Nos. 14-1521 & 14-1522

United States Court of Appeals
for the First Circuit

IN RE: NEXIUM ANTITRUST LITIGATION

ASTRAZENECA AB, ET AL.,

Appellants,

v.

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

Appellees.

On Appeal from the United States District Court
for the District of Massachusetts (MDL No. 12-2409)
(Hon. William G. Young)

BRIEF OF *AMICUS CURIAE* THE AMERICAN ANTITRUST INSTITUTE SUPPORTING APPELLEES AND AFFIRMANCE

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INTEREST OF *AMICUS CURIAE*

The American Antitrust Institute (AAI) is an independent and nonprofit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. AAI is managed by its Board of Directors with the guidance of an Advisory Board consisting of over 125 prominent antitrust lawyers, law professors, economists and business leaders.[1] *See* http://www.antitrustinstitute.org. The goals of U.S. competition policy could be seriously undermined if, as Appellants argue, antitrust plaintiffs must show harm to every class member under Federal Rule of Civil Procedure 23(b)(3). Appellants' reading of the predominance requirement would make private enforcement virtually impossible in many cases where the alternative to a class action is no enforcement at all.

[1] All Parties consent to the filing of this brief. The Board of Directors alone has approved this filing for AAI; individual views of members of the Board of Directors or Advisory Board may differ from AAI's positions. Two members of AAI's Advisory Board represent Appellees in this case; one member of the Board of Directors is a partner whose firm represents direct purchasers in a related case; none played any role in the Directors' deliberations. Pursuant to Fed. R. App. P. 29(c)(5), 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 AAI or its counsel – has contributed money that was intended to fund its preparation or submission.

SUMMARY OF ARGUMENT

At issue is whether plaintiffs in an antitrust action must be able to show harm to every class member to satisfy the predominance requirement of Rule 23(b)(3). The language of Rule 23(b)(3) does not support such a rule. It requires in relevant part that "the questions of law or fact common to class members predominate over any questions affecting only individual class members." Fed. R. Civ. P 23(b)(3). The Rule does not require that *each* issue be common to every class member. It provides only that common issues *predominate*.

Antitrust litigation often involves many common issues, including whether defendants engaged in the alleged conduct, whether that conduct violated the antitrust laws, and whether any antitrust violation generally harmed the class. Those issues often predominate. It is thus possible—indeed, routine—for common issues to predominate in litigation and at trial, even if some individual issues arise in assessing whether some class members suffered harm and even if some class members suffered no injury at all. That is a consequence of Rule 23(b)(3) requiring predominance, not uniformity.

No binding precedent requires this Court to rule otherwise. To the contrary, *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013), held that Rule 23(b)(3) does "*not* require a plaintiff" to prove that each element of her claim is susceptible to classwide proof. *Id*. at 1196 (emphasis in original). Instead, it

requires that common questions "*predominate*." *Id*. (emphasis in original). *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548 (2011), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1435 (2013), respectively, require only that at least one issue must be common to the class and that the damages plaintiffs seek must match their theory of liability, conditions that can be satisfied even if some class members suffered no harm.

Similarly, the holding of *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6 (1st Cir. 2008), does not conflict with *Amgen*, even if *dicta* from that case does. Any doubt about this issue was eliminated by *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156 (1st Cir. 2009), in which the defendant argued, relying on *New Motor Vehicles*, that plaintiffs had not shown harm to every class member (which was true), *id*. at 194-95, 197, and the First Circuit nevertheless affirmed certification of a class. *Id*. at 199.

As a matter of policy, imposing a requirement of harm to every class member would greatly undermine the primary purposes of antitrust litigation—compensation and deterrence—while compromising its accuracy and efficiency.

ARGUMENT

I. Federal Rule of Civil Procedure 23(b)(3) Does Not Require a Showing of Harm to All Class Members.

For class certification, plaintiffs must satisfy all of the requirements of Rule 23(a) and one of the provisions of Rule 23(b). As is typical in antitrust litigation, Rule 23(a) is not at issue on this appeal. The sole point of contention is whether plaintiffs have shown they can meet the Rule 23(b)(3) requirement that common issues predominate. Plaintiffs must demonstrate that the issues will be predominantly common as they attempt to prove their claims. *Amgen*, 133 S. Ct. at 1196-97. The predominance requirement is designed to ensure that the class is sufficiently cohesive for a representative action to make practical sense. *Id*. at 1196-97 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)).

Common issues typically predominate in purchaser antitrust class actions. Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 Geo. Mason L. Rev. 983, 989-93 (2010) [hereinafter Davis & Cramer, *Politics of Procedure*]. Defendants either did or did not do what plaintiffs claim they did. Defendants' conduct either was illegal or it was not. The conduct either had a general tendency to increase the prices plaintiffs paid or it did not.

If these common issues predominate, that should by itself satisfy the Rule 23(b)(3) predominance requirement. *Cordes & Co. Fin. Servs., Inc. v. A.G.*

Edwards & Sons, Inc., 502 F.3d 91, 108 (2d Cir. 2007) ("Even if the district court concludes that the issue of injury-in-fact presents individual questions, . . . it does not necessarily follow that they predominate over common ones and that class action treatment is therefore unwarranted."); Joshua P. Davis & Eric L. Cramer, *Of Vulnerable Monopolists: Questionable Innovation in the Standard for Class Certification in Antitrust Cases*, 41 Rutgers L.J. 355, 358-60 (2009) [hereinafter Davis & Cramer, *Vulnerable Monopolists*]; Davis & Cramer, *Politics of Procedure*, 17 Geo. Mason L. Rev. at 989-93.

A difficult issue, however, can be whether defendants' conduct harmed some significant proportion of the class. This issue has sometimes been called "common impact." That label should be understood as shorthand for the proposition that plaintiffs must offer common evidence capable of showing harm to the class members *to the extent necessary* for common issues—not individual issues—to predominate overall in the litigation. *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000) (holding common issues must predominate but that there need not be no individual issues*); see also Cordes*, 502 F.3d at 108-09 (same); *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 162 (3d Cir. 2002) (same); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001) ("The predominance requirement calls only for predominance, not exclusivity, of common questions.") (citation omitted); *In re Ford Motor Co.*

Ignition Switch Prods. Liab. Litig., 174 F.R.D. 332, 340 (D.N.J. 1997) ("That common issues must be shown to 'predominate' does not mean that individual issues need be nonexistent.").

This conclusion follows the admonition from *Amgen*:

> Rule 23(b)(3) . . . does *not* require a plaintiff seeking class certification to prove that each "elemen[t] of [her] claim [is] susceptible to classwide proof." What the rule does require is that common questions "*predominate* over any questions affecting only individual [class] members."

133 S. Ct. at 1196 (citations omitted) (alterations and emphasis in original).

At issue in *Amgen* was whether the plaintiff had to prove materiality to certify a class in a securities fraud case. *Id*. at 1191. The plaintiff invoked the "fraud-on-the-market" presumption, which allows a plaintiff, under appropriate circumstances, to prove reliance by establishing the materiality of a misrepresentation or omission. *Id*. The defendants argued that the plaintiff had to prove materiality as a prerequisite for class certification. *Id*.

The Supreme Court rejected that argument. *Id*. In doing so, it noted two flaws in defendants' position. First, an issue is common whether class members win or lose, as long as they do so together. *Id*. at 1196. Common issues predominate when the claim of a class "fail[s] in its entirety; there will be no

remaining issues to adjudicate." *Id*. Thus, plaintiffs need merely *attempt* to prove an element through common evidence for it to be common; they need not prevail.[2]

Defendants' argument failed for a second reason. Predominance does not require that there are *no* individual issues. Rather, the issue is whether "a proposed class is 'sufficiently cohesive to warrant adjudication by representation'—the focus of the predominance inquiry under Rule 23(b)(3)." *Id*. at 1196-97 (quoting *Amchem*, 521 U.S. at 623). The mere presence of *some* individual issues—particularly if they are "more imaginative than real"—does not suffice to "undermine class cohesion and thus [those issues] cannot be said to 'predominate' for purposes of Rule 23(b)(3)." *Id*. at 1197; *see also Cordes*, 502 F.3d at 108-09; *Visa Check*, 280 F.3d at 140; Davis & Cramer, *Politics of Procedure*, 17 Geo. Mason L. Rev. at 1006-08.

What, then, is the basis in Rule 23(b)(3) for requiring plaintiffs to prove harm to every class member? Advocates of this position rarely say. Appellants, for example, first assert that Rule 23(b)(3) requires predominance of common issues and then assert that predominance requires harm to every class member.

[2] *See Dukes*, 131 S. Ct. at 2551 (noting standard at class certification is whether an issue is "*capable* of classwide resolution—which means that determination of its truth *or falsity* will resolve an issue that is central to the validity of each of the claims in one stroke") (emphasis added); *Hydrogen Peroxide*, 552 F.3d at 311-12 (holding the plaintiffs' burden at class certification is not to prevail on the merits but to show issues are "capable of proof at trial through evidence that is common to the class"); *see generally* Davis & Cramer, *Politics of Procedure*, 17 Geo. Mason L. Rev. at 976-78.

App. Br. at 13-15. However, they never explain the logical connection between the two. There isn't one. *Predominance* does not require that common evidence satisfy every element of every claim for every class member. That would be *uniformity*. Rule 23(b)(3) does not require uniformity, only predominance. *See S. States Police Benev. Ass'n, Inc. v. First Choice Armor & Equip., Inc.*, 241 F.R.D. 85, 89 (D. Mass. 2007).

This is consistent with class trials of antitrust claims brought by purchasers, where the jury instructions generally do not address common impact at all. *See generally* Davis & Cramer, *Politics of Procedure*, 17 Geo. Mason L. Rev. at 990-91; Davis & Cramer, *Of Vulnerable Monopolists*, 41 Rutgers L.J. at 371-72 (same). Defendants generally raise common impact as the key issue *at class certification* but ignore that issue *at trial*, *id.*, even though the predominance inquiry is supposed to focus on the issues that actually will matter in adjudicating a case. *Amgen*, 133 S. Ct. at 1196-97; *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 n.8, 317, 319 (3d Cir. 2008) (explaining courts should consider how a trial on the merits would be conducted if a class were certified).

In sum, both logic and experience dictate that common issues can predominate even if some absent class members suffered no injury. Appellants never address that straightforward proposition.

II. Case Law Does Not Support Requiring a Showing of Harm to All Class Members.

Appellants cite various cases in contending that predominance requires evidence of harm to every class member. Two that figure centrally in their argument come from the Supreme Court, *Dukes* and *Comcast*. Neither supports their position. *Dukes* did not turn on predominance under Rule 23(b)(3) but rather on commonality under Rule 23(a)(2). *Dukes*, 131 S. Ct. at 2550-51. The Court, therefore, had no reason to address whether common issues can predominate despite the presence of some uninjured class members.

At issue in *Dukes* was whether plaintiffs satisfied the commonality requirement of Rule 23(a)(2). *Id*. Before the Court was a nationwide class of female Wal-Mart employees alleging sex discrimination. *Id*. at 2547-48. The Court concluded that there was not even a single issue that bound the class together. *Id*. at 2556-57. Instead, the class members' claims depended on different actions by different actors in different locations. *Id*.

Although the language of *Dukes* is not perfectly consistent, the Court implied commonality does *not* require uniformity among class members. The Court indicated a general company policy of discrimination would have sufficed for commonality. *Id*. at 2554-55. "'[W]hether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking'

is the essential question on which respondents' theory of commonality depends. If [plaintiffs' expert] has no answer to that question, we can safely disregard what he has to say." *Id*. at 2554.

The Court did *not* require a showing that 100% of Wal-Mart's decisions were determined by "stereotyped thinking" for commonality. The "essential question," instead, was whether those decisions comprised 0.5% or 95%. Ninety-five percent, it seems, would be enough for commonality. The Court thus indicated that even the single common issue required by Rule 23(a)(2) need not be a uniformly common issue.

It follows that the predominance of common issues required by Rule 23(b)(3) need not be predominance of uniformly common issues. As the Supreme Court recently clarified, "this has the effect of 'leav[ing] individualized questions . . . in the case.'" *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U. S. __, (slip op., at 14-15) (2014) (internal citation omitted). But "there is no reason to think that these questions will overwhelm common ones and render class certification inappropriate under Rule 23(b)(3)." *Id.* "That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate." *Id*. *Dukes* and *Halliburton* thus demonstrate that Rule 23(b)(3) does *not* require a showing of harm to every class member.

Comcast, upon which Appellants also rely heavily, provides even weaker support for requiring proof of harm to every class member. *Comcast* held that plaintiffs must seek only those damages they claim were caused by the conduct at issue. 133 S. Ct. at 1433. Plaintiffs offered a method of calculating the cumulative damages from four separate antitrust theories. *Id*. The trial court found only one of those theories susceptible to classwide treatment. Plaintiffs had not disaggregated the damages based on the single surviving theory. *Id*. The Supreme Court held—relying "on the straightforward application of class-certification principles," *id*. at 1433—that plaintiffs can seek only those damages stemming from the claims they may pursue. *Id*. at 1434. Failure to abide by that straightforward principle undermined predominance. As the Court explained, the "model purporting to serve as evidence of damages . . . must measure only those damages attributable to that theory. If the model does not attempt to do that, it cannot possibly establish damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id*. at 1433. The Court nevertheless cautioned that it was not disturbing the longstanding rule that damages "[c]alculations need not be exact." *Id.* (citing *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931)).

Neither *Dukes* nor *Comcast*, then, provides a basis for the view that plaintiffs must show harm to every class member. *Amgen* contradicts that

proposition. *See also Halliburton*, 573 U. S. __, (slip op., at 15). This reading of Supreme Court precedent finds support in recent federal appellate court opinions. For example, *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013), involved, *inter alia*, a class of plaintiffs claiming a design defect caused their Sears washing machines to develop mold. *Id*. at 797. The Seventh Circuit responded to an argument from Sears that many class members suffered no injury:

> Sears argued that most members of the plaintiff class had not experienced any mold problems. But if so, we pointed out, that was an argument not for refusing to certify the class but for certifying it and then entering a judgment that would largely exonerate Sears—a course it should welcome, as all class members who did not opt out of the class action would be bound by the judgment.

Id. at 799.

The Seventh Circuit did not deny that the proposed class might include uninjured members. It held common issues predominated anyway. Relying on precedent, including *Amgen*, Judge Posner explained that predominance does not involve "counting noses" or "bean counting." *Id*. at 801. It would be "incorrect" to decide predominance based on "whether there are more common issues or more individual issues, regardless of relative importance." *Id*. Instead, "[a]n issue 'central to the validity of each of the claims' in a class action, if it can be resolved 'in one stroke,' can justify class treatment." *Id*. (quoting *Dukes*, 131 S. Ct. at 2551). What "predominance requires" is "a qualitative assessment." *Id*. The

fundamental issue is practical: "the 'predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Id*. at 2566 (quoting *Amchem*, 521 U.S. at 623).

The implication of Judge Posner's analysis is crucial. Appellants' claim that plaintiffs must show harm to every class member finds no basis in Rule 23(b)(3). That is a form of inappropriate nose or bean counting. What matters is whether the common issues will predominate in the litigation as a practical matter, taking into account the relative importance of the common issues to the litigation and how widely they are shared among class members.

What of *Comcast*? As Judge Posner explained, "'[A] methodology that identifies damages *that are not the result of the wrong*' is an impermissible basis for calculating class-wide damages." *Butler*, 727 F.3d at 799 (quoting *Comcast*, 133 S. Ct. at 1434) (emphasis in original). But whether plaintiffs' liability theory matches their damages is a separate issue from whether a class contains uninjured members. *Id*. at 801. The Sixth Circuit's decision in *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.* offered a similar interpretation of *Comcast*. 722 F.3d 838, 860 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014) (citing *Comcast*, 133 S. Ct. at 1435) ("Due to the [plaintiffs'] model's inability to distinguish damages attributable to the allowed theory of liability, the Court ruled

that the predominance prerequisite of Rule 23(b)(3) did not warrant certification of a class.").[3]

Appellants attempt to distinguish *Butler* and *Whirlpool Front-Loading Washers*. They write, "[t]he question in those cases was not whether a class that contained uninjured members could be certified, but rather whether a class that contained members who suffered different amounts of damages could be certified." App. Br. at 29-30, n.8. Not so. *Butler* did not reject Sears' argument that most members of the class had not suffered from mold. *Butler*, 727 F.3d at 799. It held that common issues predominated even if that were true. *Id*. To be sure, *Butler* also held that individual issues regarding the amount of damages did not defeat class certification. *Id*. Those two holdings were both necessary and consistent.[4]

Appellants also rely on loose language from certain decisions to the effect that predominance requires common evidence of harm to every class member. They focus, for example, on *dicta* from *New Motor Vehicles*, 522 F.3d 6, but whether a showing of harm to every member of a class is required was not before

[3] *See also Leyva v. Medline Industries, Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (same).

[4] *See also Whirlpool Front-Loading Washers*, 722 F.3d at 855 ("Whirlpool next contends that the certified class is too broad because it includes [washing machine] owners who allegedly have not experienced a mold problem and are pleased with the [machine's] performance . . . . Satisfied customers lack anything in common with consumers who may have misused their machines and complain of mold problems, Whirlpool argues; furthermore, [the named plaintiffs] are atypical of satisfied consumers and cannot represent them. Our precedent indicates otherwise.").

this Court. The incomplete record at the time of class certification left unclear "whether [plaintiffs'] proposed model will be able to establish, without need for individual determinations for the many millions of class members, which consumers were impacted by the alleged antitrust violation and which were not." *Id*. at 28.

In other words, it was not apparent whether plaintiffs had common evidence of impact on any—or at least millions—of class members. As a result, this Court did not need to address the effect on certification if a relatively small proportion of class members suffered no injury.[5] This *dicta* should not survive *Amgen*'s pronouncement that not every element of a claim need be common to every class member—a proposition that follows logically from the predominance requirement

[5] *See also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252, 254 (D. C. Cir. 2013) (comments whether class may have contained uninjured members are *dicta* because plaintiffs' model of impact appeared to contain a fundamental flaw—suggesting injury to class members that could not in fact have suffered injury); *Hydrogen Peroxide*, 552 F.3d at 315-22 (comments about proportion of class that must be harmed for predominance are *dicta* because trial court made basic errors in certifying class, including refusing to address class issues that overlapped with merits and to assess competing expert opinions); *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294, 303, 307 (5th Cir. 2003) (declining to address whether issue of fact of damage undermined predominance because plaintiffs proposed method of calculating damages that was "clearly inadequate"); *Blades v. Monsanto Co.*, 400 F.3d 562, 572-74 (8th Cir. 2005) (deferring to trial court denial of certification under abuse of discretion standard and holding, *inter alia*, that individualized evidence would be necessary to determine impact for each class member and wild variations in price meant that in "a substantial number of cases" plaintiffs suffered no harm).

of Rule 23(b)(3). *Amgen*, 131 S. Ct. at 1196-97; *see also Halliburton*, 573 U. S. __, (slip op., at 15).

Average Wholesale Price confirms this point. The defendant relied on *New Motor Vehicles* and other case law to argue class certification should be reversed because the plaintiffs had not shown harm to every class member. 582 F.3d at 194-199. It was true that plaintiffs had not made that showing; the district court allowed "proof in the aggregate" of harm to the class, *id*. at 195, relying on evidence that the members of the class suffered harm *in general*, even if there may well have been unidentified exceptions. *Id*. at 195-97. Common issues, however, still predominated because the defendant had not shown sufficiently "*significant* individualized issues." *Id*. at 197 (emphasis added).

The First Circuit explained that "class-action litigation often requires the district court to extrapolate from the class representatives to the entire class." *Id*. at 195. It later continued, "[a]s a general matter, this is precisely the kind of analysis that Rule 23 was designed to permit, and it would quickly undermine the class-action mechanism were we to find that a district court presiding over a class action

lawsuit errs every time it allows for proof in the aggregate." *Id.* This Court declined to so undermine class actions. *Id.*[6]

In sum, the best reading of the law after *Amgen*, *Dukes*, and *Comcast* is the same as it was before those opinions. Predominance under Rule 23 does *not* require common evidence of harm to every class member. That proposition finds perhaps its clearest expression in another opinion by Judge Posner, *Kohen v. Pacific Investment Management Company LLC*, 571 F.3d 672 (7th Cir. 2009):

> [A] class will often include persons who have not been injured by the defendant's conduct; indeed this 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. Such a possibility or indeed inevitability does not preclude class certification, despite statements in some cases that it must be reasonably clear at the outset that all class members were injured by the defendant's conduct.

Id. at 677; *see also Gintis v. Bouchard Transp. Co., Inc.*, 596 F.3d 64, 67 (1st Cir. 2010) (holding trial court could certify class containing uninjured members and remanding to determine whether common evidence can be used in attempting to prove "a very substantial proportion" of class claims); *Tardiff v. Knox County*, 365

[6] Appellants pretend the plaintiffs in *Average Wholesale Price* had shown harm to every class member. App. Br. at 29 & n.7. They simply ignore the language where the court acknowledged that plaintiffs had not shown harm to all class members. *See, e.g., Average Wholesale Price*, 582 F.3d at 199 (noting "evidence . . . may have been mixed" and trial court based finding of harm on what "most" of the class members did).

F.3d 1, 6 (1st Cir. 2004) (holding common issues predominated even if some class members were not injured, and therefore could not prove liability, although "a large number of class members" in that group could warrant denying class certification or narrowing the class); *In re Neurontin Mktg. and Sales Practices Litig.*, 712 F.3d 60, 70 (1st Cir. 2013) (vacating trial court's denial of class certification based on potential individual issues regarding causation and injury).[7]

[7] Numerous other courts have held that predominance does not require evidence of harm to every member of a class. *See, e.g., Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012) (vacating denial of class certification and holding that certification is proper even where individual questions as to injury are present, so long as they do not predominate over common questions affecting the class as a whole); *Mims v. Stewart Title Guar. Co.*, 590 F.3d 298, 308 (5th Cir. 2009) ("class certification is not precluded simply because a class may include persons who have not been injured by defendant's conduct"); *Cordes*, 502 F.3d at 107-08 (finding that common issues may predominate in a case as a whole, even if they do not predominate regarding injury-in-fact, and vacating denial of class certification); *In re Flonase Antitrust Litig.*, 284 F.R.D. 207, 232 (E.D. Pa. 2012) (finding that that in an antitrust case, damages may be demonstrated as a matter of just and reasonable inference, and some variation among class members will not defeat class certification); *In re Urethane Antitrust Litig.*, 251 F.R.D. 629, 538 (D. Kan. 2008) (finding generalized injury establishes class-wide impact); *Meijer, Inc. Warner Chilcott Holdings, Co.*, 246 F.R.D. 293, 308, 310 (D.D.C. 2007) (finding class certification appropriate even though injury could not be shown as to certain class members); *In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 352 (N.D. Cal. 2005) (same); *J.B.D.L. Corp. v. Wyeth-Ayerst Labs, Inc.*, 225 F.R.D. 208, 218-19 (S.D. Ohio 2003) (same); *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 320-21 (E.D. Mich. 2001) (stating "inability to show injury as to a few does not defeat class certification where the plaintiffs can show widespread injury to the class").

III. Predominance Should Involve a *Qualitative* Assessment, Subject to an Abuse of Discretion Standard.

If predominance does not require a method of proving harm to every class member, a fair question is what it does require. Must plaintiffs show harm to some fixed proportion or percentage of the class? Or, to be more precise, do they need to offer evidence *capable* of making that showing?

The best answer is that the proper standard is not quantitative, but qualitative. *Butler*, 727 F.3d at 801. As the text of Rule 23(b)(3) instructs, and cases like *Amgen* confirm, what matters is which issues will dominate litigation and trial and whether they can be addressed on a classwide basis. *See Hydrogen Peroxide*, 552 F.3d at 311 n.8, 317, 319. The crux of a case may be whether defendants did what plaintiffs claim and whether defendants' conduct violated the law. Those issues are often common to all class members. If so, it may not matter if individual issues arise regarding whether some class members suffered a resulting injury. *Cordes*, 502 F.3d at 107-08. Indeed, as noted above, the jury instructions in several antitrust cases demonstrate that common impact may play no role whatsoever at trial.[8] The significance of impact as a trial issue should influence the *proportion* of the class for which plaintiffs must offer common evidence of injury.

[8] *See supra* Part I, at 7-8; s*ee also* Davis & Cramer, *Politics of Procedure*, 17 Geo. Mason L. Rev. at 990-91; Davis & Cramer, *Of Vulnerable Monopolists*, 41 Rutgers L.J. at 371-72.

This approach helps to explain why trial court decisions regarding class certification are subject to an abuse of discretion standard. *Smilow v. Sw. Bell Mobile Sys.*, 323 F.3d 32, 37 (1st Cir. 2003) (citing *Califano v. Yamasaki*, 442 U.S. 682 (1979)). The trial court judge is in the best position to assess the form litigation and trial are likely to take, including which issues are likely to figure prominently and which may play little or no role. *Overka v. Am. Airlines, Inc.*, 265 F.R.D. 14, 19 (D. Mass. 2010) ("The 'determination of predominance' necessarily implicates the judge's discretion, 'because [it] requires a common sense judgment regarding what the case is really about, and whether it would be more efficient to try the case as a class suit.'") (internal citation omitted). That insight is the product of repeated interactions with the parties in organizing a case, resolving discovery issues, and overseeing motion practice.

No one-size-fits-all approach is appropriate regarding predominance. *Waste Mgmt.*, 208 F.3d at 296 ("Predominance under Rule 23(b)(3) cannot be reduced to a mechanical, single-issue test").[9] No set proportion or percentage of a class suffering injury should be required. A trial court's contextualized assessment of which issues will predominate is the best feasible measure.

[9] *See also George v. Nat'l Water Main Cleaning Co.*, 286 F.R.D. 168, 179 (D. Mass. 2012) ("[t]he Court . . . considers the relative importance and prevalence of the different issues within the lawsuit [when deciding predominance]").

IV. No Article III, Rules Enabling Act, or Policy Considerations Justify Denying Certification of Classes Containing Uninjured Members.

A. Article III Does Not Prevent Certification of Classes Containing Uninjured Members.

Article III does not create a barrier to certifying classes containing uninjured members. There are two main schools of thought on this issue. *In re Deepwater Horizon*, 739 F.3d 790, 800-02 (5th Cir. 2014) (discussing both approaches). First, many courts hold that only the named plaintiffs, or a single named plaintiff, must have standing. *See, e.g.*, *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011) (finding that at least one plaintiff must demonstrate standing); *DG ex rel. Stricklin v. DeVaughn*, 594 F.3d 1188, 1197 (10th Cir. 2010) ("[O]nly named plaintiffs in a class action seeking prospective injunctive relief must demonstrate standing"); *Average Wholesale Price*, 582 F.3d at 194-99 (holding class certification did not violate Constitution even though plaintiffs had extrapolated harm to class from harm to class representatives, rather than shown harm to all class members); *Kohen*, 571 F.3d at 676 ("as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied"); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 306 (3d Cir. 1998) (finding Article III standing "determined vis-à-vis the named parties"); *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 768-71 (1st Cir. 2011) (same); *see also* W.

Rubenstein, A. Conte & H. Newberg, Newberg on Class Actions § 2:3 (5th ed. 2011) ("These passive members need not make any individual showing of standing because the standing issue focuses on whether the named plaintiff is properly before the court, not whether represented parties or absent class members are properly before the court.").

That approach makes sense. Article III, in relevant part, requires a case or controversy. U.S. Const. art. III, § 2. If the named plaintiffs have standing, there is a case or controversy, and a court can hear the matter. Certification of a class merely provides a procedural mechanism for resolving that case or controversy.

Other courts, however, hold that absent class members must also have standing. Parsing those cases, it is clear that the burden those courts impose is modest. *See generally* Joshua P. Davis, Eric L. Cramer, & Caitlin V. May, *The Puzzle of Class Actions with Uninjured Members*, 82 Geo. Wash. L. Rev. __ (forthcoming 2014), http://ssrn.com/abstract=2254151 [hereinafter Davis et al., *Class Actions with Uninjured Members*]. The absent class members need merely be in the group of plaintiffs who could *potentially* recover if they were to prove their case. *Id.*

Consider *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006), a seminal case for this approach.[10] It involved RICO Act allegations by taxpayers

[10] *Deepwater Horizon* labeled this approach as "the *Denny* test." 739 F.3d at 801.

who purchased foreign currency options based on tax strategies purportedly devised by a bank and law firm, and then marketed by an accounting firm. *Id.* at 260. The tax strategies allegedly violated the law. *Id.* The appeals court held that not only the class members who were audited had standing, but also those who were not audited and those who did not complete a tax strategy transaction. *Id*. at 265. Each of these groups could have been harmed—if only because of the risk of an audit or the possibility of spending time and money in reliance. *Id*. The fact that the absent class members were among those who could have suffered injury sufficed. *Id*.

The same approach explains the outcomes in other cases. *See Mazza v. Am. Honda Motor Co*., 666 F.3d 581, 594-95 (9th Cir. 2012); *In re Light Cigarettes Mktg. Sales Practice Litig*., 271 F.R.D. 402, 419-20 (D. Me. 2010); Davis et al., *Class Actions with Uninjured Members* (discussing *Avritt v. Reliastar Life Ins. Co*., 615 F.3d 1023 (8th Cir. 2010)).[11]

[11] The other cases Appellants cite do not hold otherwise. *Halvorson v. Auto-Owners Inc. Co*, for example, had no need to address whether Article III requires proof of harm to every class member, even if common issues otherwise predominate, because the court held common issues did *not* predominate. 718 F.3d 773, 777 (8th Cir. 2013) ("we conclude that the predominance requirement of Rule 23(b)(3) is not met"). Its discussion of standing was therefore *dicta*. The same is true for *Adashunas v. Negley*, which denied certification on other grounds, including the failure to include a reasonably defined class. 626 F.2d 600, 603-04 (7th Cir. 1980). Moreover, it was unclear in *Adashunas* that any significant number of class members suffered injury given the "abstract, conjectural or hypothetical" harm at issue. *Id*. at 604. Indeed, Appellants *acknowledge* that the

In an action like this one, those courts would find standing for those plaintiffs who paid money for Nexium and lost the opportunity to purchase a generic version of the drug. It is possible that they would have bought a less expensive product if not for the alleged conduct. Thus, they have standing under Article III. In contrast, if the class included members who did not pay money for Nexium—for example, who paid for a different product for treating gastrointestinal disorders—they could not possibly recover and therefore, in jurisdictions that take this approach, they would lack standing under Article III. *See generally* Davis et al., *Class Actions with Uninjured Members*.

B. The Rules Enabling Act Does Not Prevent Certification of Classes Containing Uninjured Members.

Appellants also refer repeatedly to the Rules Enabling Act ("REA"). *See* App. Br. at 14-15, 18, 32. They make only a vague argument for why including uninjured members in a class could rule afoul of the REA. It would not.

The class device would simply change the process for adjudicating claims, not the substantive rights of the plaintiffs. For example, including absent class members in a class should not affect the total liability of the defendants. A proper econometric analysis will not be affected by the presence in a class of members

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Seventh Circuit bases standing only on the named plaintiffs, not absent class members. App. Br. at 32 (citing *Kohen*, 571 F.3d at 676-78).

who suffered no harm. Joshua P. Davis, *Classwide Recoveries*, 82 Geo. Wash. L. Rev. __ (forthcoming 2014), http://ssrn.com/abstract=1768148.

In a typical antitrust purchaser action, for example, an economist will assess the total aggregate overcharge paid by the class members using various statistical tools. *Id*. If one were to increase the class size to include uninjured purchasers, the effect should simply be to add nothing repeatedly to overall damages. *Id*. And no matter how many times one adds nothing, the effect remains the same. There is no increase in liability. *Id*. Similarly, class certification should not alter plaintiffs' obligation to prove liability. As a result, there is no violation of the REA. *See generally* Davis et al., *Class Actions with Uninjured Members*.

At one point, Appellants also suggest that certifying a class including uninjured members would expand jurisdiction and therefore would confer a substantive right in violation of the REA. App. Br. at 33. But they do not explain why jurisdiction over absent class members is substantive for purposes of the REA. The Supreme Court held the opposite, concluding federal courts *can* adjudicate state law claims using the class device even if the claims could be pursued only individually in state court. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co*., 559 U.S. 393, 408 (2010); *see also* Davis et al., *Class Actions with Uninjured*

Members (explaining why including uninjured members in a class does not violate REA).[12]

C. Policy Reasons Support Allowing Certification of Classes Containing Uninjured Members.

Policy considerations also support certifying classes containing uninjured members. First, where, as here, plaintiffs are unlikely to be able to bring their claims individually, denying class certification can deprive the potential class members of any meaningful opportunity to obtain compensation. *See Whirlpool Front-Loading Washers*, 722 F.3d at 861 ("Use of the class method is warranted particularly because class members are not likely to file individual actions—the cost of litigation would dwarf any potential recovery.") (internal citations omitted). Private enforcement usually provides the only means for compensating the victims of antitrust violations. Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 Ga. L. Rev. 1, 16-17 (2013). This could be a great loss. Research has shown private enforcement—primarily through class actions—has resulted in recoveries of over $30 billion dollars since 1990. Joshua P. Davis & Robert H. Lande, *Towards an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 Seattle U. L. Rev. 1269, 1272 (2013).

[12] Similarly, although Appellants do not raise the issue, there should be no concern about due process, another issue sometimes raised when classes contain uninjured members. *See* Davis et al., *Class Actions with Uninjured Members*.

Second, denial of class certification would undermine deterrence of antitrust violations. Private enforcement appears to provide a more powerful deterrent to antitrust violations than criminal enforcement of the antitrust laws by the Department of Justice. *See generally* Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 BYU L. Rev. 315 (2011). Moreover, even with private enforcement, the total deterrence effect of the antitrust laws—including through criminal and civil enforcement under federal and state law—provides suboptimal deterrence. *See generally* John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 Cardozo L. Rev. 427 (2012).[13]

Finally, class certification often provides a more accurate and efficient way than individual litigation in cases involve a large number of potential plaintiffs. *See* Davis, *Classwide Recoveries*. This is so in part because courts can make far more precise assessments by relying on aggregate rather than individualized evidence, as well as for more technical reasons. *Id*. Of course, if plaintiffs cannot afford to pursue individual litigation—as is likely true here—they lose regardless of the merits, a terribly inaccurate way to resolve a dispute. *Id*. Alternatively, if

[13] Contrary to an assertion that is sometimes made, certifying the class would not place undue pressure on defendants to settle. *See* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357 (2003); *see also* Davis & Cramer, *Politics of Procedure*, 17 Geo. Mason L. Rev. at 980; Davis & Cramer, *Of Vulnerable Monopolists*, 41 Rutgers L.J. at 371-72.

hundreds or thousands of plaintiffs could pursue litigation individually, it would be far less efficient—and far more demanding on judicial resources—for them to do so than to have a single proceeding resolve in one fell swoop what defendants did, whether the conduct was illegal, and whether it harmed the class in general.

CONCLUSION

For the foregoing reasons, this Court should not read the predominance standard of Rule 23(b)(3) to require evidence of harm to every class member.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B) as it contains 6,814 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the type face requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) as it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type style.

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that, on June 26, 2014, a copy of the foregoing Brief of *Amicus Curiae* the American Antitrust Institute Supporting Appellees and Affirmance was filed via this Court's CM/ECF system and that all parties required to be served have been served.

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