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 FOR THE COMMITTEE TO SUPPORT THE ANTITRUST LAWS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Committee to Support the Antitrust Laws states that it is a nonprofit corporation and no entity has any ownership interest in it.

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INTEREST OF AMICUS CURIAE[1]

"Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). The Supreme Court and this Court have long recognized the key role private litigants play in enforcing federal antitrust laws. *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) ("Without doubt, the private cause of action plays a central role in enforcing this regime."); *Memorex Corp. v. Int'l Bus. Machines Corp.*, 555 F.2d 1379, 1383 (9th Cir. 1977) ("[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business

[1] All Plaintiffs consent to the filing of this amicus brief. Defendants do not oppose, if the Court determines the brief is not out of time under Ninth Circuit Rule 29-2(e)(2). But Rule 29-2 does not control here, where there was no petition for rehearing *en banc* and therefore there could be neither petitioner nor respondent. *See* Dkt. 128. Instead, amicus curiae's brief is filed under Ninth Circuit Rule 35-3. *See* Circuit Advisory Committee Note to Rule 35-3 ("*After the en banc court is chosen, the judges on the panel decide whether there will be oral argument or additional briefing.*") (italics in original). In light of the Order permitting supplementary briefing (Dkt. 133) and the preference articulated in Fed. R. App. 29(a)(6) for amicus briefs in support of a party to be filed *after* a party's principal brief is filed, amicus curiae's brief is timely. In the alternative, amicus curiae assert that general principles of equity support the panel accepting this brief for filing.

behavior in violation of the antitrust laws.") (quoting *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968)).

The Committee to Support the Antitrust Laws (COSAL) is an independent, nonprofit corporation devoted to preventing, remediating, and deterring anticompetitive conduct through the enactment, preservation, and enforcement of a strong body of antitrust laws.[2] Even in this matter, where the government has successfully prosecuted and levied significant criminal penalties on participants in the packaged seafood cartel, victims would have no recompense without private action.

I. INTRODUCTION

"There is little dispute over the existence of [the] price-fixing scheme" at issue in this case. *Olean Wholesale Grocery Coop, Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774, 782 (9th Cir. 2021), *reh'g en banc granted*, 5 F.4th 950 (9th Cir. 2021). Starkist and its senior vice president pled guilty to "a conspiracy among major packaged-seafood-producing firms . . . to fix, raise, and maintain the prices of

[2] Amicus states that no counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person or entity—other than COSAL—has contributed money that was intended to fund its preparation or submission. In addition, no COSAL member whose firm is counsel for a party had any involvement in the organization's decision to file this amicus brief.

packaged seafood in the United States."[3] Bumble Bee Foods also pled guilty to that conspiracy,[4] while a jury convicted the company's CEO for conspiring to fix canned tuna prices, and the court sentenced him to *40 months* in prison.[5] Chicken of the Sea admitted fixing prices and agreed to cooperate with federal investigators.[6] And yet, Defendants hope to shirk their responsibility to their victims by urging this Court to adopt a new procedural hurdle to class certification that would effectively immunize them from civil antitrust enforcement.

Rule 23(b)(3) requires that common issues predominate; it does not require that plaintiffs prove that all or nearly all plaintiffs have been injured as a prerequisite to class certification. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 459 (2013) (requiring that "*questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class"). Predominance is practical. It is about whether in practice common issues will predominate at trial. *Olean Wholesale,* 993 F.3d 774. And in this case, as in many

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[3] Plea Agreement, *United States v. Starkist Co.*, No. 3:18-cr-000513-EMC, at *3 (N.D. Cal. Nov. 14, 2018), https://bit.ly/36DMif9; Plea Agreement, *United States v. Hodge*, No. 3:17-cr-00297-EMC (N.D. Cal. June 28, 2017), https://bit.ly/36GxE6K.

[4] Amended Plea Agreement, *United States v. Bumble Bee Foods*, *LLC,* No. 3:17-cr-00249-EMC (N.D. Cal. Aug. 2, 2017), https://bit.ly/2UpLkR3.

[5] Press Release, Department of Justice (DOJ), Former Bumble Bee CEO Sentenced To Prison For Fixing Prices Of Canned Tuna (June 16, 2020), https://bit.ly/3xQo5hu.

[6] *Olean Wholesale*, 993 F.3d at 782.

antitrust cases, they will—regardless of whether impact is a common issue and regardless of whether injury is common to all or virtually all class members. Here, class members, as purchasers of the products affected by Defendants' conspiracy, have that interest.

Nor does Article III justify a requirement that all or nearly all plaintiffs be injured. Standing does *not* require a plaintiff to *prevail* in a case or controversy, but only to have "a personal interest" in the case or controversy.

Amicus curiae COSAL respectfully requests that this en banc panel affirm the District Court's opinion granting class certification and allow the victims to hold Defendants to account.

II. ARGUMENT

A. RULE 23 DOES NOT REQUIRE THE DISTRICT COURT TO DETERMINE THAT THE PERCENTAGE OF UNINJURED PLAINTIFFS CLASS MEMBERS IS *DE MINIMIS* OR WHICH PARTIES' EXPERT IS CORRECT TO FIND PREDOMINANCE

While courts must engage in a "rigorous analysis" that "may … overlap with the merits of the plaintiff's underlying claim" before certifying a class," they may not embark upon "free-ranging merits inquiries at the [class] certification stage." *Amgen*, 568 U.S. at 465-66. Courts should only consider "[m]erits questions … 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.

Here, the district court did not need to determine which parties' expert is correct as to the number of uninjured plaintiffs (if any) or to find that the percentage of uninjured plaintiffs is *de minimis* to assess predominance. Uninjured class members do not transform injury into an individual issue. And even if the presence of more than a *de minimis* percentage of uninjured class members made injury an individual issue, common issues can still predominate in antitrust cases. Thus, the district court properly certified the classes without first finding the number and the extent of uninjured class members. *In re Packaged Seafood Prods. Antitrust Litig.*, 332 F.R.D. 308, 316 (S.D. Cal. 2019), *vacated and remanded sub nom. Olean Wholesale*, 993 F.3d 774, *reh'g en banc granted*, 5 F.4th 950.

1. The percentage of uninjured class members is irrelevant to predominance when they are identifiable

Rule 23(b)(3) does not require the district court to determine which parties' expert is correct in its assessment of the percentage of uninjured plaintiffs.

Under Rule 23(b)(3), plaintiffs must show 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). A question is common to the class if "the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016). Common questions predominate if they are significant and "can be resolved for all members of the class in a single adjudication." *True*

Health Chiropractic, Inc. v. McKesson Corp., 896 F.3d 923, 931 (9th Cir. 2018); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (The predominance inquiry asks whether the class is "sufficiently cohesive to warrant adjudication by representation.").

Here, a single trial would resolve the issue of injury as to each of the three classes in their entirety. Take the DPPs, for example. Defendants' expert testified that if Plaintiffs' experts' regression model is modified, it is no longer capable of showing harm to 28% of the DPP class. Plaintiffs' expert disagrees with that modification, offering a robustness check that confirms harm to at least 94.5% of class members (and, Plaintiffs' experts claim, the econometric model and qualitative evidence together show harm to a significantly higher percentage of class members, likely all of them). If Defendants were vindicated on this point at trial and a jury determined Plaintiffs failed to prove injury to 28% of class members, there is no risk the trial court will have to adjudicate the issue of impact individually for such class members. The jury would already have done so by deciding in Defendants' favor. Individual issues would not suddenly predominate.

Defendants assert that the district court must resolve the battle of the experts because "[t]he larger the share of uninjured class members, the more individualized inquiries . . . will predominate . . . ." Defendants' Supplemental Brief (Dkt. 149) (hereinafter Defs' Br.) at 14. But the percentage of uninjured class members is not

always proportional to the likelihood individual issues would predominate at trial. *See Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016) ("Predominance is not . . . a matter of nose-counting.").

Like the Supreme Court, the Ninth Circuit has never held that every class member must be injured for common issues to predominate. On the contrary, this Court noted in *Torres* that "non-injury to a subset of class members does not necessarily defeat certification of the entire class, particularly [when] 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." *Torres*, 835 F.3d at 1137. The district court or claims administrator can easily "winnow out" the class members who purchased outside the three-year conspiracy period as a matter of accounting. *See id.*; *see also* Fed. R. Civ. P. 15(b)(2) ("A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence. . . ."); Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment").

The same is true as to the ratio of injured to uninjured class members in this case. Whether common issues predominate does not depend on which parties' expert is right. Predominance "requires . . . that *questions* common to the class predominate, not that those questions will be answered . . . in favor of the class." *Amgen*, 568 U.S. at 459. The Direct Purchaser Plaintiffs' model, for example,

returns a result as to whether each class member has paid an overcharge, and so it makes no difference as to the district court's or the jury's ability to winnow out those uninjured members; individual issues are no more likely to predominate. *Id.*

Defendants would require that a trial court find Plaintiffs' expert testimony is right and Defendants' expert testimony is wrong. That is a step too far. It is one thing for a court to find that plaintiffs have offered reliable common evidence that, *if believed*, would establish classwide impact. It is quite another for a court to decide whether plaintiffs' evidence is *persuasive*. That would require plaintiffs to win twice on the merits—before a judge, then a jury. *Id.* at 477 (trial courts at class certification should not decide merits issues that "might have to be shown all over again at trial").

Courts do not require plaintiffs to prevail on the merits before certifying a class; they require plaintiffs to show that they have common evidence *capable of* answering them. *Id.* at 468-69; *Olean Wholesale*, 993 F.3d at 784. For injury to be a common issue, a court need merely find that plaintiffs' expert testimony is admissible and can prove widespread harm to the class. After that, its persuasiveness is "the near-exclusive province of the jury," and the district court can deny class certification "only if . . . no reasonable juror could have believed" the evidence persuasive. *Tyson Foods*, 577 U.S. at 459.[7] The district court did exactly that. *See*

[7] The panel majority distinguished *Tyson Foods* because it involved "a wage-and-hour class action where representative evidence is explicitly permitted to establish

In re Packaged Seafood, 332 F.R.D. at 328 (finding that Plaintiffs had met their burden because the expert's "regression model, supplemented by the correlation tests, the record evidence, and the guilty pleas and admissions entered in this case, is sufficient to show common questions predominate as to common impact.").

2. Common issues often predominate in antitrust cases even if injury is not a common issue.

The district court properly certified the classes without first finding that the percentage of uninjured plaintiffs was *de minimis*. In antitrust cases, common issues can predominate even if more than a *de minimis* percentage of class members could make injury an individual issue.

This Court has taken a practical approach to predominance. Predominance gauges how litigation and trial will play out—whether common questions would drive the case or whether it would devolve into a host of common issues. *Olean Wholesale*, 993 F.3d at 784. A question's potential to "drive the resolution of the

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liability in individual cases." *Olean Wholesale*, 993 F.3d at 786 n.4 (citing *Tyson Foods*, 577 U.S. at 449) (in turn citing *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680, 687 (1946))). But that distinction does not work because *Mt. Clemens* derived its approach from *antitrust* precedents. 328 U.S. at 688 (citing *Bigelow v. RKO Radio Pictures, Inc*., 327 U.S. 251, 263-66 (1946) (antitrust case); *Story Parchment Co. v. Paterson Parchment Co*., 282 U.S. 555, 563 (1931) (same); *Eastman Kodak v. S. Photo Materials Co.*, 273 U.S. 359, 377–379 (1927) (same)). The antitrust doctrine that the Supreme Court extended to FLSA cases also still applies to antitrust. Indeed, the panel correctly recognized that individual plaintiffs in antitrust cases may rely on representative evidence. *Olean Wholesale*, 993 F.3d at 787-90.

litigation necessarily depends on the nature of the underlying legal claims that the class members have raised." *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014).

Uninjured class members rarely drive antitrust cases. Antitrust cases turn almost entirely on the defendants' conduct and its effects, issues that by their nature are common to class members. *Amchem Prods.*, 521 U.S. at 625 ("Predominance is a test readily met in certain cases alleging … violations of the antitrust laws."). Did defendants do what plaintiffs allege? Did those actions violate the antitrust laws? Did they cause antitrust injury in general? What were the total damages?

In contrast, defendants do not care *what percentage* of class members ultimately will recover (other than raising that issue to attempt to defeat class certification and avoid facing the merits of plaintiffs' claims). What matters to defendants is whether they have to write a check to plaintiffs and how big that check is. If plaintiffs prevail at trial—or, far more frequently, through a settlement—defendants have no interest in how the money they pay is distributed. That is a task for the plaintiffs and the court to address at the tail end of the litigation process. *See Torres*, 835 F.3d at 1137. And there are practical ways to undertake that task, none of which will bog the court down in adjudicating individual issues.

Defendants, however, urge the Court to adopt a blanket rule that leaves no room to consider what a trial would look like if it the class uninjured class members.

Under the test urged by Defendants, a *de minimis* percentage of uninjured plaintiffs defeats certification, regardless of their impact on the litigation. Defendants do not argue that the text of Rule 23 requires that a class have no more than a *de minimis* percentage of uninjured plaintiffs. Instead, they argue that plaintiffs can show that common questions predominate over individual issues only if they provide "'a common method of proof'" for "each essential element" of their claims. Defs' Br. at 10 (citing *Castillo v. Bank of Am., NA*, 980 F.3d 723, 732-33 (9th Cir. 2020)).

Both the Supreme Court and this Court have made clear that predominance "does *not* require a plaintiff seeking class certification to prove that each element of [their] claim is susceptible to classwide proof. . . ." *Amgen*, 568 U.S. at 469; *Castillo*, 980 F.3d at 730. Rather, the focus at class certification is whether "one or more common questions predominate." *Castillo*, 980 F.3d at 730. "When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson Foods*, 577 U.S. at 453 (quotation marks omitted).

To the extent one could consider Defendants' *de minimis* test a "tool" for measuring predominance, it certainly isn't the sharpest in the shed. The percentage of uninjured class members is a weak metric for a lack of predominance. Injury can

be a common issue even if more than a *de minimis* percentage of class members is uninjured, and, particularly in antitrust cases, common issues can predominate in a case as a whole even if injury is not common to class members. *See id.*

The Court should reject Defendants' atextual euphemism for predominance and, instead, focus on what this Court and the Supreme Court have determined predominance actually means: whether common questions can be resolved in a single adjudication and what that would look like.

B. DEFENDANTS MISCONSTRUE ARTICLE III STANDING DOCTRINE

Defendants' position is that if Plaintiffs at any point in federal litigation lose on any of the elements of their claim—including impact—they no longer have Article III standing. Defs' Br. at 12. Plaintiffs' claims would then have to be dismissed for lack of subject matter jurisdiction. Defendants weave this point into their more general argument that class certification is inappropriate if plaintiffs fail to show that only a de minimis percentage of class members was unharmed. In doing so, Defendants mischaracterize the implications of their argument and the requirements for Article III standing.

Defendants assume that if more than a de minimis percentage of class members lack Article III standing, a court should find common issues do not predominate and deny class certification under Rule 23(b)(3). That, however, does not follow. Instead, the court would have to dismiss the claims of the uninjured class

members for lack of subject matter jurisdiction. The remaining class members, however, could proceed on a class basis.

The class members whose claims were dismissed, on the other hand, should be able to pursue those claims in state court, possibly on a class basis. As Justice Thomas noted in his dissent in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), a finding that plaintiffs lack Article III standing does not prevent "state courts—which 'are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law'—[from serving] as the sole forum for such cases, with defendants unable to seek removal to federal court." *Id.* at 2224 n.9 (Thomas, J. dissenting) (citations omitted).

In sum, Defendants provide no persuasive explanation for why a finding of a lack of Article III standing for some class members—*de minimis* or otherwise—should result in a denial of class certification for others.

But the flaw in Defendants Article III argument runs deeper. Most fundamentally, Defendants are wrong that any time a plaintiff loses on the merits, it lacks Article III standing. Standing does not require a plaintiff to *prevail* in a case or controversy, but only to have "a personal interest" in the case or controversy. *Id.* at 2208.

For that reason, "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction." *Steel Co. v. Citizens for a*

Better Env't, 523 U.S. 83, 89 (1998). As Justice Scalia explained in addressing Article III standing, "Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Id*. (quoting *Oneida Indian Nation of N.Y. v. Cnty. of Oneida*, 414 U.S. 661, 666 (1974)).

Put differently, to paraphrase *Steel Co.*, for Article III standing plaintiffs must have a claim that is not insubstantial or implausible. They can do so by showing they were *exposed to the relevant harm*. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594-95 (9th Cir. 2012); *Castillo*, 980 F.3d at 730; *Torres*, 835 F.3d at 1137. They do not have to win on the merits on any of the elements of their claim.

To be sure, in some cases, plaintiffs cannot meet even the modest requirements for Article III standing. *Lujan* held, for example, that U.S. domestic plaintiffs *were not exposed to the relevant kind of injury* to enforce the Endangered Species Act for behavior that occurred in foreign countries and could not have affected them. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). *TransUnion* similarly held that the plaintiffs *were not exposed to the relevant kind of injury* if the defendant gathered incorrect information about them but did not disseminate it and so could not have caused them harm. *TransUnion*, 141 S. Ct. at 2208-09.

Here, in contrast, Defendants do not deny that every member of each proposed class bought packaged tuna subject to an alleged overcharge. Each member of each class was exposed to the relevant kind of injury—alleged inflated prices from an illegal conspiracy. Each has a personal interest in the litigation. None of them is seeking to litigate an antitrust violation that affected only others.

Defendants do not deny that an alleged financial injury suffices for Article III standing. Nor could they. *TransUnion*, 141 S. Ct. at 2204 ("certain harms readily qualify as concrete injuries under Article III. The most obvious are traditional tangible harms, such as physical harms or monetary harms."). All of the members of each proposed class thus all have Article III standing.

C. CLASS AND INDIVIDUAL LITIGATION WOULD RELY ON THE SAME REPRESENTATIVE EVIDENCE

Defendants also argue that plaintiffs here rely on improper representative evidence of impact. That argument fails as a basis for denying class certification for two reasons. First, all members of the proposed classes rely on the same representative evidence. If that evidence fails for any of them, it fails for all of them. It is thus a common issue, not an individualized one. *See Amgen*, 568 U.S. at 468 ("the failure of proof on [one element of the plaintiff's claims] would end the case for one and for all; no claim would remain in which individual [] issues could potentially predominate")

Second, plaintiffs litigating their claims individually would have to rely on the same sort of representative evidence that the classes have put forward in support of class certification. There is no practical way to look at a single transaction or a small set of transactions on its own to determine whether an alleged price-fixing conspiracy caused prices to rise above competitive levels. Only economic and econometric analyses addressing wider market forces and larger patterns of pricing could support a finding of impact for individual class members.

That point applies with particular force to the small purchasers for whom Defendants' claim plaintiffs offer insufficient evidence of impact. In fact, those class members have the least bargaining power and were least likely to avoid the effects of the alleged price-fixing conspiracy. They are not situated at all like the large opt-out plaintiff Walmart, that can afford to hire its own lawyers and that made enough purchases to support an impact model unlike the one used by the plaintiff classes. Indeed, what Defendants' econometric models really do is to take advantage of the small number of purchases by small class members, slicing and dicing the data in an effort to show there is insufficient evidence of their injuries. In essence, Defendants attempt to impose an unrealistic and novel standard for proof—one that would not apply in individual litigation—and then ironically claim that the class members most likely to be harmed cannot meet that standard.

Under longstanding case law, antitrust defendants cannot rely on the uncertainty created by their own wrongdoing to avoid civil liability. *DSPT Int'l, Inc. v. Nahum*, 624 F.3d 1213, 1223 (9th Cir. 2010) (Defendants are "not entitled to complain that [the damages] cannot be measured with the same exactness and precision as would otherwise be possible.") (quoting *Eastman Kodak Co. of N.Y. v. S. Photo Materials Co.*, 273 U.S. 359, 379 (1927) ("It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate.")); *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555, 563 (1931); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 263-66 (1946) ("The most elementary conceptions of justice and public policy," after all, "require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."). That line of antitrust cases was the basis for the Supreme Court's ruling in *Anderson v. Mt. Clemens Pottery Co.*, that plaintiffs bringing claims under the Fair Labor Standards Act may rely on representative evidence to prove individual injuries. 328 U.S. 680, 688 (1946) (citing *Eastman Kodak*; *Story Parchment*; and *Bigelow*). *Tyson Foods* in turn relied on *Mt. Clemens* to reach the same conclusion. 577 U.S. at 475 (majority "goes beyond" *Mt. Clemens* by holding "that employees can use representative evidence in FLSA cases to prove an otherwise uncertain element of liability"). Defendants' effort to distinguish *Tyson Foods* fails. The antitrust doctrine that the Supreme Court extended to FLSA still also applies in antitrust.

Plaintiffs' evidence of the widespread impact of the Defendants' price-fixing conspiracy thus should suffice for each member of each class to get to a jury if the plaintiff were to pursue individual litigation. The Rules Enabling Act holds that the same evidence must suffice in the class context. Procedural rules cannot alter substantive law. To be sure, such evidence might or might not prove persuasive. But, again, that is an issue common to all class members. The class members' evidence of impact should rise or fall together for all class members, supporting a finding that common issues predominate under Rule 23(b)(3). *Amgen*, 568 U.S. at 468.

D. ANTITRUST POLICY SUPPORTS CLASS CERTIFICATION

It is not surprising that Defendants would challenge class certification with marginal procedural arguments to avoid a determination on the merits in light of the egregious facts here. Multiple defendants (and settling defendants) and their employees have pleaded guilty to or been convicted of criminal charges, and have paid more than $100 million dollars in criminal fines based on the same conduct that Plaintiffs allege in this case.

Class actions in antitrust conspiracies offer the best means for both redress and deterrence because the defendant's wrongful conduct has harmed many purchasers and caused injuries that are large in the aggregate, but not cost-effective for victims to seek redress through individual litigation. *See Hawaii v. Standard Oil*

Co., 405 U.S. 251, 266 (1972) ("Rule 23 of the Federal Rules of Civil Procedure…enhance[s] the efficacy of private [antitrust] actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture."); *Amchem Prods.,* 521 U.S. at 617 ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.") (quotation omitted).

Were it not for Defendants' desire to prevent a confrontation on the merits, it is unlikely Defendants would forgo class certification in order to assert individual defenses. Defendants' *overall* liability remains the same if the court decertifies this case, as individual class members could use the expert reports filed on behalf of the class in their own actions. Defendants would no doubt appreciate the class mechanism if class members each brought individual actions, just as DoorDash did when more than 5,800 of its couriers sought to enforce arbitration provisions in their agreements. DoorDash, faced with more than $11 million in administrative fees, sought an indefinite stay of those arbitrations because ***it would be more efficient to resolve the plaintiffs' claims in a class action.*** *Abernathy v. DoorDash, Inc.*, 438 F.

Supp. 3d 1062, 1064 (N.D. Cal. 2020).[8] In such a case, class certification "should be beneficial to [Defendants]—they have but one suit to meet, instead of innumerable ones." *Weeks. v. Bareco Oil Co.*, 125 F.2d 84, 90 (7th Cir. 1941).[9]

Defendants do not ask the court to adopt their novel de minimis standard to give them the chance to raise individual defenses on those cases. They want the standard so they never have to raise those defenses at all. *Id.* ("If the defense is to create barriers, and to make litigation expensive, so as to avoid trial, the opposition by defendants to a single trial can better be understood and appreciated.").

Antitrust conspiracy cases are especially well-suited for class-treatment because the central issues—common proof of pass-through, impact and damages—are common to every antitrust defendant and class member. Here, the issues that Defendants assert preclude class certification are problems of Defendants' own making. As the parties whose wrongful conduct injured Plaintiffs in a way that made

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[8] Ironically, DoorDash originally sought to dismiss a class action pending in a different venue on the grounds that the couriers had a duty to arbitrate. *Id.* at 1066. The Court noted that DoorDash "blanche[d] at the cost of the filing fees it agreed to pay in the arbitration clause. No doubt, [because it] never expected that so many would actually seek arbitration. Instead, in irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this order." *Id.* at 1068.

[9] The Advisory Committee Notes to Fed. R. Civ. P. 23 cite *Weeks. v. Bareco Oil Co.* approvingly as a case that properly weighs the factors courts consider when assessing predominance. Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment.

it difficult to ascertain their precise damages, Defendants should not be permitted to avoid the risk of uncertainty by erecting new barriers to class certification.

III. CONCLUSION

For the foregoing reasons, the Ninth Circuit should affirm the district court's grant of class certification.

Dated: September 10, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,154 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word, Times New Roman 14-point font.

Dated: September 10, 2021

/s/ Deborah A. Elman
Deborah A. Elman

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2021, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Deborah A. Elman
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