No. 19-56514
Scheduled for Oral Argument - En Banc on September 22, 2021

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, Case No. 3:15-md-02670-JLS-MDD

DEFENDANTS-APPELLANTS' SUPPLEMENTAL EN BANC BRIEF

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INTRODUCTION

Plaintiffs in this case sought certification of three classes based on the assumption that every direct purchaser of packaged tuna in the United States was overcharged by the same percentage. That assumption defies the realities of the marketplace—which is characterized by individualized negotiations and other individualized factors affecting pricing, such as retail strategies. The panel unanimously (and properly) recognized that the class certification decision here cannot stand, but it disagreed on certain aspects of how the case should proceed on remand. The panel majority got it right in three main respects.

First, the panel majority correctly held that the presence of a more than *de minimis* number of uninjured class members precludes certification. A more than *de minimis* number of uninjured class members means that individualized inquiries about injury (a necessary element of the underlying antitrust claim) and injury-in-fact (a necessary element of Article III standing) will predominate over questions common to the class. The *de minimis* requirement is firmly grounded in this Court's own precedent and has been adopted by every Court of Appeals to consider the question. Any contrary decision would bring this Court into conflict both with the decisions of other circuits and with the Supreme Court's own precedents.

Second, the panel also correctly recognized that representative evidence—including the averaging assumptions Plaintiffs' experts employed—is impermissible

if it masks differences among class members and it could not be used "to establish liability if [each class member] had brought an individual action." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 455 (2016). The panel remanded for a determination whether Plaintiffs' experts' averaging assumptions in fact masked individualized differences here, but the record already shows that they did. As Defendants' expert showed, without the averaging assumption, Plaintiffs' model could not show injury to 28% of the direct purchaser class (and 48% when Defendants' actual costs are used and not the artificial "cost indexes" Plaintiffs' experts employed). This evidence shows that Plaintiffs' models *depend* on masking individualized differences among class members in attempting to manufacture predominance.

Third, the panel unanimously agreed that the district court erred in failing to resolve the dispute over the extent of uninjured class members. That determination, as the panel held, must be made by the district court *before* any class is certified. Accordingly, every member of the panel agreed that the certification decision must be vacated. The en banc Court should do the same.

STATEMENT OF THE CASE

This appeal arises from antitrust suits by purchasers of packaged tuna. Plaintiffs sought to certify three classes: (1) hundreds of direct purchasers ranging from nationwide mega-buyers like Costco and Amazon to local distributors and retailers (DPPs); (2) millions of individuals who bought tuna for personal

consumption from retailers ranging from big-box chains to convenience stores (EPPs); and (3) thousands of individuals and companies who bought bulk-sized tuna from certain distributors for resale as prepared foods like tuna salad (CFPs).

A. Packaged Tuna Market

There are many types of packed tuna products, including 5-ounce brand-name cans of tuna; private-label products (*e.g.*, store-brand products sold by Trader Joe's and Costco); and food-service-sized private-label and branded products. These different products are sold through different channels.

For branded products, each Defendant issues a national price "list." However, the vast majority of Defendants' customers do not pay list price. Rather, they negotiate individually with each Defendant, ER1712-13, and some negotiations do not even begin with list prices, ER561 (Kroger); ER1178-80 (Giant Eagle). Indeed, many power buyers resist or refuse price increases. *See, e.g.*, ER1116.

Private-label products (*i.e.*, products made by Defendants or other manufacturers but sold under a store's own label, like Costco's Kirkland tuna) do not appear on Defendants' national price lists. ER1717; ER1713. Instead, private-label purchasers set the specifications for the products they want to purchase and sell under their own store name and then use bespoke bidding processes, in which list prices play no role. *See, e.g.*, *id.*; ER1118-19 (HEB); ER1129 (Golub). Many companies (including non-Defendants) participate in these processes, and the store

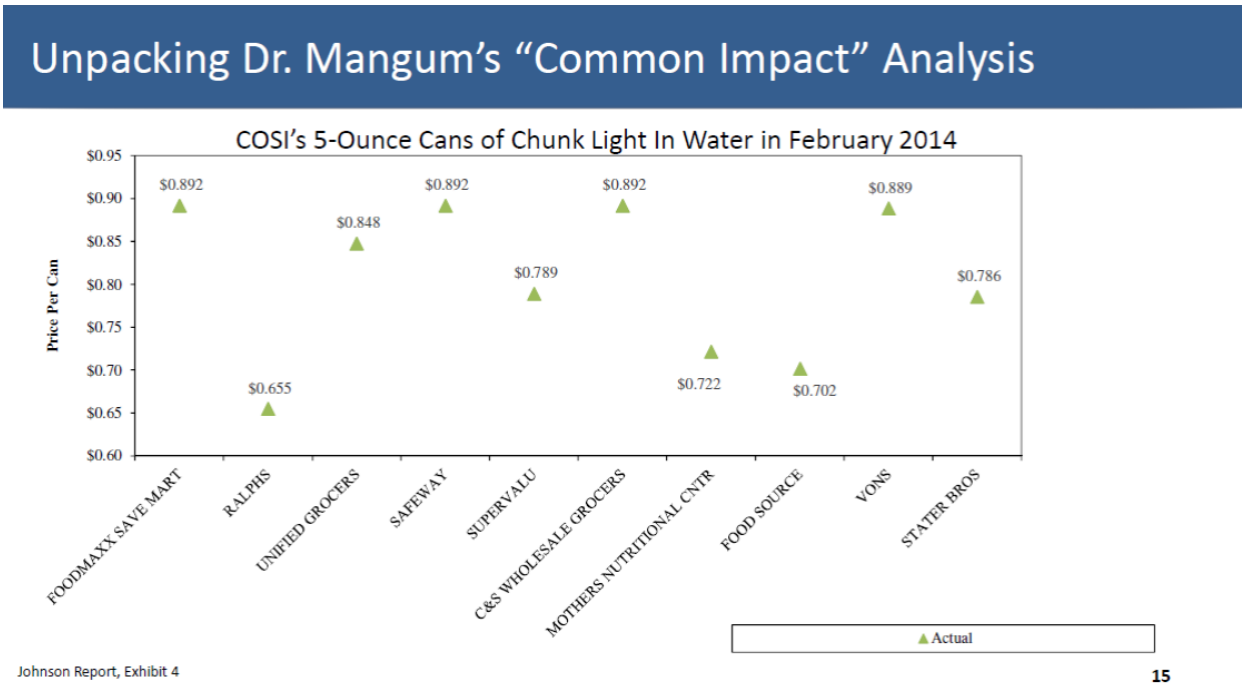
awards the private-label supply contract to the lowest bidder. ER1713; ER1717; ER216-25; ER1193-94.

In addition to these different sales channels, multiple other individualized factors play into variation in tuna prices, including:

- bargaining power
- procurement strategies
- retail strategies
- purchasing priorities
- product variation

Defs.' Br. 7-9.

To illustrate, California direct purchasers paid widely divergent prices for the *same* 5-ounce branded canned tuna during the *same* month:



ER1018. As this chart shows, the prices paid by direct purchasers in California varied by as much as 23 cents for the same 5-ounce can of tuna in February 2014.

This wide variation among *direct purchaser* prices in turn feeds into variation in *indirect purchaser* prices. Different direct purchasers not only pay different prices for packaged tuna, but the degree to which they "pass through" any changes in those prices to consumers varies greatly too. ER1664-65. Large retailers like Costco may choose to absorb some or all of a price increase, ER1662-63, and retail sales strategies (*e.g.*, focal-point pricing and loss-leader pricing, Defs.' Br. 11-12) often lead to sales to consumers at prices below the store's acquisition cost, ER1627-28; ER1651; ER1662-63; ER2204-05. Accordingly, in many instances, any price increase borne by a direct purchaser will not be passed on to an indirect purchaser.

B. Class Certification Decision

In an attempt to satisfy Rule 23(b)(3)'s predominance requirement, all three classes relied on statistical models that *assumed* that all direct purchasers were overcharged by *the same average percentages* as a result of the alleged conspiracy. *See, e.g.*, ER1017; ER1479; ER2191-92; ER1629-30; ER2212. Based on that assumption, DPPs' expert claimed his model showed injury to 94.5% of the class. ER2019. But that figure was entirely artificial.

As Defendants' experts explained, those averaging assumptions are untenable given the realities of the marketplace—where packaged tuna prices are individually negotiated, and direct purchasers are differently situated in those negotiations. To account for this reality, Defendants' expert ran DPPs' model with one modification: Instead of calculating a single average overcharge for *all* direct purchasers, Defendants' expert allowed the overcharge to vary by direct purchaser. ER663; ER718-19; ER1026. Without the averaging assumption, DPPs' model could not show injury to at least 28% of the class (169 members)—including both large entities like Trader Joe's and smaller entities like Cento Fine Foods in New Jersey. ER718-24; ER1479-81.[1] DPPs' expert conceded that without the averaging assumption, his

[1] *Cf.* ER1616-21 (Amazon, Big Lots, Cost U Less, Costco, CVS, Demoulas Super Markets, Dollar General, Dollar Tree, Family Dollar, Food Lion, Fred Meyer, LA Foods, Randalls, Save-A-Lot, Save Mart Supermarkets, Shaw's Supermarkets, Smart & Final, ShopRite, Topco, Trader Joe's, Union Supply, Wegmans, 99 Cents Only Stores); ER455-57 (Amazon, Trader Joe's, CVS); ER1075-76 (Amazon,

model was incapable of measuring injury for 61 class members (10% of the class) because of the model type he used and did not return a statistically significant result for another 108 class members (16.7% of the class). ER720-23; ER1030; ER1351; ER1481. Thus, Plaintiffs' expert admitted that his model cannot show injury to over one-quarter of the class.

Plaintiffs' models also suffered from other fundamental flaws as well. For example, the models generated "false positives"—*i.e.*, showing impact where, by definition, there could not be any: Plaintiffs' models estimated purported overcharges during time periods outside Plaintiffs' conspiracy period and on products sold by non-Defendants. *See* ER1478-79 & n.65, 1471 & n.50; ER735-37, 741-42; ER1047-52, 1061-63; ER1738-39; ER229-34; ER1197. Plaintiffs' experts also used their own fabricated "cost indexes"—as opposed to Defendants' *actual* cost data produced in discovery. ER1490-94; ER1759-61. It is no mystery why; when using *actual* cost data, DPPs' model cannot show impact to 48% of class members. ER577; ER1042-44; ER1581. Plaintiffs' models also failed the "Chow Test"—a well-accepted statistical test—which confirms that Plaintiffs' pooling and use of averages was inappropriate as a matter of econometrics. ER1489-90 & n.112; ER1616-18 & n.41; ER1759-61 & n.84; *see* Defs.' Br. 21 n.9.

Trader Joe's, Food Lion, Dollar General, Big Lots, Save Mart Supermarkets); ER400 (Sam's Club, Ralph's, Peyton's, Wakefern, Costco).

Despite recognizing that predominance was the "most important[]" issue at class certification, ER12, and that Defendants' "criticisms are serious," ER23, the district court certified all three classes, ER58. The district court recognized that, if DPPs' "model [was] unable to show impact to over 28% of the class members," DPPs "would unquestionably" fail to satisfy predominance. ER16. But the court nonetheless deferred that question to a jury at trial on the belief that "determining which expert is correct is beyond the scope" of class certification and was "'ultimately a merits decision.'" ER23-24 (citation omitted). Flipping the burden of proof, the district court certified the classes because "Defendants ha[d] not persuaded the Court that [Plaintiffs'] model is unreliable." ER24.

C. Panel Decision

A panel of this Court unanimously concluded that the district court's certification decision must be vacated and remanded for the court to revisit its predominance inquiry. Op. 34-35. But the panel disagreed on how the remand should proceed. The panel majority held that the party seeking certification must show that "the number of uninjured class members [is] de minimis." *Id*. at 32 n.12. And because "Rule 23(b)(3) requires courts 'to make findings about predominance . . . *before* allowing the class,'" the panel majority held that the district court erred by failing to consider whether the putative classes swept in too many uninjured members. *Id*. at 33 (citation omitted). The panel also held (as Defendants

had argued) that representative evidence can be used only if "each class member could have relied on that sample to establish liability if he or she had brought an individual action," *id.* at 22 (quoting *Tyson Foods*, 577 U.S. at 455), and if it does not "*in fact* mask individualized differences," *id.* at 28. The panel then remanded for the district court to rigorously analyze whether Plaintiffs' averaging assumptions "*did* mask individual differences among the class members, such as bargaining power, negotiation position, and marketing strategies." *Id*. at 31-32.

Judge Hurwitz agreed that the district court's certification decision must be vacated because of the court's flawed predominance inquiry, but disagreed with the *de minimis* rule. *Id.* at 35-36 (concurring in part and dissenting in part).

ARGUMENT

I. THE PANEL MAJORITY CORRECTLY HELD THAT A CLASS WITH A MORE THAN *DE MINIMIS* NUMBER OF UNINJURED MEMBERS CANNOT BE CERTIFIED

The panel majority properly held that the presence of a more than *de minimis* number of uninjured class members precludes class certification. Op. 32-33.

A. The Panel Majority's *De Minimis* Requirement Is Correct

As the panel majority recognized, Rule 23(b)(3)'s predominance requirement is "exacting." Op. 15. Class litigation is proper only where the "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (citation omitted). It cannot alter legal

burdens or prejudice a defendant's right to advance individualized defenses. *See id.* at 455-60; *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011).

This Court has explained that assessment of predominance "begins . . . with the elements of the underlying cause of action." *Walker v. Life Ins. Co. of the Sw.*, 953 F.3d 624, 630 (9th Cir. 2020) (citation omitted). A district court considering class certification must look "'through the prism' of Rule 23, [and] undertake a 'rigorous assessment of the available evidence and the method or methods by which the plaintiffs propose to use the evidence to prove' those elements." *Reinig v. RBS Citizens, N.A.*, 912 F.3d 115, 128 (3d Cir. 2018) (alteration in original) (citation omitted). A class may be certified only if each essential element of a cause of action is provable through "a common method of proof." *Castillo v. Bank of Am., NA*, 980 F.3d 723, 732-33 (9th Cir. 2020). The presence of a more than *de minimis* number of uninjured class members directly bears on predominance. *See Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1136 (9th Cir. 2016) (holding that the "existence of large numbers of class members" who were not injured may defeat predominance).

Injury is an essential element of Plaintiffs' antitrust claims, *see* 15 U.S.C. § 15, so the classes must be able to prove that element through a "common method of proof," *Castillo*, 980 F.3d at 732-33. There are a more than *de minimis* number of class members in all three classes who cannot rely on Plaintiffs' models to prove their injury. As a result, answering the question which class members can

demonstrate the impact necessary to establish liability will require numerous, individualized inquiries. These individualized inquiries will be sufficiently numerous and burdensome to predominate over the common questions. *See In re Rail Freight Surcharge Antitrust Litig.–MDL No. 1869* ("*Rail Freight I*"), 725 F.3d 244, 252 (D.C. Cir. 2013) (holding that unless "plaintiffs [can] prove" injury "through common evidence," "individual trials are necessary to establish whether a particular [class member] suffered harm from the price-fixing scheme," defeating predominance).

Proof of "average injury" fails to solve this problem because it leaves open whether any given individual was injured—which one must answer as many times as there are members in the class. *See Wal-Mart*, 564 U.S. at 349-50. If the issue is ignored—for example, by dismissing some uninjured class members as "anomalies"—the court effectively modifies substantive antitrust law, allowing uninjured class members to share in a recovery they could not obtain alone. But enlarging class members' substantive rights is improper. *Tyson Foods*, 577 U.S. at 458 ("[P]laintiffs and defendants" cannot have "different rights in a class proceeding than they could have asserted in an individual action."). And, by the same token, depriving defendants of their right to present individualized defenses to individualized issues is improper. *See id.*; *Wal-Mart*, 564 U.S. at 366-67; *In re Asacol Antitrust Litig.*, 907 F.3d 42, 55 (1st Cir. 2018).

Whether or to what extent a class includes uninjured members depends in part on how broadly a class is drawn. Oftentimes, a plaintiff can avoid this problem simply by narrowing the scope of a proposed class. *See Krakauer v. Dish Network, LLC*, 925 F.3d 643, 652 (4th Cir.), *cert. denied*, 140 S. Ct. 676 (2019). But if a plaintiff draws a class so large that it includes uninjured class members, then the individualized issues presented by the presence of those class members precludes certification of the proposed class. As this Court has recognized, plaintiffs must "filter the putative class members to exclude those who were never" injured from the class. *Castillo*, 980 F.3d at 732; *see also Stuart v. State Farm Fire & Cas. Co.*, 910 F.3d 371, 377 (8th Cir. 2018); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006). The *de minimis* requirement thus serves the important function of counteracting the incentive to define classes in an overbroad manner.

The Supreme Court's intervening decision in *TransUnion* underscores that the presence of uninjured class members is also problematic because of its Article III dimension. As the Court explained, "[e]very class member must have Article III standing in order to recover individual damages," and every class member "must maintain their personal interest in the dispute at all stages of litigation." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021). Injury-in-fact is an essential part of Article III standing. "No concrete harm, no standing." *Id.* at 2200.

The Supreme Court in *TransUnion* declined to address in the first instance "whether *every* class member must demonstrate standing *before* a court certifies a class." *Id.* at 2208 n.4 (first emphasis added) (citing *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1273 (11th Cir. 2019)). But in reserving that question, the Court cited a decision—*Cordoba*—which holds that certifying a class where class members lack standing "poses a powerful problem under Rule 23(b)(3)'s predominance factor." *Cordoba*, 942 F.3d at 1264, 1273.

When a large number of class members have not suffered injury-in-fact, individualized inquiries will be required to identify which class members have been injured, and standing is not "capable of proof at trial through evidence that [is] common to the class." *Comcast Corp. v. Behrend*, 569 U.S. 27, 30 (2013); *see also Rail Freight I*, 725 F.3d at 252-53 ("Common questions of fact cannot predominate where there exists no reliable means of proving classwide injury in fact."); *see Cordoba*, 942 F.3d at 1274 ("When this standing question is added to the mix, individualized questions may predominate over common issues susceptible to class-wide proof."). Indeed, certifying a class with uninjured members likely exceeds the constitutional boundary of judicial authority under Article III, which "does not give

federal courts the power to order relief to any uninjured plaintiff, class action or not." *TransUnion*, 141 S. Ct. at 2208 (citation omitted).[2]

B. The Partial Dissent's Criticisms Of The *De Minimis* Requirement Are Unfounded

Judge Hurwitz's objections to the *de minimis* principle are unpersuasive.

First, the partial dissent reasoned that the *de minimis* requirement is atextual because Rule 23 "simply instructs the district court to determine whether common questions exceed others." Op. 37 (Hurwitz, J.). It is true that the inquiry focuses on the existence of common questions. But the *de minimis* inquiry is a tool for implementing Rule 23(b)(3)'s textual requirement that "questions of law or fact common to class members predominate" over individual ones. When large numbers of class members are uninjured, individualized inquiries are required to determine injury (or lack thereof) on a case-by-case basis. The larger the share of uninjured class members, the more individualized inquiries are necessary—and those inquires eventually will predominate over the common questions. The *de minimis*

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[2] The predominance inquiry is context-specific. *See In re Rail Freight Fuel Surcharge Antitrust Litig.–MDL No. 1869* ("*Rail Freight II*"), 934 F.3d 619, 624-25 (D.C. Cir. 2019); *Asacol*, 907 F.3d at 54. For example, in a price-fixing case that involves "a homogeneous or fungible product which was marketed in a similar manner throughout the country" (say, wheat sold via a commodity exchange), injury is more likely to be uniform and thus individualized issues are less likely to predominate. *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 324 (5th Cir. 1978). But here, where the market is characterized by individualized negotiations and the classes are drawn so broadly that Plaintiffs' own model fails to establish injury for a more than *de minimis* number of class members (at least 28% of DPPs), they will.

requirement is thus simply a way of implementing the core textual requirement of Rule 23(b)(3) that common questions must predominate.

Second, the partial dissent reasoned class certification is permitted so long as uninjured class members can be "winnow[ed] out" later. Op. 36 (Hurwitz, J.) (citation omitted). This approach improperly assumes that it is enough to show an aggregate harm to the class *as a whole*, and that the presence of uninjured class members can be sorted out later. But a "certify now, winnow later" rule flouts the principle that the requirements of Rule 23 must be met *before* a class is certified, which the partial dissent itself recognized. *Id.* at 35. As the Supreme Court has held, Rule 23(b)(3) "requires the judge to make findings about predominance and superiority *before* allowing the class." *Wal-Mart*, 564 U.S. at 363 (emphasis added). And where a purported class's proposed "common proof" in fact shows injury to only, say, 72% of the class, that purported class has not shown that it can "prove, through common evidence, that all class members were in fact injured"—and thus has not satisfied Rule 23's requirements. *In re Rail Freight Fuel Surcharge Antitrust Litig.–MDL No. 1869* ("*Rail Freight II*"), 934 F.3d 619, 624 (D.C. Cir. 2019).

The partial dissent's approach also disregards that it is the plaintiff's burden to identify a proposed class that meets the requirements of Rule 23. *See Wal-Mart*, 564 U.S. at 350. Often, the presence of uninjured class members can be avoided simply by drawing the proposed class more narrowly. *See supra* 12. But if the

presence of uninjured class members is permitted, plaintiffs will be encouraged to draw classes as broadly as possible to maximize the potential liability defendants face. And "there would be no logical reason to prevent a named plaintiff from bringing suit on behalf of a large class of people, forty-nine percent or even ninety-nine percent of whom were not injured, so long as aggregate damages on behalf of 'the class' were reduced proportionately." *Asacol*, 907 F.3d at 56.

More fundamentally, a "certify now, winnow later" approach also raises core Article III problems. Once a class is certified, defendants are subjected to additional demands and settlement pressures, and absent class members may be subject to legally binding judgments. *See* Op. 30 n.8 (explaining the burdens of this approach on defendants); *see also Taylor v. Sturgell*, 553 U.S. 880, 894 (2008) (preclusion); *Devlin v. Scardelletti*, 536 U.S. 1, 10-11 (2002) (settlements); *Cooper v. Fed. Rsrv. Bank of Richmond*, 467 U.S. 867, 874 (1984) (judgments). A "certify now, winnow later" approach would thus permit a court to exercise power over individuals who fall outside its jurisdiction. *See Lewis v. Casey*, 518 U.S. 343, 360 n.7 (1996) ("Courts have no power to presume and remediate harm that has not been established."); *see also TransUnion*, 141 S. Ct. at 2208.[3]

[3] The partial dissent's approach resembles the "*Lusardi* method" that numerous courts (including this Circuit) have rejected in the FLSA collective action context. *See Campbell v. City of Los Angeles*, 903 F.3d 1090, 1112 (9th Cir. 2018); *Swales v. KLLM Transp. Servs., LLC*, 985 F.3d 430, 440 (5th Cir. 2021). Under that approach,

In any event, the partial dissent did not identify any mechanism for post-certification winnowing. Nor did Plaintiffs—who bear the burden of affirmatively establishing that certification is appropriate. *Wal-Mart*, 564 U.S. at 350. The question is not simply whether a class can be winnowed to "ensure that uninjured plaintiffs will not recover," Op. 36, but whether a district court can do so *without* individualized inquiries that predominate over common questions, *see Cordoba*, 942 F.3d at 1275. Merely pointing to some hypothetical future winnowing process just sidesteps the core predominance question. *See* Op. 30 n.8.

Third, the partial dissent reasoned that sorting out uninjured class members is akin to making individualized damages determinations—which often does not defeat class certification. Op. 37 (Hurwitz, J.). But as this Court recently emphasized, injury and damages are fundamentally different. *See Castillo*, 980 F.3d at 730-32. The issue here is not that Plaintiffs are "unable to prove the *extent* of the damages suffered by each individual plaintiff at this stage." *Id.* at 732 (emphasis added). Rather, the question is whether they have "been unable to provide a common method of proving the fact of injury and any *liability*." *Id.* (emphasis added).

Showing that a plaintiff has suffered injury is necessary to establish an essential element of the class claim itself—and therefore liability. *Id.* at 731; *see*

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the court first "conditionally certifies the collective action," and the employer may move to decertify after discovery. *In re JPMorgan Chase & Co.*, 916 F.3d 494, 500-01 (5th Cir. 2019). There is no basis to import this method to Rule 23 itself.

supra 10-11. Moreover, the fact of injury goes to Article III standing, which just underscores the need to address the presence of uninjured class members *before* certification. *See supra* 12-14. Thus, unlike the extent of damages, a court must consider whether class members in fact were injured in deciding whether common questions of law and fact predominate before certifying any class.[4]

Fourth, the partial dissent objected to the idea of a numerical threshold. Op. 39-40 (Hurwitz, J.). But the panel majority did not adopt a "numerical or bright-line rule." *Id.* at 32 (panel op.). Instead, like the district court itself, the majority correctly concluded that regardless of the specific threshold, a class where close to *one-third* of members are uninjured cannot be certified. *Id.* Other courts have observed that "the 'few reported decisions' involving uninjured class members 'suggest that 5% to 6% constitutes the outer limits of a *de minimis* number.'" *Rail Freight II*, 934 F.3d at 624-25 (citation omitted). But any assessment of how many uninjured class members is *de minimis*—such that individualized injury assessments would predominate—would naturally depend on the nature of the putative class and

[4] *Vaquero v. Ashley Furniture Industries, Inc.*, 824 F.3d 1150 (9th Cir. 2016), is not to the contrary. As this Court has recognized, *Vaquero* "stands for the proposition that individualized damages calculations do not defeat predominance." *Castillo*, 980 F.3d at 731. It has no bearing on the predominance issue here, which "goes to *liability* rather than damages." *Id.* (citation omitted).

its claims. *See Rail Freight II*, 934 F.3d at 625; *Asacol*, 907 F.3d at 54. And all agree that a class with at least 28% uninjured class members cannot be certified.

C. As The Partial Dissent Recognized, Rejecting The *De Minimis* Requirement Would Create A Circuit Conflict

The partial dissent correctly recognized that adopting its position would create a circuit conflict. Op. 40 (Hurwitz, J.). Both the D.C. and First Circuits have held that the presence of a more than *de minimis* number of uninjured class members defeats predominance. In *Rail Freight II*, the D.C. Circuit held that predominance is defeated in the context of an alleged price-fixing conspiracy if the number of uninjured class members is more than "de minimis." 934 F.3d at 624-25. The First Circuit, too, has recognized the *de minimis* requirement. As Judge Kayatta explained for the court in *Asacol*, when "any class member may be uninjured, and there are apparently thousands who in fact suffered no injury," the "need to identify those individuals will predominate" and "render an adjudication unmanageable." 907 F.3d at 53-54; *see id.* at 56-57 (discussing cases from other circuits).[5]

[5] The partial dissent attempted to distinguish *Asacol* on the ground that the First Circuit did not define *de minimis* with a numerical threshold but rather in "functional terms." Op. 40 n.2 (Hurwitz, J.). But so did the panel majority here. *Id.* at 32 (panel op.).

II. THE PANEL MAJORITY CORRECTLY HELD THAT REPRESENTATIVE EVIDENCE IS NOT ALLOWED TO THE EXTENT IT MASKS INDIVIDUALIZED DIFFERENCES

The Court also should hold that Plaintiffs' averaging assumptions may not be used to establish predominance. Those assumptions would not "have been sufficient to sustain a jury finding" of injury in an individual action, *Tyson Foods*, 577 U.S. at 459, and impermissibly mask individualized differences among class members.

A. The Panel Majority Correctly Recognized The Requirements For The Use Of Representative Evidence

As the panel recognized, the Supreme Court has held that representative evidence cannot be used to establish predominance unless "each class member could have relied on that [evidence] to establish liability if he or she had brought an individual action." *Tyson Foods*, 577 U.S. at 455; *see Asacol*, 907 F.3d at 54.

The panel also correctly recognized that "[s]tatistical evidence is not a talisman. Op. 28. At a minimum, "[c]ourts must . . . rigorously analyze the use of such evidence to test its reliability and to see if the statistical modeling does *in fact* mask individualized differences." *Id.* Here, Plaintiffs' experts used averaging assumptions to paper over individualized differences among class members. For example, the prices paid for private-label products swept in by the overbroad class definitions were set without reference to price lists. ER1717; ER1713. And the prices direct purchasers paid for Defendants' branded products were set through individualized bilateral negotiations, and reflected not only differences in bargaining

power but also differences in procurement strategy, negotiation priorities, and product preference. *See supra* 3-4. As a result, it is undisputed that many purchasers suffered *no* price increase due to the alleged conspiracy. Yet, Plaintiffs' three models assumed that all direct purchasers suffered the same average overcharges, and that these overcharges were passed on in their entirety to every indirect purchaser, no matter the circumstances. That use of averaging is impermissible because it obscures important differences among class members. *See Wal-Mart*, 564 U.S. at 367; *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 307 (5th Cir. 2003).

The panel apparently believed Defendants were advocating for a "categorical[]" rule against the use of representative evidence at class certification. Op. 26. Not so. Defendants have consistently argued—in line with *Tyson Foods*—that representative evidence may be allowed only if it could be used to establish liability in an individual action. *See* Defs.' Br. 2-3, 27, 35-41; Reply Br. 2, 4-6, 9-10. This is a case-by-case inquiry that depends, among other things, on the nature of the class claims and the representative evidence at issue. *Compare Tyson Foods*, 577 U.S. at 459 ("As *Mt. Clemens* confirms, under these circumstances the experiences of a subset of employees can be probative as to the experiences of all of them."), *with id.* at 458 (In *Wal-Mart*, because "the employees were not similarly situated," if they "had brought 1½ million individual suits, there would be little or no role for representative evidence."). If an *individual member* could not use the

representative evidence to sustain a jury finding of liability in a hypothetical individual action, then the *class* cannot use that evidence in a class action.

B. The Representative Evidence In This Case Is Impermissible

After correctly recognizing the *Tyson Foods* rule for when representative evidence is allowed, the panel found that Plaintiffs' use of averaging here was not necessarily impermissible, so long as (1) the "type of representative evidence [Plaintiffs proffered] can be used to prove injury in individual antitrust suits" and (2) it does not "*in fact* mask individualized differences." Op. 28. But the record here shows that Plaintiffs' representative evidence flunks both of those requirements.

First, Plaintiffs' averaging assumptions would not be sufficient to establish injury (a required element for establishing liability) in an antitrust action by any individual class member. Here, as in *Asacol*, Plaintiffs have "point[ed] to no such substantive law that would make an opinion that ninety percent of class members were injured both admissible and sufficient to prove that any given individual class member was injured." *See Asacol*, 907 F.3d at 54. To the contrary, injury "is a question unique to each particular plaintiff and one that must be proved with certainty." *Bell Atl. Corp.*, 339 F.3d at 302 (citation omitted). In any individual case brought by a given member of the class, that class member could not establish her own injury by showing—through a regression model or otherwise—that a *group* of entities suffered some average injury. The existence of an *average* injury, without

more, says nothing about whether any particular purchaser was injured—especially here, given the numerous individualized factors that influence pricing. *See supra* 3-5. Instead, as Plaintiffs' counsel appeared to acknowledge at argument (Oral Argument at 47:17), the class member would need to present data related to its *own* purchases and its *own* injury in an individual action.[6]

For example, in the NBA's COVID-19 bubble, scoring was up across the league by an average of nine points per game—compared to before the bubble. *See Scoring in NBA's bubble reaching new heights*, ESPN (Aug. 9, 2020), https://www.espn.com/nba/story/_/id/29628560/scoring-nba-bubble-reaching-new-heights. That scoring totals were up *on average* across the NBA, however, does not prove that every NBA team's scoring was up. In fact, 5 of the 22 teams in the bubble scored *less* in the bubble than they had before. *Id.* Put simply, an increase in average scoring did not reflect that all teams in the bubble scored more. Instead, for nearly 23% of the teams, scoring was actually *down.* The same is true here: An average price increase across *all* purchasers in no way means that *each* purchaser suffered a

[6] It is not enough that representative evidence may be admissible in an individual action to bolster other evidence of injury. Under *Tyson Foods*, Plaintiffs must show that their representative evidence would "have been *sufficient to sustain* a jury finding" as to injury in an individual action. *Tyson Foods*, 577 U.S. at 459 (emphasis added). Even if Plaintiffs' representative evidence were admissible along with other evidence to show injury, the averaging assumptions *alone* would not be sufficient to sustain a jury finding on antitrust impact in an *individual* case.

price increase. Indeed, when Defendants' expert ran DPPs' regression customer-by-customer, there were no overcharges for 28% of class members.

And, tellingly, none of the plaintiffs who sued Defendants individually even attempted to rely on Plaintiffs' experts' averaging assumptions to establish that they actually were injured. In this multidistrict litigation, more than 100 direct purchasers have pursued their own cases against Defendants rather than participate in the DPP class. Not one relied on Plaintiffs' averages to attempt to establish it was injured by the alleged conspiracy. Instead, those individual plaintiffs relied on their own data to show impact (leaving Defendants with the opportunity to raise individualized defenses about what that data or other evidence shows). Defs.' Br. 3, 44.

Second, the record shows that Plaintiffs' averaging assumptions *do* mask individualized differences among class members that bear on whether class members suffered any injury. To begin with, the panel majority misunderstood how the DPPs' model used averages. DPPs' expert did not "average[] the overcharge calculation using Defendants' own data, and then use[] that average in a regression model to calculate what percentage of the class was impacted." Op. 26. Rather, he used a pooled regression to calculate a classwide average overcharge of 10.28%. He then purported to calculate the percentage of the class that was impacted by subtracting the average 10.28% overcharge from a "predicted actual" price for every single class transaction across the board to come up with a "predicted but-for" price, and

recorded "impact" whenever a class member had at least one transaction where its "predicted but-for" price was lower than its actual price. In other words, DPPs' expert did not simply use an average overcharge in a regression model to calculate the percentage of the class that was impacted: He created the illusion of classwide impact by applying the average 10.28% overcharge to *every one* of the hundreds of millions of class transactions. Defs.' Br. 17-19.

The panel also reasoned that, even assuming the existence of individualized differences, an increase in the "list price" for packaged tuna products necessarily would have raised the "baseline price" for all class members at the start of negotiations. Op. 27. But that too is incorrect. The evidence shows that many negotiations did not start from a list price. For instance, purchasers of private-label tuna procured tuna through bespoke bid processes, which were divorced from the list prices for branded products. *See supra* 3-4. Even for branded products, some purchasers used individualized bidding processes without reference to any list price. *See supra* 3. And the vast majority of purchasers negotiated discounts, rebates, and other promotional benefits, Defs.' Br. 6, such that a "minimal increase in national pricing would not necessarily mean that all consumers would pay more," *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 29 (1st Cir. 2008).[7] This

[7] Other courts have reached the same conclusion in similar circumstances. *See, e.g.*, *Robinson v. Texas Auto. Dealers Ass'n*, 387 F.3d 416, 423 (5th Cir. 2004)

record evidence disproves Plaintiffs' suggestion that all direct purchasers were "bargaining within a sandbox"—rather, numerous purchasers negotiated prices *entirely independent* from the list price. ER292.[8]

As Judge Kleinfeld observed at oral argument, there is no basis to "lump[] together" in one class those who may pay list price and those "who never pay list price." Oral Argument at 10:20. Yet that is exactly what the proposed class does. It masks over all the individualized differences affecting pricing.

Furthermore, the record reflects that many class members—even those who did not procure tuna through bidding processes—were not injured by the alleged price-fixing conspiracy. As Defendants' expert showed, DPPs' model failed to show injury for nearly *one-third* of DPPs when the average overcharge assumption was removed. *See supra* 6. And EPPs' model showed that numerous direct purchasers—including Amazon, Trader Joe's, and Food Lion—actually *paid less* during the alleged conspiracy than they otherwise would have. ER1076. This record evidence disproves the panel majority's hypothesis that an increase in "the baseline price at

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(rejecting evidence of inflated baseline for negotiations because it "defie[d] the realities of the haggling" in the market); *In re Fla. Cement & Concrete Antitrust Litig.*, No. 09-23187-CIV, 2012 WL 27668, at *9 (S.D. Fla. Jan. 3, 2012) (discounting a Dr. Mangum model for similar reasons).

[8] The "sandbox" testimony relied upon by Plaintiffs at oral argument actually confirms that negotiations happened "on top of" any list price. DAPs' Opp'n to Statutes of Limitations MSJ, Ex. 15 at 79 (Dkt. No. 2084). Citations to "Dkt." refer to the docket in the lower court.

the start of negotiations" would have increased "the range of prices that resulted from negotiation." Op. 27.

The panel seemed to treat as dispositive the fact that Walmart "was shown to have suffered overcharges as a result of Defendants' conduct." Op. 27. But Walmart is just one purchaser, and the evidence shows that numerous direct purchasers were *not* impacted at all by the alleged conspiracy. These include large retailers like Amazon, Big Lots, Costco, CVS, Dollar General, Dollar Tree, Food Lion, Sam's Club, Trader Joe's, Wegmans—and the list goes on. *See supra* 6 & n.1. Moreover, the underlying finding of injury for Walmart was based not on averaging, but on a Walmart-specific analysis that allowed for the estimation of a separate overcharge to Walmart. ER1467; ER1479-81; ER1606; ER1610-11.

Plaintiffs have argued that, even without the averaging assumption, DPPs' model shows injury to 98.5% of the class. Pls.' Br. 22. But here again, Plaintiffs are just cooking the numbers. DPPs' 98.5% figure simply backs out the many DPPs for whom their model is unable to establish *any* injury: the 61 class members (10% of the class) for whom the model provides no answer at all, and the 108 class members (16.7% of the class) for whom the answer is not statistically significant. ER1481. But there is no reason why these class members should be disregarded. They are, after all, still a part of the putative class. And the model's inability to show injury confirms that Plaintiffs cannot meet their Rule 23 burden of showing that

"they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy." *Rail Freight II*, 934 F.3d at 624.

In the end, the panel explained that, even "if Plaintiffs' representative evidence *could* be used to satisfy predominance, we cannot embrace their conclusions and averaging assumptions uncritically." Op. 28 Instead, the panel stressed, "[c]ourts must still rigorously analyze the use of such evidence to test its reliability and to see if the statistical modeling does *in fact* mask individualized differences." *Id*. The panel then vacated the district court's certification decision and remanded for the court to determine whether Plaintiffs' models were unreliable in proving injury or masked individualized differences. *Id*.

We agree that the certification decision cannot stand, but the panel overlooked that ample evidence already in the record establishes that the models are flawed:

- The models generated false positives.
- The models flunked the Chow Test.
- The models used cost indexes rather than actual cost data.
- And when the average overcharge assumptions are eliminated, the models cannot show injury to at least 28% of the class (48% if actual cost data is used).

See supra 6-7.

Accordingly, this Court can and should hold—on the record before it—that these Plaintiffs' use of average overcharge assumptions is improper.

III. THE PANEL CORRECTLY CONCLUDED THAT THE CLASS CERTIFICATION DECISION CANNOT STAND

The panel unanimously agreed that, at a minimum, the class certification order here must be vacated because the district court failed to make key factual findings underlying the predominance inquiry. Op. 34-35; *id.* at 35 (Hurwitz, J.).

The district court in this case declined to resolve the parties' dispute over the extent of uninjured class members, reasoning that "determining which expert is correct is beyond the scope" of class certification and is "'ultimately a merits decision'" for the jury. ER23-24 (citation omitted). As both the panel majority and the partial dissent agreed, that decision is plainly at odds with this Court's—and the Supreme Court's—precedents. "[T]he plain text of Rule 23" requires "that the district court, not a jury, must resolve factual disputes bearing on predominance." *Id*. at 35 (Hurwitz, J., concurring in part and dissenting in part); *see id.* at 28-29 (panel op.); *see Wal-Mart*, 564 U.S. at 363. This includes resolving disputes over any "battle of the experts," *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011), and assessing any expert evidence's "reliab[ility] in proving or disproving the elements of the relevant cause of action," *Tyson Foods*, 577 U.S. at 455.

To make matters worse, the district court compounded its error by "improperly shift[ing]" of the burden of persuasion "to Defendants to affirmatively disprove the claims made by Plaintiffs' expert." Op. 34 n.14. It is bedrock Rule 23 law that the "*party seeking class certification* must affirmatively demonstrate his compliance with the Rule." *Wal-Mart*, 564 U.S. at 350 (emphasis added). The district court here flipped that principle on its head. That, too, was error.

Accordingly, as the panel unanimously and correctly agreed, no matter the answers to the first two questions discussed above, the district court's class certification decision still cannot stand.

CONCLUSION

For these reasons and those in Defendants' prior briefing, the district court's class certification order should be reversed, and this case should be remanded.

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Respectfully submitted,

s/ Gregory G. Garre

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rule of Appellate Procedure 32(a)(5)-(6), Ninth Circuit Rule 32-1, and this Court's August 20, 2021 Order, Defendants-Appellants' Supplemental En Banc Brief is proportionately spaced, has a typeface of 14 point and contains 6,908 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

s/ *Gregory G. Garre*
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