No. 18-1065

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

IN RE ASACOL ANTITRUST LITIGATION

UNITED FOOD & COMMERCIAL WORKERS UNIONS AND EMPLOYERS MIDWEST HEALTH BENEFITS FUND, *ET AL.*,
Plaintiffs,

TEAMSTERS UNION 25 HEALTH SERVICES & INSURANCE PLAN, *ET AL.*,
Plaintiffs-Appellees,

v.

WARNER CHILCOTT LIMITED, *ET AL.*,
Defendants-Appellants.

ZYDUS PHARMACEUTICALS USA, INC., *ET AL.*,
Defendants.

On Appeal from the United States District Court
for the District of Massachusetts (No. 1:15-cv-12730)

BRIEF FOR AMICI CURIAE PUBLIC CITIZEN, INC., AND PUBLIC CITIZEN FOUNDATION, INC., IN SUPPORT OF APPELLEES' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Amici curiae Public Citizen, Inc., and Public Citizen Foundation, Inc., are nonprofit, non-stock corporations. They have no parent corporations, and no publicly traded corporations have an ownership interest in them of any kind.

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INTEREST OF AMICI CURIAE[1]

Amici curiae Public Citizen, Inc., and Public Citizen Foundation, Inc., (jointly, Public Citizen) are nonprofit consumer advocacy organizations that appear on behalf of their members and supporters nationwide before Congress, administrative agencies, and courts. Public Citizen works on a wide range of issues, including enactment and enforcement of laws protecting consumers, workers, and the public. The enforcement of such laws frequently involves class actions as well as individual actions. Public Citizen has a longstanding interest in preserving the viability of both these mechanisms for protecting the rights of consumers and the general public.

Accordingly, Public Citizen has represented parties or filed amicus briefs in many cases in the Supreme Court, this Court and other federal courts involving class action procedures. Of particular relevance here,

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[1] As required by Federal Rule of Appellate Procedure 29(b)(2), amici have moved for leave to file this brief. Defendants-appellants and plaintiffs-appellees have consented to the motion.

This brief was not authored in whole or part by counsel for a party; no party or counsel for a party contributed money that was intended to fund this brief's preparation or submission; and no person other than the amici curiae, their members, or their counsel contributed money intended to fund the brief's preparation or submission.

Public Citizen's Litigation Group was co-counsel for the respondent in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), and submitted a brief as amicus curiae in this Court in *In re Nexium Antitrust Litigation*, 777 F.3d 9 (1st Cir. 2015). Public Citizen submits this brief out of concern that the panel's opinion in this case deviates from both of those decisions in ways that may hinder the certification of class actions in a broad range of cases where certification would both satisfy the terms and serve the policies of Federal Rule of Civil Procedure 23. Public Citizen believes that this brief may be helpful to the Court in considering whether to grant panel or en banc rehearing.

ARGUMENT

This Court rarely grants en banc rehearing, and with good reason. In this case, however, the panel's decision merits further consideration, either by the panel itself or by the full Court, because: (1) its reasoning conflicts with both this Court's decision in *Nexium* and the Supreme Court's decision in *Tyson Foods*; (2) it is likely to perpetuate confusion and uncertainty about whether and how classes consisting of an overwhelming majority of injured plaintiffs and a small number who have not suffered compensable damages may be certified; and (3) it is

likely to spread that uncertainty to class actions involving other types of claims, including consumer and employment cases, where classes likewise may include a small number of members who have not suffered a compensable injury.

1. This case and *Nexium* present nearly identical circumstances, in which classes consisting of members who paid for name-brand drugs claimed to have suffered damages as a result of antitrust violations resulting in the exclusion of lower-priced generic competitors from the market. In each case, the classes included a small percentage (estimated here based on expert analyses to be approximately 10 percent) of members who suffered no damages because they would have paid a higher price for the name-brand drug even if lower-priced generic drugs were available. In *Nexium*, the Court held that the presence of such class members, and the need for some mechanism to weed them out at a later stage in the case, did not prevent class certification. The Court noted a number of possible ways to address the issue, including the submission of individual affidavits or declarations in a claims process at the damages stage of the case. *See* 777 F.3d at 19–20. The Court declined to hold that

certification was improper where "[d]efendants have merely speculated that a mechanism for exclusion cannot be developed later." *Id.* at 21.

In this case, by contrast, the panel held that the presence of a similar percentage of uninjured class members precluded certification, and it rejected the possibility that those members could be winnowed out in a damages-phase claims process based initially on the submission of affidavits or declarations attesting to injury. *See* 907 F.3d at 51–54. The panel's opinion appears to indicate that, in such circumstances, injury to each class member must be established at or before trial of liability issues and determination of aggregate damages, and cannot be left to a later damages phase. *See id.* at 52–54. And the panel opinion requires that a definite plan for excluding uninjured members be developed at the time of certification. *See id.* at 58. In contrast, the opinion in *Nexium* required only a basis for concluding that such a plan could be developed at a later stage. *See* 777 F.3d at 21, 32.

Thus, at the very least, "one could be forgiven for concluding—as the District Court did—that *Nexium* does require certification of the class proposed here," as Judge Barron put it. 907 F.3d at 59 (concurring opinion). The panel's effort to distinguish *Nexium* is problematic at best.

Contrary to the panel opinion's statement, the Court in *Nexium* did not "assume[]" that affidavits establishing injury would be unrebutted. *See id.* at 54. Rather, in explaining the potential use of an affidavit-based claims process, this Court in *Nexium* observed that an affidavit, if unrebutted, would establish a plaintiff's entitlement to share in a class award without violating the rights of the defendants. 777 F.3d at 20. But the Court in fact assumed (as Judge Barron's concurrence here recognizes) that the defendants might challenge some such affidavits, and that their right to do so at a later stage in the case would be preserved. *Id*. at 21; *see* 907 F.3d at 59 (Barron, J. concurring).

Contrary to the suggestion in Judge Barron's concurrence, *Nexium* does not hold that any such challenges must be resolved before a classwide liability and aggregate damages determination. *See id*. at 59. Rather, *Nexium* requires only that culling of uninjured individuals occur before final resolution of the case, and it allows for the possibility that this process might occur in a damages phase following classwide liability determinations. *See* 777 F.3d at 19–20; 33. Finally, the view that *Nexium* concerns only the abstract question whether plaintiffs are categorically barred from relying on individual means of proving injury, *see* 907 F.3d

at 60–61 (Barron, J., concurring), does not square with *Nexium*'s holding that certification in the specific circumstances of that case—which were so comparable to the circumstances here—was proper.

The panel's decision is just as difficult to square with *Tyson*. There, the Supreme Court upheld not only the certification of a class, but also a verdict providing the class an aggregate damages award, based on representative proof that established both the fact and amount of the defendant's liability to the class, and that a small percentage of the class members had not suffered compensable damages. The Court specifically held that the presence of uninjured class members did not provide a basis for reversing the certification of the class, and that the development of a viable methodology for identifying uninjured class members was properly left to the district court on remand as part of the proceedings regarding disbursal of the award to the class. 136 S. Ct. at 1050.

Tyson contradicts the panel's decision in at least two respects: First, *Tyson* holds directly that a method of excluding uninjured class members need not be devised at the time of certification. Second, *Tyson* is incompatible with the suggestion that such members must be identified and excluded before, or as part of, a trial on the merits of common liability

issues and determination of an aggregate damages award. The panel's view that *Tyson* is distinguishable because the representative proof used to establish liability to the class was different from that contemplated here, *see* 907 F.3d at 54–55, misses a fundamental point: Here, as in *Tyson*, the common proof would establish the defendant's liability and the amount of damages suffered by the class as a whole, while also indicating that a small minority of the class suffered no injury. The panel's reasoning—that certification of a class is improper in such circumstances unless a plan for excluding uninjured members before or at trial is offered at the time of certification—would have precluded certification in *Tyson*.

2. Although the panel's decision says that it leaves *Nexium* intact, and *Tyson* obviously remains binding on courts in this Circuit and nationwide, the problem of squaring the panel's decision with the holdings in *Nexium* and *Tyson* is likely to lead to confusion in trial courts and uncertainty among plaintiffs and defendants about what classes are potentially viable. The concurring opinion attempts to provide some guidance as to how such issues might be addressed by outlining some scenarios in which proposals to use affidavits to identify injured class

members in the first instance might be sufficient to "satisfy the predominance requirement," 907 F.3d at 60 (Barron, J., concurring)—including, perhaps, "in a case not unlike this one," *id*. at 61.

Whether the concurrence's suggestions would satisfy the holding of the opinion of the panel itself seems uncertain at best. As a result, the panel's decision is likely to require class representatives with potentially meritorious claims to attempt to devise new methods to triangulate the holding in this case, the holding in *Nexium*, and the concurrence's suggestions for reconciling the two. There will be no assurance that that such efforts can ultimately succeed, but lengthy and costly litigation will be necessary to resolve the questions posed by efforts to navigate this Court's newly complicated jurisprudence.

Thus, the panel's decision will perpetuate the "struggle[] to develop a uniform mode of analyzing such cases." *Id*. at 59 (Barron, J., concurring). And it will do so unnecessarily given that existing precedents, including *Nexium* and *Tyson*, should have already provided the answer to whether classes can be certified in the circumstances here. If, at the end of the day, the result is that certification remains possible "in a case not unlike this one," *id*. at 61, then the panel's decision will

have complicated the process for arriving at that result for no good reason; but if a path to certification cannot be found, then the benefits of class litigation of cases where common issues predominate will be lost.

Moreover, both the panel opinion and the concurrence suggest that any path to certification must involve resolution of issues concerning whether individual class members have been injured, prior to or simultaneously with trial on the common issues of liability and aggregate damages. *See* 907 F.3d at 52 (rejecting plaintiffs' proposed reliance on affidavits because it would not "eliminate the question of injury in fact before trial"); *see also id.* at 59 (Barron, J., concurring) (rejecting use of affidavits at claims-processing phase). Requiring individual issues to be determined before or simultaneously with resolution of common issues, however, would sacrifice most of the benefits of class treatment by transforming trial of common issues into trial of individual ones.

For this reason, courts faced with such cases have generally relegated resolution of the entitlement of individual class members to share in a class award to a subsequent damages or distribution stage. Although there is no reason in principle why such staging could not protect defendants' due process and Seventh Amendment rights in the

event of genuine disputes as to an individual's entitlement, the panel's decision may be read to preclude such methods.

As a result, trial courts attempting to comply with the decision's dictates will be faced with difficult tasks of devising mechanisms that can achieve the benefits of resolving classwide issues "in one stroke," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011), while complying with the apparent mandate that individual issues be resolved first or simultaneously. Putting the resolution of individual issues ahead of common ones, however, is likely to deprive not only plaintiffs, but also defendants, of much of the benefit of the efficiencies of resolving common issues in a single proceeding in which the class "will prevail or fail in unison" without regard to "the individual circumstances of particular class members." *Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, 568 U.S. 455, 460 (2013). Indeed, in *Nexium* itself, the classwide resolution of the antitrust claims favorably to the defendants at trial ultimately spared them the burden of inquiring case-by-case into whether individual class members were injured.

3. Finally, the confusion and uncertainty that the panel's decision is likely to engender will not be limited to antitrust class actions.

As *Tyson* illustrates, the phenomenon of small numbers of class members not suffering injuries that can support claims for damages is a common feature of employment class actions as well. The presence, or arguable presence, of class members who have not suffered a compensable injury is likewise common in securities fraud class actions, consumer fraud class actions, and other consumer class actions. Indeed, as the Seventh Circuit has observed, the presence of some uninjured members in a class "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 v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009).

For this reason, attorneys specializing in class-action defense have already begun advising that under the reasoning of the panel's decision, "many types of class actions—including consumer class-actions—will be harder to certify."[2] For example, according to these commentators,

> [*Asacol*'s] reasoning applies equally to false-advertising class actions involving the purchase of food, drug, or other consumer

[2] Patterson Belknap Webb & Tyler LLP, *In re Asacol*: First Circuit Sharply Limits Certification of Classes Containing Uninjured Members at 1 (Oct. 2018), *available at* https://www.pbwt.com/content/uploads/2018/10/In-re-Asacol_First-Circuit-Sharply-Limits-Certification-of-Classes-Containing-Uninjured-Members-PDF-1.pdf.

> products. Consumers are diverse in their purchasing practices and their preferences. It is almost always true that some consumers who bought a product did not see the disputed product claim; that some who saw it did not rely on it; and that some purchasers may actually prefer the product the way it is to the way the plaintiff alleges that it "should have" been. *Asacol* would make certification very difficult on facts like those—as long as the defendant does not waive its right to challenge individual consumers' proof.[3]

This Court should not adhere to a view with such potentially wide-ranging negative consequences for class actions. The Court should grant rehearing to make clear that where the overwhelming majority of class members have suffered compensable injuries, and common questions as to liability and damages otherwise predominate, the possibility that uninjured members may be culled through a claims process following classwide determination of liability and aggregate damages does not preclude certification of a class. Rather, in such circumstances, "the opportunity to challenge each class member's claim to recovery during the damages phase" amply protects "the defendants' due process rights." *Mullins v. Direct Digital LLC*, 795 F.3d 654, 671 (7th Cir. 2015).

[3] Patterson Belknap Webb & Tyler, *supra* note 2, at 2.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for rehearing or rehearing en banc.

Respectfully submitted,

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November 20, 2018

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rules of Appellate Procedure 32(a) and 29(b)(4) as follows: The type face is fourteen-point Century Schoolbook font, and the word count, as determined by the word-count function of Microsoft Word 2016, is 2,527, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and the rules of this Court.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I certify that on November 20, 2018, 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 the case, including all parties required to be served.

/s/ Scott L. Nelson
Scott L. Nelson