the controversy fairly and efficiently." *Id.* at 460 (alterations omitted). "How many (if any) of the class members have a valid claim is the issue to be determined *after* the class is certified." *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014); *see also In re Nexium*, 777 F.3d at 21–22; *Kohen*, 571 F.3d at 677.

Thus, as this Court has recognized, the possibility that some class members may not have suffered an injury common to members of the class is not by itself a reason to deny certification, although it may in some cases be an indication that common issues do not predominate or that a class action is not a superior method of adjudication. *See Torres*, 835 F.3d at 1136. For example, "the existence of large numbers of class members who were never exposed to the challenged conduct to begin with" can be "a flaw that may defeat predominance." *Id.* (quoting *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012)). The "need for a mechanism" to identify uninjured class members before judgment,

if there is reason to believe they exist, *see Ramirez*, 951 F.3d at 1023 n.6, may also be a consideration bearing on predominance and superiority.

This case, however, presents no such obstacles to certification. Unlike *Mazza*, where "only a small segment of an expansive class" had been subjected to allegedly unlawful conduct, *Torres*, 835 F.3d at 1137, here the "class as a whole was exposed" to defendants' unlawful conduct, *id*. Moreover, the plaintiffs' evidence, if credited by the ultimate finder of fact—as the district court found it could be—would establish that *all* members of each class suffered antitrust injury and provide a basis for classwide damages calculations. Of course, that evidence is not incontestable—a triable issue of fact, by definition, never is—but it presents a common question that can be resolved for each class in its entirety. *See Amgen*, 568 U.S. at 465–67.

Moreover, even if the plaintiffs fail to persuade the jury that their evidence establishes injury to the entirety of the classes, "there is no risk … that a failure of proof on [that] common question … will result in individual questions predominating." *Id.* Where, as in this case, the dispute is whether *all* or only *some* of the class can recover, the proper course is to allow class certification if, at the end of the day, any award

of damages to the class can be allocated so that class members with meritorious damages claims receive their proper share and those without such claims take nothing. Thus, in *Tyson Foods*, where the parties agreed that some class members had not shown an entitlement to damages, the Supreme Court rejected the assertion that the class must be decertified, and instead remanded for further proceedings to determine whether the award could be properly apportioned. *See* 136 S. Ct. at 1049–50. And the concurring opinion, while expressing doubt about the ultimate outcome, agreed that if there were a methodology for allocating damages only to those class members who suffered damages, both certification of the class and judgment in its favor could be sustained. *See id*. at 1051–53 (Roberts, C.J., concurring).

Likewise, in this case, if the finder of fact were to accept the view that the plaintiffs' evidence shows that approximately 5.5 percent of the direct-purchaser class members are uninjured, those members could be excluded from the recovery. Meanwhile, common questions as to liability, injury, and damages for the majority of the class would still predominate, and a class action would remain the superior means of adjudication. Importantly, the same would be true even if the finder of fact were to

accept the defendants' claim that as many as 28 percent of class members were uninjured. Either way, the action would satisfy Rule 23(b)(3) because the district court could readily identify and exclude the minority of the 604-member direct-purchaser class determined to be uninjured—a point the panel majority did not address. Such a result would conform to Rules Enabling Act limitations by ensuring that certification neither expanded nor contracted the substantive rights of plaintiffs and defendants. *See Tyson Foods*, 136 S. Ct. at 1047; *Ramirez*, 951 F.3d at 1024; *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1156 (9th Cir. 2016). And if some individualized proceedings were required to establish injury and damages, this Court's precedents make clear that the need for such proceedings does not defeat certification if common questions as to liability otherwise predominate. *See Vaquero*, 824 F.3d at 1154–55.

Contrary to the panel majority's view, the circumstances of this case are readily distinguishable from those in cases where other circuits declined to certify classes because of the presence of large numbers of concededly uninjured class members who could not feasibly be excluded from recovery if the class were certified and prevailed on the merits. For

example, in *In re Asacol Antitrust Litigation*, 907 F.3d 42 (1st Cir. 2018), the First Circuit addressed a claim that the defendants conspired to keep a generic drug off the market—a violation both sides' experts agreed *could not* have caused injury to approximately 10 percent of the class who would have preferred a higher-priced brand-name drug even if a generic were available. *See id.* at 46. The court's decision that the presence of those members defeated predominance did not rest on their numbers alone, but the absence of a reliable mechanism to differentiate injured and uninjured members that would not require trying the question of injury through the testimony of "thousands of class members." *Id.* at 57–58.

Likewise, the D.C. Circuit in *In re Rail Freight Surcharge Antitrust Litigation*, 934 F.3d 619 (D.C. Cir. 2019), acknowledged that the possibility of single-digit percentages of uninjured class members would not necessarily preclude certification. *See id.* at 625. It affirmed the district court's denial of certification, however, because the plaintiffs' own damages model showed that 12.7 percent of a 16,065-member class—that is, 2,037 members—had suffered no injury, *see id.* at 623. Critically, the court relied on the district court's determination that determining which

of thousands of class members had suffered injury would require individualized inquiries, and that the "need for individualized proof of injury and causation" to "winnow[] away [uninjured members] as part of the liability determination" would "destroy predominance." *Id.* at 625. Here, by contrast, the district court made no such determination. And the panel majority offered no sound reason to think it would be impracticable to identify such members and exclude them from a recovery even if the jury ultimately were to determine that 28% of the class members were not injured.

II. The panel majority's de minimis rule would impair Rule 23's efficacy.

Conditioning certification on proof that substantially all class members were injured would create practical conundrums at odds with Rule 23's structure and purpose. Although Rule 23(c)(1)(A) requires certification at an "early practicable time," assessing class members' injuries at certification is often infeasible because the members' identities are unknown. For a class to "include persons who have not been injured by the defendant's conduct … is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown."

Kohen, 571 F.3d at 677. This phenomenon merely "highlights the possibility that an injurious course of conduct may sometimes fail to cause injury to certain class members." *Torres*, 835 F.3d at 1136. "Such a possibility or indeed inevitability does not preclude class certification." *Kohen*, 571 F.3d at 677. In addition, because class certification can be revisited, *see* Fed. R. Civ. P. 23(c)(1)(C), Rule 23's central efficiency goals would be thwarted by requiring complete decertification upon a showing, at any stage, that more than a de minimis percentage of a certified class were uninjured.

Limiting Rule 23 certification to classes where the plaintiffs could prove at the time of certification that substantially all members were injured would have a particularly severe impact on the utility of class actions in consumer, securities, and antitrust cases. The Supreme Court has recognized that such cases are often appropriate for certification under Rule 23(b)(3) because "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (citing Fed. R. Civ. P. 23, advisory comm. notes to 1966 amendment). However, violations in cases that affect large numbers of victims in

similar ways—those most suited to class actions—are also likely to involve some class members who at least arguably did not suffer injury for some reason. Precluding certification unless the plaintiffs could prove at the outset that the class definition did not include more than a de minimis number of uninjured members would sacrifice the efficiencies of class proceedings and their deterrent effects on unlawful conduct. And given the relative ease with which such class members, if they proved to exist, could be weeded out at the damages phase in many cases, such curtailment of the use of class actions would serve little practical purpose, while protecting wrongdoers against the consequences of their actions.

Limiting class actions to cases where the plaintiffs could prove at certification that substantially all class members suffered compensable injuries would also threaten legitimate use of class actions to pursue other types of substantive claims. *Tyson Foods* offers a prime example: The employer followed a uniform set of practices that denied payment of millions of dollars of wages required by law to hundreds of employees, but the evidence indicated that some class members might not have suffered injuries entitling them to share in the damages award. *See* 136

S. Ct. at 1049–50. Had certification been precluded in such circumstances, the *injured* class members who had proved their entitlement to back wages would have gone uncompensated, and the employer would have retained substantial benefits from its violation of wage-and-hour laws.

Similarly, in Title VII cases using pattern-or-practice proof—generally available *only* in class actions or government enforcement actions, *see Chin v. Port Auth.*, 685 F.3d 135, 148–50 (2d Cir. 2012)—a court first adjudicates whether a discriminatory practice exists and then holds individualized hearings on each class member's injury and entitlement to a remedy. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360–61 (1977); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772–73 (1976). Limiting classes to plaintiffs who show injury at the outset would contradict the holding in *Franks* that such a showing is not necessary to class certification, but "become[s] material" only at the remedial stage. 424 U.S. at 772. As the Supreme Court has explained, "[a]t the initial, 'liability' stage of a pattern-or-practice suit the [plaintiff] is not required to offer evidence that each person for whom it will

ultimately seek relief was a victim of the employer's discriminatory policy." *Teamsters*, 431 U.S. at 360.

Finally, adoption of a rule precluding maintenance of a class action if the class may include more than a handful of uninjured members—with the corollary that the class must be decertified, potentially years into the litigation, if members who have not suffered compensable damages are revealed—is unnecessary to prevent such class members from sharing in a money judgment. If the existence, or possible existence, of such members comes to light before or after trial, several procedural solutions are available: (1) narrowing the class; (2) summary judgment as to the uninjured members; (3) instructing the jury not to base any award of damages on uninjured individuals; and/or (4) requiring a process to identify such members (if any) and exclude them from sharing in a classwide damages award. *See, e.g.*, *Tyson Foods*, 136 S. Ct. at 1049–50 (remanding for trial-court proceedings to determine whether class members who had no damages could be identified); *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 617–18 (8th Cir. 2011) (noting that courts may amend class definitions or grant summary judgment to defendants on claims that turn out to be barred).

In determining which of these courses to take, a district court should carefully determine whether the issue is one of lack of standing or failure of proof on the merits. Class members who were never *exposed* to the injurious conduct of the defendant may be excluded from the class and from the binding effect of the judgment. Those who properly claimed to suffer legal injury but lose on the *merits* because they cannot prove damages should take nothing from the class-action judgment while being subject to its binding effect. In any event, where a definable class has proved injury, liability, and entitlement to relief, the failure (for whatever reason) of claims of some class members should not deprive successful class members of the fruits of their victory. *See*, *e.g.*, *Bouaphakeo v. Tyson Foods, Inc.*, 214 F. Supp. 3d 748 (D. Iowa 2016) (remand proceedings). The rule that a more than de minimis number of members who cannot prove their claims defeats the entire class action serves none of the interests of fairness and efficiency that Rule 23 promotes.

CONCLUSION

For the foregoing reasons, this Court should rehear this case en banc and affirm the order of the district court.

Respectfully submitted,

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May 19, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief is proportionately spaced, has a typeface of 14 points, and, as calculated by my word processing software (Microsoft Word for Microsoft 365), complies with the applicable word limit of 9th Cir. R. 29-2(c)(2) because it contains 4,171 words. The electronic version of the foregoing brief has been scanned for viruses and is virus-free according to the anti-virus program used (Windows Defender).

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served May 19, 2021.

/s/ Scott L. Nelson
Scott L. Nelson