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 PLAINTIFFS-APPELLEES AND AFFIRMANCE

Scott L. Nelson
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Amicus Curiae

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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 as amicus curiae in cases involving arguments that, if accepted, would

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[1] All parties have consented to the filing of this brief. 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.

impair the utility of class actions. *See*, *e.g.*, *Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753 (8th Cir. 2020). Here, the arguments of defendants and their amici, if accepted, would demand class definitions that exclude "uninjured" members at the outset of the case rather than when the merits of the parties' claims have been adjudicated. That outcome would defeat many legitimate class actions that fully satisfy Article III's case-or-controversy requirement as well as the criteria for class certification set forth in Federal Rule of Civil Procedure 23.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a price-fixing conspiracy among the three companies that dominate the canned tuna industry. The participants admitted to the conspiracy in two criminal guilty pleas and a leniency application to the United States Department of Justice by one participant that blew the whistle on its coconspirators after the Department had begun a criminal investigation. At issue here is the district court's certification of three classes of the conspiracy's victims who seek damages under federal and state antitrust laws: a class of entities that purchased tuna directly from the conspirators (the direct purchaser plaintiffs, or DPPs) and thus have standing to assert federal claims under *Illinois*

Brick Co. v. Illinois, 431 U.S. 720 (1977); and two classes of indirect purchasers consisting of commercial food preparers (CFPs) and consumers—referred to as end payer plaintiffs (EPPs)—asserting claims under the antitrust laws of certain states that do not follow the *Illinois Brick* rule.

As to each class, the district court found that certification was appropriate under Federal Rule of Civil Procedure 23(b)(3) because three common issues predominated over any individual issues presented by the classes' claims: (1) the existence of antitrust violations (an issue that is undisputedly common to the claims of each of the three classes); (2) the existence of antitrust impact on class members; and (3) damages. The court further concluded that, for each class, a class action would be superior to other means of resolving the claims because of the efficiency and manageability advantages of resolving the issues on a classwide basis and, as to the EPP class, because the damages suffered by individual consumers would be too small to justify individual antitrust actions.

For each of the three classes, the court's determination that antitrust impact and damages presented common issues rested on a

detailed assessment of testimony by plaintiffs' econometric experts—testimony explaining how regression analyses demonstrated that all, or nearly all, of the members of each class had been injured by the price-fixing conspiracy and how the extent of their damages could be determined through application of the same analysis. That evidence was contested by defendants' expert testimony, but the court concluded that plaintiffs' evidence, including their experts' rebuttal of defendants' experts, was sufficient to establish the existence of common issues because a finder of fact could determine that it established antitrust injury and damages on a classwide basis.

The price-fixing conspirators' supporting amici, the Washington Legal Foundation and Chamber of Commerce of the United States, caricature the district court's findings as based on the view that a court may find that injury and damages present common issues by averaging the claims of injured and uninjured plaintiffs. Based on that characterization, they argue that the court impermissibly certified classes consisting of an amalgam of purchasers who paid higher prices as a result of the price-fixing conspiracy and a large number of others who suffered no injury at all. According to these amici, the inclusion of many,

or even any, uninjured members in a certified class is impermissible and threatens Article III limits on the federal courts' powers.

The class plaintiffs' brief addresses in detail the challenges to the regression analyses supporting certification and explains how those analyses in fact demonstrate that all or nearly all of the members of each class—and in particular the DPP class, which is the focus of the defendants' assertion that substantial numbers of class members were uninjured—suffered antitrust injuries that can be quantified using methodologies applicable to the entire class for purposes of damages calculations. But the arguments of defendants and their amici are not only wrong on the factual record here, but also wrong in their underlying legal premise that, at the certification stage, class plaintiffs must demonstrate that a class does not comprise uninjured members.

Rather, as this Court has held, class certification requires a showing that the class representatives have standing, and exclusion of uninjured class members, if any, need not occur until the end of the case. These holdings comport 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.

To be sure, a determination at the time of certification that a proposed class definition would include large numbers of uninjured members may, under some circumstances, be a consideration supporting the conclusion that common issues do not predominate or that a class action would not be a superior under Rule 23(b)(3). But the circumstances here would not justify such a conclusion. Nor are they comparable to the circumstances at issue in decisions of other circuits that have denied certification of classes involving large numbers of uninjured members. Rather, here, 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 even if not fully credited would allow any class members ultimately 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 under such circumstances is entirely proper.

ARGUMENT

I. Class certification does not require proof that a class includes no uninjured members.

A. The assertion that a court may not certify a class that comprises uninjured members 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 v. Mercer Canyons Inc.*, 835 F.3d 1125 (9th Cir. 2016), the Court reiterated that proof of injury to one named plaintiff suffices at the time of certification, and that there is no requirement at that stage that the class consist entirely of members who "did suffer injury, or that they must prove such injury at the certification phase." *Id.* at 1137 n.6.

As these decisions make clear, this Court's opinion in *Mazza v. American Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012), does not stand for the proposition that "no class may be certified that contains members lacking in Article III standing." Chamber Br. 9 (quoting *Mazza*, 666 F.3d at 596 (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264

(2d Cir. 2006))). The panel decision in *Mazza*, of course, could not have overruled the en banc decision in *Bates*. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc) ("[A] three-judge panel may not overrule a prior decision of the court."). And in any event, as the Court subsequently explained in *Torres*, *Mazza* did not purport to announce a new rule precluding certification of any class encompassing uninjured members. Rather, as *Torres* explains, the context of both *Mazza* and of the cited language in *Denney* reveals that the statement "signifies only that it must be possible that class members have suffered injury." 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*. at 1137 & n.6. 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 and from receiving a share of a judgment for damages is not the time of certification, but when the class action is

resolved on the merits. As this Court recently held, "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 v. TransUnion LLC*, 951 F.3d 1008, 1023 (9th Cir. 2020). *Ramirez* explained 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.* at 1023. *Ramirez* expressly recognized that 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 the time of certification.

B. The Supreme Court's decision in *Tyson Foods* strongly supports this Court's rule that the inclusion of uninjured members at the time of certification is not impermissible, let alone a defect that goes to a

court's Article III jurisdiction. In *Tyson Foods*, Tyson argued in its petition for certiorari that a class may not be certified it if contains uninjured members. Its merits brief, however, "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 a jurisdictional barrier under Article III 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 that a class may not contain uninjured members 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 time and again 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) ("[W]e have at least one individual plaintiff who has demonstrated standing .... Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit." (quoting *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977))). The same principles that apply to individual claims apply to class litigation, which, "like traditional joinder, ... leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion).

Although the Supreme Court has announced this principle most clearly in cases involving injunctive relief, it applies irrespective of the relief sought: If a single class member's injury suffices to create a justiciable controversy over her entitlement to redress, the controversy exists whether the *form* of redress is compensatory or preventive. Standing principles apply to actions aimed at either "obtaining

compensation for, or preventing, the violation of a legally protected right." *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772–73 (2000). If a single plaintiff "demonstrate[s] standing … for *each form* of relief sought," the court has jurisdiction to resolve the plaintiff's claims. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (emphasis added); *see 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). As the Supreme Court put it most recently, 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.

C. If, as demonstrated above, the possibility that some class members may not have suffered an Article III injury does not bar certification, it follows that the arguable presence in the class of members

who may be unable to demonstrate elements of a cause of action, such as "antitrust injury" or compensable damages, likewise does not pose an insuperable obstacle to maintenance of a class action. Here, for example, the unquestioned presence of many injured members in each class in this case indisputably presents a justiciable case. The *merits* question of whether all of them can demonstrate entitlement to relief does not affect a court's authority to entertain their claims. *See Bouaphakeo v. Tyson Foods, Inc.*, 593 F. App'x 578, 585 (8th Cir. 2014) (opinion of Benton, J., respecting the denial of rehearing en banc) ("The failure of some employees to demonstrate damages goes to the merits, not jurisdiction."), *aff'd*, 136 S. Ct. 1036 (2016). Jurisdiction "is not defeated" by a plaintiff's inability to demonstrate he can "actually recover." *Bell v. Hood*, 327 U.S. 678, 682 (1946); *see also Warth v. Seldin*, 422 U.S. 490, 498 (1975).

To hold otherwise would require every damages plaintiff—in individual and class-action cases—to prove her case to avoid a jurisdictional dismissal under Rule 12(b)(1). And if a plaintiff who failed to establish damages at trial lacked standing, the proper resolution would not be judgment in defendant's favor but a jurisdictional dismissal without res judicata effect. *See Steel Co. v. Citizens for a Better Env't*, 523

U.S. 83, 94 (1998). Such a novel rule would waste judicial resources, benefit neither plaintiffs nor defendants, and contradict the longstanding recognition that failure to prove entitlement to relief requires a merits judgment, not a jurisdictional dismissal. *See also Gen. Inv. Co. v. N.Y. Cent. R.R.*, 271 U.S. 228, 230–31(1926); *Bell*, 327 U.S. at 682; *Kohen*, 571 F.3d at 677 ("[W]hen a plaintiff loses a [damages] case [at trial] because he cannot prove injury the suit is not dismissed for lack of jurisdiction.").

Moreover, Rule 23 does not require a showing that all class members can succeed in showing the kinds of injuries that can support awards of compensable damages 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). Thus, "[h]ow 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 Nexium*, 777 F.3d at 21–22; *Kohen*, 571 F.3d at 677.

If the ultimate resolution of the case on the merits may be that some class members are entitled to damages and others are not, the proper course is not to deny class certification but to ensure that, at the end of the day, any award of damages to the class is 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. Even the concurring opinion in *Tyson Foods*, while expressing doubts 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).

D. Conditioning certification on proof that all class members were injured would create practical conundrums at odds with Rule 23's structure and purpose. Rule 23(c)(1)(A) requires certification at an "early practicable time," yet assessing class members' injuries at certification is often infeasible because their 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.3dat 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 decertification upon a showing, at any stage, that *any* members of a certified class were uninjured.

Limiting Rule 23 certification to classes where the plaintiffs could prove at the time of certification that all members were injured would have a particularly severe impact on the utility of class actions in antirust cases. The Supreme Court has recognized that antitrust class actions 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, antitrust violations affecting large numbers of victims in similar ways—those most suited to class actions—are also likely to involve small numbers of potential 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 any uninjured members would sacrifice the efficiencies of class proceedings and their deterrent effects on anticompetitive 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 except to protect antitrust conspirators against the consequences of their actions.

Limiting class actions to cases where the plaintiffs could prove at the certification stage that 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 a small fraction of the class 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 remainder of the class 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 *Franks*'s holding 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 uninjured members—with the corollary that the class must be decertified, potentially years after the fact, if any members without damages are revealed—is unnecessary to prevent uninjured class members from recovering. If uninjured members come to light, 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 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).

II. The possibility that the DPP class may, contrary to plaintiffs' evidence, comprise uninjured members does not defeat certification.

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.* (citing *Mazza*, 666 F.3d at 596). The ultimate "need for a mechanism" to identify uninjured class members, 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.

The circumstances of this case, however, present 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, this case is one in which each "class as a whole was exposed" to defendants' unlawful conduct, *id*. Moreover, 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 plaintiffs fail to persuade the jury that their evidence establishes injury to the entirety of the DPP class, "there is no risk … that a failure of proof on [that] common question … will result in individual questions predominating." *Id*. If, for example, the finder of fact were to accept defendants' argument that plaintiffs' evidence shows that approximately 5.5 percent of the DPP class members are uninjured, the

common questions as to liability, injury, and damages to the remaining, and overwhelming, majority of the class would still predominate, and the class action would remain a superior means of adjudicating the case. The action would continue to satisfy the requirements of predominance and superiority under such circumstances because, among other reasons, the court could readily identify and exclude the small minority of the 604-member DPP class determined to be uninjured—a point that defendants do not contest. Indeed, the same would be true even if the finder of fact were to accept defendants' claim that as many as 28 percent of the DPP class members were uninjured (a claim that, as the district court found, plaintiffs thoroughly debunked, *see* ER 16–17).

These circumstances distinguish this case from dissimilar cases in which other circuits have declined to certify classes because of the presence of large numbers of uninjured class members. For example, in *In re Asacol Antitrust Litigation*, 907 F.3d 42 (1st Cir. 2018), the First Circuit addressed a claim that the defendants had violated antitrust laws by conspiring to keep a generic drug off the market—a violation that both sides' experts agreed *could not* have caused injury to the approximately 10 percent of the class who would have preferred a higher-priced brand-

name drug even if a generic substitute were available. *See id*. at 46. Thus, *Asacol concededly* involved approximately twice as many uninjured class members as would be present in this case under defendants' *contested* interpretation of plaintiffs' evidence concerning the DPP class. Even more importantly, the First Circuit's decision that the presence of those members defeated predominance did not rest on their numbers alone, but on its conclusion that there was no 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. The court expressly distinguished a class (such as the DPP class here) "in which a very small absolute number of class members might be picked off in a manageable, individualized process at or before trial." *Id*. at 53.

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, but denied certification 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 under such circumstances the "need for individualized proof of injury and causation" to "winnow[] away [uninjured members] as part of the liability determination" was sufficient to "destroy predominance." *Id.* at 625. Both the much smaller claimed percentages and numbers of assertedly uninjured members of the DPP class, and the court's ability to identify such members if it were to determine that they in fact were not injured, differentiate this case completely from *Rail Freight*.

The district court's conclusion that common questions predominate as to both the unlawfulness of defendants' conduct and as to resulting antitrust injury and damages thus is easily sustainable, even allowing for the possibility that the DPP class may comprise some uninjured members. That those findings more than suffice to justify certification is underscored by this Court's recognition that predominance as to injury and damages is not even necessary for a Rule 23(b)(3) certification if common questions as to liability otherwise predominate. *See Vaquero v. Ashley Furniture Industries, Inc.*, 824 F.3d 1150, 1154–55 (9th Cir. 2016).

The Court, however, need not rely on that principle in this case, where common issues predominate across the board.

Finally, any suggestion that the certification in this case violates the Rules Enabling Act, or creates a risk of violation, is meritless. As the Supreme Court held in *Tyson Foods*, and this Court recognized in *Ramirez* and *Vaquero*, there can be no Rules Enabling Act violation if the proof offered to support liability to a class would support liability to its individual members. *See Tyson Foods*, 136 S. Ct. at 1047; *Ramirez*, 951 F.3d at 1024; *Vaquero*, 824 F.3d at 1156. Plaintiffs' submission is that their econometric proof would suffice to prove liability to each individual member of each class, and acceptance of their evidence by the ultimate finder of fact would resolve a common question in their favor in a manner fully consistent with the Rules Enabling Act. Similarly, should the finder of fact conclude that the proof did not establish injury and damages as to some members of the class, excluding those members from sharing in any damages award to the class would likewise avoid any Rules Enabling Act violation. In short, as in *Vaquero*, "the district court's grant of class certification has not expanded [the named plaintiffs'] substantive rights or those of the class," and the tuna conspirators "may challenge the

viability of [the plaintiffs'] evidence at a later stage of the proceedings." 824 F.3d at 1156.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's class certification order.

Respectfully submitted,

/s/ Scott L. Nelson
Scott L. Nelson
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Amicus Curiae

August 21, 2020

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 type-face of 14 points, and, as calculated by my word processing software (Microsoft Word for Microsoft 365), complies with the word limit of Fed. R. App. P. 29(a)(5) because it contains 5,246 words.

/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 August 21, 2020.

/s/ Scott L. Nelson
Scott L. Nelson