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 AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

ELLEN MERIWETHER
CAFFERTY CLOBES MERIWETHER & SPRENGAL
205 N. Monroe St.
Media, PA 19063
(215) 864-2800 (phone)
emeriwether@caffertyclobes.com

RANDY M. STUTZ
Counsel of Record
AMERICAN ANTITRUST INSTITUTE
1025 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036
(202) 905-5420
rstutz@antitrustinstitute.org

Counsel for Amicus Curiae

August 21, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Appellate Rule 26.1(a), the American Antitrust Institute states that it is a nonprofit, non-stock corporation. It has no parent corporations, and no publicly traded corporations have an ownership interest in it.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 6

I. THE DISTRICT COURT CORRECTLY APPLIED EXISTING RULE 23 STANDARDS IN CERTIFYING THE CLASS 6

A. Rule 23 Does Not Require Plaintiffs to Prove Injury to Each Class Member as a Prerequisite to Certification 7

B. Defendants' Outcome-Driven Standard for Merits Determinations at Class Certification Is Incorrect 8

C. *Tyson Foods*' Holding that Reliable Statistical Evidence Is Admissible in Class Proceedings Governs this Case 13

1. *Tyson Foods* Permits the Use of Reliable Statistical Evidence to Prove an Element of an Antitrust Claim 15

2. *Tyson Foods* Confirms that Defendants May Not Profit from Uncertainty Caused by Their Illegal Conduct 19

II. PROPERLY SPECIFIED REGRESSION ANALYSES MAY RELIABLY DEMONSTRATE CLASSWIDE IMPACT 23

CONCLUSION 28

CERTIFICATE OF SERVICE

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

<u>CASES</u>

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 2

Amgen Inc. v. Conn. Ret. Plans & Tr. Funds,
568 U.S. 455 (2013) 8, 9, 10

Anderson v. Mt. Clemens Pottery Co.,
328 U.S. 680 (1946) 13

Bigelow v. RKO Radio Pictures, Inc.,
327 U.S. 251 (1946) 19, 20, 21

Briseno v. ConAgra Foods, Inc.,
844 F.3d 1121 (9th Cir. 2017) 7, 12

Bus. Elecs. Corp. v. Sharp Elecs. Corp.,
485 U.S. 717 (1988) 22

California v. Am. Stores Co.,
495 U.S. 271 (1990) 2

Eastman Kodak Co. of N.Y. v. S. Photo Materials Co.,
273 U.S. 359 (1927) 19, 20

Erica P. John Fund, Inc. v. Halliburton Co.,
563 U.S. 804 (2011) 14

Hawaii v. Standard Oil Co. of Cal.,
405 U.S. 251 (1972) 2

Hilao v. Estate of Marcos,
103 F.3d 767 (9th Cir. 1996) 12

Ibe v. Jones,
836 F.3d 516 (5th Cir. 2016) 11

Ill. Brick Co. v. Illinois,
431 U.S. 720 (1977) 3

In re Air Cargo Shipping Servs. Antitrust Litig.,
No. 06-MD-1175 JG VVP, 2014 WL 7882100 (E.D.N.Y. Oct. 15, 2014)......... 27

In re Capacitors Antitrust Litig. (No. III),
No. 14-CV-03264-JD, 2018 WL 5980139 (N.D. Cal. Nov. 14, 2018)......... 25, 27

In re High-Tech Emp. Antitrust Litig.,
985 F. Supp. 2d 1167 (N.D. Cal. 2013).. 25

In re Hydrogen Peroxide Antitrust Litig.,
552 F.3d 305 (3d Cir. 2008)... 6, 10, 11

In re Hyundai & Kia Fuel Econ. Litig.,
926 F.3d 539 (9th Cir. 2019)... 17

In re Linerboard Antitrust Litig.,
305 F.3d 145 (3d Cir. 2002).. 25

In re Polyurethane Foam Antitrust Litig.,
314 F.R.D. 226 (N.D. Ohio 2014).. 27

In re Scrap Metal Antitrust Litig.,
527 F.3d 517 (6th Cir. 2008)... 23

In re Static Random Access Memory (SRAM) Antitrust Litig.,
264 F.R.D. 603 (N.D. Cal. 2009) 25

In re Suboxone Antitrust Litig.,
No. 19-3640, 2020 WL 4331523 (3d Cir. July 28, 2020) 13

In re TFT-LCD (Flat Panel) Antitrust Litig.,
267 F.R.D. 291 (N.D. Cal. 2010) 25

In re Urethane Antitrust Litig.,
768 F.3d 1245 (10th Cir. 2014).. 22

J. Truett Payne Co. v. Chrysler Motors Corp.,
451 U.S. 557, 566–67 (1981) 21

Messner v. Northshore Univ. Health Sys.,
669 F.3d 802 (7th Cir. 2012).. 25

Palmer v. Conn. Ry & Lighting Co.,
311 U.S. 544 (1941) 19

Priests for Life v. U.S. Dep't of Health & Human Servs.,
808 F.3d 1 (D.C. Cir. 2015) 17

Sali v. Corona Reg'l Med. Ctr.,
909 F.3d 996 (9th Cir. 2018) 6, 18

Senne v. Kan. City Royals Baseball Corp.,
934 F.3d 918 (9th Cir. 2019) 13

Story Parchment Co. v. Paterson Parchment Co.,
282 U.S. 555 (1931) 19, 20

Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 12

Torres v. Mercer Canyons Inc.,
835 F.3d 1125 (9th Cir. 2016) 8, 11, 13, 22

Tyson Foods, Inc. v. Bouaphakeo,
136 S. Ct. 1036 (2016) .... *passim*

United States v. Cazares,
121 F.3d 1241 (9th Cir. 1997) 18

United States v. Elliott,
322 F.3d 710 (9th Cir. 2003) 18

United States v. Socony-Vacuum Oil Co.,
310 U.S. 150 (1940) 20

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) 8, 10

Zenith Radio Corp. v. Hazeltine Research, Inc.,
395 U.S. 100 (1969) 15

RULES

Fed. R. Civ. P. 23(b)(3) 7

TREATISES

2 W. Rubenstein, Newberg on Class Actions
§ 4:50 (5th ed. 2012) 7

OTHER AUTHORITIES

2003 Advisory Committee Note to Rule 23 11

ABA Section of Antitrust Law, *Proving Antitrust Damages* (2d ed. 2010) 25

Black's Law Dictionary (11th ed. 2019) 25

Brief of Petitioner Tyson Foods 33-40, 136 S. Ct. 1036, No. 14-1146
(filed Aug. 7, 2015), *available at* https://www.scotusblog.com/wp-content/uploads/2015/08/14-1146ts1.pdf 23

Brief of Economists and Other Social Scientists, 136 S. Ct. 1036,
No. 14-1146 (filed Sept. 29, 2015), *available at* https://www.scotusblog.com/wp-content/uploads/2015/10/14-1146-bsac-Economists.pdf 24

Brief of Amicus Curiae Complex Litigation Law Professors
(filed Sept. 29, 2015), *available at* https://www.scotusblog.com/wp-content/uploads/2015/10/14-1146-bsac-Complex-Litigation-Law-Professors.pdf 24

John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 Cardozo L. Rev 427 (2012) 4

Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 18 Geo. Mason L. Rev. 969 (2010) 12

Paul A. Johnson, *The Economics of Common Impact in Antitrust Class Certification*, 77 Antitrust L.J. 533 (2011) 26

Sherman Act Violations Resulting in Criminal Fines & Penalties of $10 Million or More, Dept. Of Justice, https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more (last updated July 24, 2020) 3

INTEREST OF AMICUS CURIAE[1]

The American Antitrust Institute ("AAI") is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. See http://www.antitrustinstitute.org.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants that plead guilty to criminal price fixing and are precluded from contesting liability in related civil cases often channel their considerable resources (including cartel profits) into thwarting victim recovery. They do so by pushing aggressively for limits to class treatment. Because antitrust violations typically

---

[1] All parties consent to the filing of this amicus brief. The entity formerly known as Bumble Bee Foods LLC has undergone reorganization in bankruptcy proceedings, and that entity is now known as Old BBF, LLC, which is not a party to this proceeding. No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person—other than amicus curiae or its counsel—has contributed money that was intended to fund preparing or submitting this brief.

[2] Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions. Certain members of AAI's Board of Directors or Advisory Board, or their law firms, represent Plaintiffs-Appellants, but they played no role in AAI's deliberations with respect to the filing of the brief.

transfer massive wealth from consumers to cartels by way of high-volume, low-dollar price-fixing schemes, victims' claims typically allow for only "small recoveries that do not provide the incentive for any individual to bring a solo action." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (internal quotation omitted). The Supreme Court has recognized that the class action device "may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture," *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 266 (1972), and defendants appreciate that without class status, many individual victims are unlikely to pursue their claims.

By pressing for limitations on class treatment in private antitrust cases, guilty defendants can leverage victims' dependence on a claims-aggregation device to upend "an integral part of the congressional plan for protecting competition." *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990). Congress had "many means at its disposal to penalize violators" and "could have, for example, required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations." *Standard Oil*, 405 U.S. at 262. But Congress created a private treble damages remedy because it believed "the 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

behavior in violation of the antitrust laws." *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 755 (1977) (internal quotation omitted).

When guilty defendants aggressively litigate, and re-litigate complex questions involving class treatment, they subvert the Congressional scheme. They do so by layering enormous costs and uncertainty onto each successive private antitrust class claim, regardless of the merits, and regardless of admitted liability. As class counsel are forced to internalize spiraling risks and costs in pursuing class recoveries even when guilt is confirmed, the ambit of behavior meaningfully punishable under the Clayton Act begins to shrink. And over time, the inefficacy of the Act as a check on competitive abuses begins to erode the antitrust laws' promise of competitive markets.

The corrosive effect of diminishing private enforcement incentives has helped turn the U.S. economy into a breeding ground for price-fixing agreements as brazen as the conspiracy uncovered in this case. The evidence shows that cartels continue to cause massive harm to the U.S. economy, *see, e.g., Sherman Act Violations Resulting in Criminal Fines & Penalties of $10 Million or More*, U.S. Dept. of Just. (last updated July 24, 2020)[3] (showing over $13.5 billion in fines alone since 1995), yet they remain woefully under-deterred. Studies show modern cartel behavior is often net profitable to businesses even if they are caught. *See*

[3] Internet URLs for online sources are identified in the Table of Authorities.

John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 Cardozo L. Rev. 427, 478 (2012) (showing median overcharge imposed by U.S. cartels amounts to 19% of the conspirators' sales, yet the median combined sanctions amount to 17% of sales with an expected value of only 4% of sales when adjusted for the low likelihood of detection).

This case presents another tipping point in the battleground over administrable private antitrust enforcement. The Defendants, Bumble Bee, Chicken of the Sea (COSI), and Starkist ("Defendants"), which dominate the packaged tuna market, sought leniency or pled guilty to criminal price fixing, and several of their executives have been sentenced to prison. They now challenge the ability of their victims—private classes of direct purchasers ("DPPs"), commercial food service purchasers ("CFPs"), and end purchasers ("EPPs") ("Plaintiffs")—to use reliable statistical evidence to make a classwide showing of antitrust impact for purposes of satisfying the predominance requirement of Rule 23.

Four years ago, in *Tyson Foods*, the Supreme Court definitively set forth standards for plaintiffs seeking to establish that common questions predominate over individual questions under Rule 23(b)(3), and the standard under which statistical evidence may be used as common evidence to establish classwide injury. Defendants, supported by the Chamber of Commerce and the Washington Legal

Foundation, now seek to re-litigate the very same issues in this Court. Defendants' arguments must be rejected.

1. Defendants mistake the Rule 23 predominance inquiry for a merits inquiry into proof of antitrust impact. Rule 23 requires that common statistical evidence must be sufficiently reliable to be capable of supporting a prima facie showing of impact, not that each individual plaintiff would prevail on impact on the basis of Plaintiffs' statistical evidence.

Defendants' argument that district courts must resolve the merits of impact "questions" at defendants' prerogative is based on faulty reasoning that cannot be reconciled with the plain meaning canon, which governs interpretation of the Federal Rules in this Circuit. The Supreme Court's holding in *Tyson Foods*, which allows reliable statistical evidence to prove injury, controls this case. The opinion cannot be read as narrowly limited to Fair Labor Standards Act claims or to require that proof would sustain a jury verdict after a trial in an individual case, as Defendants suggest. Both readings are foreclosed by the opinion, including by the Court's reliance on *Mt. Clemens*, which derives its evidentiary rule entirely from antitrust law.

2. Properly specified regression analyses are well-accepted and reliable statistical tools widely used in litigation settings. Defendants' arguments that regression analyses are categorically inappropriate because they use "averages" that

"assume away" individual differences among class members are incorrect and foreclosed by *Tyson Foods*. Regression models, which invariably rely on averaging techniques as a first step or component part of a more robust analysis, like Plaintiffs' models here, are a permissible method of proof. And regression models that begin by calculating aggregate damages and average overcharges and then subsequently use controls to account for supply and demand factors and differences across the class are routinely accepted as capable of helping resolve the element of antitrust impact at trial.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY APPLIED EXISTING RULE 23 STANDARDS IN CERTIFYING THE CLASS

Rule 23 does not require plaintiffs to *prove impact* on each class member as a prerequisite to class certification. Defendants conflate the Rule 23 inquiry—whether antitrust impact is *capable of proof* at trial using common evidence—with the merits inquiry of whether class members have in fact been injured by Defendants' illegal conduct. *See, e.g., Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1004–05 (9th Cir. 2018); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311–12 (3d Cir. 2008) ("Plaintiffs' burden at the class certification stage is not to

prove the element of antitrust impact" but instead "is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members.").

In other words, Defendants contend that Rule 23(b)(3) requires courts to determine that common answers, instead of common questions, will predominate in class litigation. Defendants are incorrect. And here, where plaintiffs would rely on statistical evidence that is sufficiently reliable to support a prima facie showing of impact on a classwide basis, common questions predominate. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045–46, 1048 (2016).

A. Rule 23 Does Not Require Plaintiffs to Prove Injury to Each Class Member as a Prerequisite to Certification

The plain meaning of the language of Rule 23(b)(3) clarifies that the predominance inquiry requires common "questions" to predominate during litigation; it does not require proof of common answers to those questions. Fed. R. Civ. P. 23(b)(3); *see Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1125 (9th Cir. 2017) (The Court's first step in construing Rule 23 is "determin[ing] whether the language at issue has a plain meaning.").

The Supreme Court has explained that "a common question is one where '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*, 136 S. Ct. at 1045 (quoting 2 W. Rubenstein, Newberg on Class Actions § 4:50, pp.

196–97 (5th ed. 2012)); *see also Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016) (quoting same). Accordingly, "under the plain language of Rule 23(b)(3), plaintiffs are not required to prove … that the predominating question will be answered in their favor." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 468 (2013); *see* Black's Law Dictionary (11th ed. 2019) (Prima facie evidence is evidence [s]ufficient to establish a fact or raise a presumption *unless disproved or rebutted*.") (emphasis added); *Torres*, 835 F.3d at 1123 (questions are common if they have the "capacity" to generate common answers that would "help drive the resolution of the litigation" (quoting *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)).

Applying circular reasoning, Defendants maintain that "questions" only have the "capacity" to "help drive" the resolution of litigation if the questions' answers have been proven and thereby resolved. Thus, Defendants would have Rule 23 allow representative evidence to establish that impact is a common question only if the evidence "actually prove[s] class-wide impact—and the extent to which class members were actually injured." Defs.' Opening's Br. 51. Under the plain meaning of Rule 23 and binding precedent, that is not the law.

B. Defendants' Outcome-Driven Standard for Merits Determinations at Class Certification Is Incorrect

Defendants' "common answers" standard requires district courts to provide on-demand merits resolutions. Defendants would have district courts weigh the

probative value of expert opinions and make fact findings and merits determinations whenever a Defendant asks the court to take a question from the jury. Defs.' Opening Br. 28 (district court "must" resolve the merits of an issue at class certification if the parties "dispute" the issue and "present competing evidence"); *id*. at 51 ("[T]he parties disputed the extent to which [Plaintiffs'] evidence actually proved class-wide impact—and the extent to which class members were actually injured."); *id*. ("Resolving this dispute in Defendants' favor therefore would preclude certification.").

Defendants' argument is a tautology. They reason that, if the Court were to resolve evidentiary and merits disputes over impact *in Defendants' favor*, then Plaintiffs would not be able to rely on their proffered evidence to make the required showing. That circular logic adds nothing to the predominance inquiry; it merely restates the truism that if Plaintiffs lose on the merits, they will not be able to prove their case.

If anything, Defendants' argument defeats itself by demonstrating commonality. Here, a failure of Plaintiffs' proof on the element of impact would create a "fatal similarity," not a "fatal dissimilarity," *Tyson Foods*, 136 S. Ct. at 1047, rendering impact a paradigmatic common "question" according to that term's plain meaning. *Amgen*, 568 U.S. at 467. Because Plaintiffs' claims will either rise or fall together when the impact question is answered at trial, the question is "capable

of class-wide resolution" insofar as "determination of its truth *or falsity* will resolve an issue … in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (emphasis added).

Under the plain meaning of Rule 23(b)(3), neither defendants nor courts are permitted to look past a question's capability for classwide resolution to inquire how the question is actually resolved. That is the quintessential "free ranging merits inquiry" foreclosed by the Supreme Court and the plain language of Rule 23. *Amgen*, 568 U.S. at 466.

A predominance standard that allows defendants to unilaterally eliminate the distinction between a showing that impact is susceptible of common proof and a showing that plaintiffs will prevail on impact also defies common sense. If defendants, rather than courts, controlled the litigation in this way, rational defendants would invariably exercise their option to force merits determinations at class certification in every case (and on every issue). The effect would be to mandate that overburdened federal courts must always resolve the battle of the experts over both impact and damages (among other issues) prior to trial. And plaintiffs would have to prove their case twice—on the merits at class certification and then, if they win, on the merits again at trial. *See Hydrogen Peroxide*., 552 F.3d at 317. Rule 23 is neither so lopsided nor so inefficient.

Defendants claim that the district court's failure to answer the predominance question "raises the troubling prospect" of "uninjured class members being awarded monetary relief" to which they have no entitlement. Def's Br. at 59. However, Defendants ignore that the predominance inquiry focuses on whether common questions will predominate in the adjudication of class claims *at trial*. *See, e.g., Ibe v. Jones*, 836 F.3d 516, 533 (5th Cir. 2016) ("predominance and superiority inquiries … require envisioning what a class trial would look like"); *Hydrogen Peroxide*, 552 F.3d at 312 ("Deciding this issue [of impact]" requires assessment of "the method or methods by which plaintiffs propose to use the evidence to prove impact at trial"); *see also* 2003 Advisory Committee Note to Rule 23 ("A critical need is to determine how the case will be tried.").

The prospect of uninjured class members is not a trial issue in cases where plaintiffs attempt to prove aggregate damages. And antitrust plaintiffs, like Plaintiffs here, almost always attempt to do so, because estimates of aggregate damages (calculated by way of regression analysis, *see infra* Part II) are typically more accurate and efficient than estimates of individual damages in resolving the inherent uncertainty caused by an antitrust violation. *See infra* Part I.C.2. In such cases, including this case, defendants do not have a cognizable interest in litigating the identity of class members at trial. The issue has no bearing on Defendants' interest in the amount of damages for which they will be liable. *See Torres*, 835 F.3d at

1140–41 (individual calculations from "partitioning of damages" among class members "would not impact a defendant's liability for the total amount of damages"); Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 18 Geo. Mason L. Rev. 969, 999 (2010) ("[T]he total damages are unaffected by the possible presence of individual class members that the model finds did not pay overcharges.").[4] Consequently, antitrust verdict forms typically require a finding that conduct harmed "the class" or "class members," not each individual class member. *See id.* at 992, n.127 (2010) (citing several verdict forms in antitrust trials).

In the Ninth Circuit, which does not read an extra-textual "ascertainability" requirement into Rule 23, *Briseno*, 844 F.3d at 1127, any individual questions concerning uninjured class members necessarily arise, if at all, *after* trial, during the litigation's post-judgment phase. *Tyson Foods*, 136 S. Ct. at 1050 (identification of uninjured class members was "premature" after class certification and jury verdict but could be considered on remand prior to damages distribution phase);

---

[4] The same point belies Defendants' Due Process arguments. Opening Br. 36. Uninjured class members that do not affect Defendants' aggregate damages fail to implicate a concrete interest. *Hilao v. Estate of Marcos*, 103 F.3d 767, 786 (9th Cir. 1996) (class-action defendant's interest was "only in the total amount of damages for which it will be liable," not "the identities of those receiving damage awards"); *cf. Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing.").

Torres, 835 F.3d at 1137 (district court can "winnow out those non-injured members at the damages phase of the litigation, or … refine the class definition"); *see also In re Suboxone Antitrust Litig.*, No. 19-3640, 2020 WL 4331523, at *5 (3d Cir. July 28, 2020) ("Although allocating the damages among class members may be necessary after judgment, 'such individual questions do not ordinarily preclude the use of the class action device.'") (quoting *Tyson Foods*, 136 S. Ct. at 1045). The prospect of uninjured class members thus does not undermine the cohesiveness of the class to warrant adjudication by representation.

C. Reliable Statistical Evidence Is Admissible in Class Proceedings Under *Tyson Foods*

In *Tyson Foods*, the Supreme Court explicitly condoned the use of reliable representative evidence in litigation, including with respect to class certification. *Tyson Foods*, 136 S. Ct. at 1046 ("The permissibility [of a representative or statistical sample] turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action."). Defendants seek to limit *Tyson Foods* to claims arising under the Fair Labor Standards Act (FLSA) on the basis that FLSA claims are subject to "a special evidentiary rule" established in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). Defs.' Opening Br. 37–38*; see also id*. at 39–40 (giving similar reading to *Senne v. Kan. City Royals Baseball*

Corp., 934 F.3d 918 (9th Cir. 2019)). Defendants also read *Tyson Foods* as allowing the use of representative evidence only if the evidence could "sustain" liability *after* trial if it had been "introduced in each [class member]'s individual action." Def's Br. 37.

Neither limitation is supported by the *Tyson Foods* opinion. Far from confining its decision to FLSA claims, the Court broadly stated that "whether and when statistical evidence can be used to establish classwide liability will depend on the purpose for which the evidence is being introduced and on 'the elements of the underlying cause of action.'" *Tyson Foods*, 136 S. Ct. at 1046 (quoting *Erica P. John Fund, Inc. v. Halliburton Co*., 563 U.S. 804, 809 (2011)); *see also id*. at 1051 (Roberts, C.J., concurring) ("I take the Court to [require] … the same standard of proof that would apply in any case").

Moreover, as discussed more fully below, *Mt. Clemens* derives what Defendants describe as its "special evidentiary rule" from antitrust cases. *See infra* Part I.C.2. And while the Court held that representative evidence is a permissible means of proving classwide injury if each class member could have relied on that evidence to establish injury in an individual action, it did not hold that the inverse is true: that evidence must be excluded (or is unreliable) *unless* each class member could have relied on it to establish injury in an individual action. *Tyson Foods*,

136 S. Ct. at 1048. Defendants' efforts to narrow and evade *Tyson Foods* therefore must be rejected.

1. *Tyson Foods* Permits the Use of Reliable Statistical Evidence to Prove an Element of an Antitrust Claim

Seizing upon the Court's statement that the representative evidence in *Tyson Foods* "could have been sufficient to sustain a jury finding," 136 S. Ct. at 1048, Defendants maintain that Plaintiffs' evidence here is impermissible because it could not prove antitrust impact in each individual action. Defs.' Opening Br. 41–42. There are three things wrong with this assertion. First, the Supreme Court did not hold that representative evidence is permissible in a class case *only* if it could be used by each plaintiff in an individual action. *See Tyson Foods*, 136 S. Ct. at 1046 ("*One way* for respondents to show, then, that the sample relied upon here is a permissible method of proving classwide liability is by showing that each class member could have relied on that sample to establish liability if he or she had brought an individual action.") (emphasis added).

Second, regression analyses, such as those proffered by Plaintiffs' experts, are a mainstay of antitrust actions and are widely held to be a relevant and reliable means to establish antitrust impact and damages, whether on a class or individual basis. Here, even in a given class member's hypothetical individual action, the class member easily could rely on statistical evidence showing an industry-wide overcharge exceeding 10%, together with a 95% probability of individual impact,

to make a prima facie showing of individual impact by a preponderance of the evidence. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969) (holding that antitrust impact can be inferred through circumstantial evidence); ER17 (noting that plaintiffs who did not purchase during the benchmark period could still rely on Dr. Mangum's regression analysis as evidence of impact). Any argument that an individual plaintiff did not suffer impact would arise only as part of Defendants' rebuttal case, not the individual's prima facie showing.

Third, the contention that representative evidence is permitted under *Tyson Foods* only if it actually proves injury to each class member was the *losing* argument of the two-justice dissent in *Tyson Foods*. 136 S. Ct. at 1057–58 (Thomas, J., dissenting) (arguing that "uncertain" liability should have led the Court to find "Mericle's study could not sustain a jury verdict in favor of these plaintiffs"). The dissent singled out the majority's refusal to require a showing that the plaintiffs' evidence would sustain a jury finding by proving an element of liability in an individual action. *Id.* at 1058 (majority "goes beyond" *Mt. Clemens* by holding "that employees can use representative evidence in FLSA cases to prove an otherwise uncertain element of liability"). And the dissent identified that refusal as the basis for its disagreement and the distinguishing feature of the majority opinion. *Id*. at 1057 n.3 ("The majority never explains why Dr. Mericle's representative evidence

could have sustained a jury finding in favor of any individual employee in an individual case, and instead … explains why Dr. Mericle's sample was permissible in the circumstances.").

The winning argument, and the holding of the Court, is that representative evidence of injury is permissible if it is reliable, because predominance requires only common evidence that is *capable* of sustaining a jury finding on a given question. *Id.* at 1048–49. As the Court said in *Tyson Foods*, "[o]nce a district court finds evidence to be admissible, its persuasiveness is, in general, a matter for the jury." *Id.* at 1049. So long as the evidence is sufficiently reliable to create a common question (rather than a common answer) by supporting a prima facie showing of the elements of the underlying claim, then "resolving that question . . . is the near-exclusive province of the jury." *Id.*

This Court need only apply that holding consistent with its statement that "'[i]t is not our job to re-litigate or trim or expand Supreme Court decisions. Our job is to follow them as closely and carefully and dispassionately as we can.'" *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 576 (9th Cir. 2019) (quoting *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 808 F.3d 1, 14 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc)). Here, class plaintiffs would rely on a methodologically sound regression analysis coupled with

record evidence, guilty pleas, and extensive industry structure evidence,[5] all of which is common to the class, to make a prima facie showing of antitrust impact. Nothing more is required under Rule 23. *See Sali*, 909 F.3d at 1005.

Nevertheless, after a three-day evidentiary hearing, at which the district court considered both Plaintiffs' and Defendants' expert reports and testimony, the court made a reliability determination based upon findings that Plaintiffs' experts were "in fact persuasive" relative to Defendants' rebuttal experts. ER11; *see* ER18, ER20, ER24, ER27, ER35, ER37–38. Those findings cannot be disturbed unless they are clearly erroneous, which they are not. *United States v. Cazares*, 121 F.3d 1241, 1245 (9th Cir. 1997); *see United States v. Elliott*, 322 F.3d 710, 715 (9th Cir. 2003) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

Once the district court, having considered Defendants' experts' failed rebuttals, was satisfied that Plaintiffs' "proffered expert testimony has the requisite integrity to demonstrate classwide impact," ER10, the question of impact became a common question to be resolved by the jury. The district court thus applied the correct standards and correctly declined Defendants' invitation to make free-ranging merits determinations that would exceed the court's authority to determine whether common questions predominate under Rule 23.

[5] *See* ER12.

2. *Tyson Foods* Confirms that Defendants May Not Profit from Uncertainty Caused by Their Illegal Conduct

Defendants' argument that *Tyson Foods* is limited by "the special evidentiary rule" announced in *Mt. Clemens* confirms that *Tyson Foods'* reasoning is equally applicable to antitrust cases. *Mt. Clemens* derives the just-and-reasonable inference standard for "fill[ing] an evidentiary gap created by the [defendant's wrongdoing]" in FLSA cases entirely from antitrust law's standard for doing the same. *Tyson Foods*, 136 S. Ct. at 1040; *see Mt. Clemens*, 328 U.S. at 688 (attributing authority for rule to *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555, 563(1931) (antitrust case); *Eastman Kodak Co. of N.Y. v. S. Photo Materials Co.*, 273 U.S. 359, 377–379 (1927) (antitrust case); *Palmer v. Conn. Ry & Lighting Co.*, 311 U.S. 544, 560 & n.11 (1941) (Bankruptcy Act case relying on *Story Parchment* and *Eastman Kodak*); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 263–66 (1946) (antitrust case)).

Defendants purport to challenge Plaintiffs' representative evidence as insufficient to establish impact, but their argument rests on uncertainty about damages calculations that Defendants themselves caused. *Compare, e.g.,* Defs.' Opening Br. 42–43 (emphasizing that the net amount at which prices were fixed varied by customer type and other market factors), *with* Pls. Br. 41 (Dr. Mangum's model used net packaged tuna prices on a transaction by transaction basis that accounted for all possible deductions such as discounts, promotions, and returns).

Defendants' argument fails because the cases on which *Mt. Clemens* relies confirm that "[d]ifficulty of ascertainment is no longer confused with right of recovery for a proven invasion" under the antitrust laws. *Bigelow*, 327 U.S. at 265–66. Evidence is sufficient if it would "support a just and reasonable inference that petitioners were damaged." *Id.*; *see also Eastman Kodak*, 273 U.S. at 379 (method of proof is sufficient if it is "based on evidence furnishing data from which the amount of the probable loss could be ascertained as a matter of reasonable inference"); *Story Parchment*, 282 U.S. at 562–63 ("it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference"). That is the same standard applied in *Tyson Foods* and *Mt. Clemens*. *See Tyson Foods*, 136 S. Ct. at 1040.

Defendants do not dispute that all of the class members purchased illegally price-fixed products, despite the broad scope of the conspiracy. *See* Defs.' Opening Br. 33. And the record leaves no doubt that Defendants' conduct denied every DPP, CFP, and EPP their right to competitive, market-based prices, which is an unmistakable violation. *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940) ("Any combination which tampers with price structures is engaged in an unlawful activity. . . . [T]o the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces.").

Defendants' argument is that, because the amount of each individual plaintiff's damages is uncertain, it is possible that *some* individual plaintiffs' damages *could* be calculated as zero or negative. Putting aside that the district court made a contrary finding—that Plaintiffs' evidence was sufficiently reliable to be capable of showing classwide impact with only a de minimis number of uninjured class members[6]—antitrust defendants are no more permitted to profit from the uncertainty caused by their illegal conduct than FLSA defendants. *See, e.g.*, *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566–67 (1981) ("The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation" but "it does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted.").

The defendants in *Tyson Foods* attempted to confuse and conflate proof of injury and damages in the same fashion. They argued that the class contained "members who were not injured and have no legal right to any damages," that "class plaintiffs cannot offer proof that all class members are injured," and that class plaintiffs "have not demonstrated any mechanism for ensuring that uninjured

[6] The district court found the evidence to be capable of showing that "all or nearly all" members suffered impact. ER10. Importantly, the Ninth Circuit requires only the lesser showing that the class does not include "a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct." *Torres*, 835 F.3d at 1138 (internal quotation omitted).

class members do not recover damages." 136 S. Ct. at 1049–50. Here, as there, those arguments are "premature" at best and do not prevent Plaintiffs from using reliable statistical evidence to create a just-and-reasonable inference of the amount and extent of their damages. *Id*. at 1050; *see id.* at 1047 ("Rather than absolving the employees from proving individual injury, the representative evidence here was a permissible means of making *that* very showing.") (emphasis added).

Moreover, this case is like *Torres* because "proof is not a matter of probability—it is a matter of logic." *Torres*, 835 F.3d at 1140. Naked price fixing is a felony because it is "manifestly anticompetitive" and "always or almost always tend[s] to restrict competition and decrease output." *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988); *see In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1254 (10th Cir. 2014) ("[P]rice-fixing affects all market participants, creating an inference of class-wide impact even when prices are individually negotiated."). Thus, here, as in *Torres*, there is only the prospect that an "injurious course of conduct" caused "fortuitous non-injury to a subset of class members." *Torres*, 835 F.3d at 1137. And "the possibility that an injurious course of conduct may sometimes fail to cause injury to certain class members … fails to reveal a flaw that may defeat predominance, such as the existence of large numbers of class members who were never *exposed* to the challenged conduct to begin with." *Id*.

In sum, there is no difference between any uncertainty in this case and the uncertainty that led the *Tyson Foods* Court to allow plaintiffs to rely on a just-and-reasonable inference in calculating the amount and extent of their damages after a proven violation. Antitrust law applies the same evidentiary rule to antitrust plaintiffs that *Tyson Foods* and *Mt. Clemens* apply to FLSA plaintiffs. And when antitrust plaintiffs put forward representative evidence that is sufficiently reliable to support a classwide showing of prima facie impact and "measurable damages," *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 532 (6th Cir. 2008), that evidence must go to the jury.

II. PROPERLY SPECIFIED REGRESSION ANALYSES MAY RELIABLY DEMONSTRATE CLASSWIDE IMPACT

Just as Defendants' efforts to raise the standards for predominance and the use of statistical evidence at class certification are barred by *Tyson Foods*, so too is Defendants' frontal assault on the use of regression modeling as a method of statistical analysis. Defendants argue that regression models are impermissible if they rely on "averaging," because averaging "assume[s] away" differences among individual class members. Defs.' Opening Br. 27, 33, 34. Defendants' argument was litigated and rejected in *Tyson Foods* and fundamentally misunderstands regression analysis.

The Petitioner in *Tyson Foods* made the losing argument Defendants repeat here. Brief of Petitioner Tyson Foods 33-40, 136 S. Ct. 1036, No. 14-1146 (filed Aug. 7, 2015) (improper to permit a class action when common evidence based on "a hypothetical 'average'" because "individual class members may well be above or below the average" and "averages were used to mask differences among class members"). The Court said, "a categorical exclusion of that sort, however, would make little sense." *Tyson Foods*, 136 S. Ct. at 1046. "[A] representative or statistical sample, like all evidence, is a means to establish or defend against liability." *Id*.

The Court's holding that relevant and reliable representative evidence is admissible proof in litigation cited two amicus briefs by experts in economics and complex litigation, respectively. *Tyson Foods*, 136 S. Ct. at 1046 (citing Brief of Economists and Other Social Scientists (filed Sept. 29, 2015) [hereinafter "Tyson Economists' Br."]; Brief of Amicus Curiae Complex Litigation Law Professors (filed Sept. 29, 2015) [hereinafter "Tyson Complex Litig. Prof's Br."]). Those briefs show why Defendants' argument fails.

As the Economists explained to the Court, "Multiple regression analysis … is a bedrock tool of science and economics, and regression analysis by definition uses 'average' data analysis to reveal broader industry and market trends." Tyson Economists' Br. 2. Indeed, "[a]ll inferential techniques in statistics are, in one way

or another, based on the well-accepted concepts of sampling and extrapolation." *Id.* at 7. "[N]o sensible economist would cast categorical doubt on the use of such methods." *Id.* at 11.

Accordingly, regression analysis is "routinely permitted" to prove antitrust impact and has been singled out as appropriate specifically for that purpose. Tyson Complex Litig. Prof's Br. 5–6 (citing *In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167, 1206 (N.D. Cal. 2013) (describing "roadmap widely accepted in antitrust class actions"); *Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 808 (7th Cir. 2012) (Federal Trade Commission uses same economic and statistical methods)); *see also* ABA Section of Antitrust Law, Proving Antitrust Damages 125–26 (2d ed. 2010) (regression analysis is "particularly useful in separating the impact of an alleged anticompetitive act on market outcomes (such as pricing) from the impact of other influences").

And regression analysis also is routinely used in antitrust class actions to prove that impact was widespread across a class. *See, e.g., In re Linerboard Antitrust Litig.*, 305 F.3d 145, 153–55 (3d Cir. 2002); *In re Capacitors Antitrust Litig.*, No. 14-CV-03264-JD, 2018 WL 5980139, at *7 (N.D. Cal. Nov. 14, 2018); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 291, 313 (N.D. Cal. 2010); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603, 614 (N.D. Cal. 2009).

Defendants' portrayal of Plaintiffs' experts' regression models as attempting to prove classwide impact through "averaging assumptions" is a caricature both of Plaintiffs' experts' models and regression modeling generally. Properly specified regression models of classwide impact, including Plaintiffs' expert models, do not end upon calculating average overcharges; they calculate total damages and average overcharges as *part of* a regression *analysis* to model classwide impact. See ER14, ER31-34, ER50–51, (describing inputs and robustness and sensitivity checks in relation to experts' base calculations of overcharges and pass through); ER31 (describing "two-step methodology").[7] Defendants' attacks on the use of averaging ignore the second-step of the analysis that constitutes the evidence on which Plaintiffs base their showing of classwide impact. *See* Paul A. Johnson, *The Economics of Common Impact in Antitrust Class Certification*, 77 Antitrust L.J. 533, 553–54 (2011) ("[A]n economist may use econometric techniques to control for price changes caused by [supply and demand] factors" and then "focus[] on the uniformity of these differences across putative class members"; if "substantially all transactions were affected by the event" then "[s]uch a finding should be viewed as an element of legal proof supporting the hypothesis of common impact, but does not 'prove' the hypothesis in a scientific sense").

[7] The experts also relied on qualitative common indicators of impact, such as the guilty pleas and industry structure evidence, which bolstered their quantitative analysis and vice versa. ER11-12.

Calculating aggregate damages and average overcharges and then using controls to account for various differences across the class to model whether substantially all transactions were affected by the price-fixing conspiracy is a well-accepted method of establishing classwide antitrust impact. *See, e.g., In re Air Cargo Shipping Servs. Antitrust Litig*., No. 06-MD-1175 JG VVP, 2014 WL 7882100, at *55 (E.D.N.Y. Oct. 15, 2014) (pooled model showing aggregate class-wide damages insufficient to establish classwide impact alone but re-running the regression using indicator variables "fixes the problem"); *In re Polyurethane Foam Antitrust Litig*., 314 F.R.D. 226, 251 (N.D. Ohio 2014) ("[W]hat matters" is whether class members "paid more for a given product than market forces, represented in [the expert's] models by his supply and demand regressors, would have demanded—not whether the pattern of price changes … was the same over a given interval of time.") (internal quotation omitted).

More importantly, the district court here made findings that the experts' respective analyses, not just their use of average overcharges, lacked methodological flaws that would prevent the class members from relying on them at trial to prove impact. ER23, ER27–38, ER54. Those findings are not clearly erroneous, and Defendants may contest Plaintiffs experts' conclusions at trial. *See Capacitors*, 2018 WL 5980139, at *7 (similar averaging-based critique of Plaintiffs' expert "may be grist for a good cross-examination at trial"); *see also id*. (such critiques "demand

too much” and would set certification bar at “extreme height” that “would almost certainly kill off most antitrust class actions”).

This Court should hold that categorical arguments attacking basic methods of regression modeling may no longer be countenanced after *Tyson Foods*. “[T]he fact-bound work necessary to evaluate whether a given study is reasonable … cannot be reduced, as [Defendants] would have it, to broad attacks on ‘average,’ ‘statistical,’ and other representative evidence in class actions or any other setting.” Tyson Economists’ Br. 6.

CONCLUSION

For the foregoing reasons, the district court’s order granting class certification should be affirmed.

Respectfully submitted,

/s/ Randy M. Stutz
RANDY M. STUTZ
AMERICAN ANTITRUST INSTITUTE
1025 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036
(202) 905-5420
rstutz@antitrustinstitute.org

Ellen Meriwether
CAFFERTY CLOBES MERIWETHER & SPRENGEL
205 N. Monroe St.
Media, PA 19063
(215) 864-2800 (phone)
emeriwether@caffertyclobes.com

August 21, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 19-56514

I am the attorney or self-represented party.

This brief contains __6,476______ words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[X] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
 [ ] it is a joint brief submitted by separately represented parties;
 [ ] a party or parties are filing a single brief in response to multiple briefs; or
 [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated ______________.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Randy M. Stutz **Date** August 21, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August, 2020, I electronically filed the foregoing with the Clerk of the 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/ Randy M. Stutz

Dated: August 21, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 18. Certificate for Paper Copy of Electronic Brief

Instructions for this form: http://www.ca9.uscourts.gov/forms/form18instructions.pdf

9th Cir. Case Number(s) 19-56514

My name is Randy M. Stutz

I certify that this brief is identical to the version submitted electronically on *(date)*:

August 21, 2020.

Signature s/ Randy M. Stutz **Date** August 21, 2020

(either manual signature or "s/[typed name]*" is acceptable)*