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 REHEARING EN BANC

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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.

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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] AAI submits this brief because the panel majority's opinion conflicts with intra-Circuit precedent, Supreme Court precedent, and Rule 23. The predominance standard in this Circuit should remain sufficiently flexible to account for the realities of class litigation on behalf of antitrust victims.

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[1] All parties consent to the filing of this amicus brief. 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. Counsel to amicus curiae Joshua P. Davis represented the Commercial Food Service Product plaintiffs during the pendency of the litigation but is not currently involved in the litigation and has not been involved in the litigation since 2019.

[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.

SUMMARY OF ARGUMENT

Amicus curiae supports *en banc* review. The panel opinion can be read to require a district court to make a factual finding of injury to all but a *de minimis* percentage of class members for common issues to predominate at class certification. Amicus curiae believes no federal court has ever adopted such a stringent standard. It is inconsistent with Supreme Court and Ninth Circuit precedent and with Federal Rule of Civil Procedure 23. And it aims to solve a problem that appears not to exist. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774, 797 (9th Cir. 2021) (Hurwitz, J., concurring in part and dissenting in part) ("Put simply, the *de minimis* rule is a solution in search of a problem.").

To be clear, amicus curiae agrees with the panel opinion insofar as it endorses using: statistical analysis at class certification, regression models to assess classwide impact in antitrust cases, and averaging assumptions when supported by sufficient data. *Id.* at 787–90. These points are consistent with Rule 23. But requiring a judge to find the percentage of class members that were injured is not.

In understanding how extraordinary that requirement is, two elements of the panel's holding should be treated separately: first, resolution of an ultimate merits issue at class certification; and, second, setting a maximum percentage of uninjured class members for predominance. Because both elements conflict with *Torres v.*

Mercer Canyons, Inc., 835 F.3d 1126 (9th Cir. 2016), Supreme Court precedent, and Rule 23, *en banc* review is appropriate. Fed. R. App. P. 35(b)(1).

ARGUMENT

I. THE PANEL MAJORITY REQUIRES AN INAPPROPRIATE FINDING ON THE MERITS

For predominance, courts do not require plaintiffs to prevail on the merits; at most they require plaintiffs to show that they have common evidence *capable of* proving their case. *Amgen, Inc. v. Conn. Retirement Plans and Trust Funds*, 568 U.S. 455, 468-69 (2013) (noting, at most, predominance requires that an element of a claim is "*susceptible to* classwide proof") (emphasis added); *Bumble Bee*, 993 F.3d at 784 ("*In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 191 (3d Cir. 2020) (holding that district courts must find by a 'preponderance of the evidence that the plaintiffs' claims are *capable of* common proof at trial')") (emphasis added); *Torres*, 835 F.3d at 1134 (issue is common if it "'is susceptible to generalized, class-wide proof'") (quoting *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1125, 1045 (2016)); *cf. In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 624–25 (D.C. Cir. 2019) (finding no predominance only because 12.7% of class members were conceded to be uninjured *by plaintiffs' own expert*).

That distinction—between making a factual finding, on one hand, and determining that reliable evidence is capable of supporting such a finding, on the

other—may seem subtle. Yet it matters greatly in practice. It is one thing for a court to find that plaintiffs have offered reliable common evidence that, *if believed*, would establish classwide impact. It is quite another for a court to decide whether plaintiffs' evidence is *persuasive*. That would require plaintiffs to win twice on the merits—before a judge, then a jury. *Amgen*, 568 U.S. at 460 (trial courts at class certification should not decide merits issues that "might have to be shown all over again at trial").

Put differently, under the appropriate standard, for injury to be a common issue, a court need merely find that plaintiffs' expert testimony is admissible and can prove widespread harm to the class. *Bumble Bee*, 993 F.3d at 786, n. 4 (acknowledging *Tyson Foods* "stated that once a district court finds representative evidence 'admissible, its persuasiveness is, in general, a matter for the jury,' and class certification should only be denied if 'no reasonable juror' could have found the plaintiffs' representative evidence persuasive") (quoting *Tyson Foods*, 136 S. Ct. at 1049).[3] The panel majority, in contrast, can be read to require a trial court to find

[3] The panel majority distinguishes *Tyson Foods* because it involved "a wage-and-hour class action where representative evidence is explicitly permitted to establish liability in individual cases." *Id*. (citing *Tyson Foods*, 136 S. Ct. at 1049 (citing *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680, 687 (1946))). But that distinction does not work because *Mt. Clemens* derived its approach from *antitrust* precedents. *Mt. Clemens*, 328 U.S. at 688 (citing *Bigelow v. RKO Radio Pictures, Inc*., 327 U.S. 251, 263-66 (1946) (antitrust case); *Story Parchment Co. v. Paterson Parchment Co*., 282 U.S. 555, 563 (1931) (same); *Eastman Kodak v. Southern Photo*

plaintiffs' expert testimony is right and defendants' expert testimony is wrong. That is a step too far. *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 459 (2013) (emphasis added) (predominance requires "*questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class").

A finding that plaintiffs have proven on the merits that defendants caused nearly all class members to suffer injury is unnecessary to assess predominance. Three of the four showings required for plaintiffs to recover in an antitrust case—violation, general causation of harm, and aggregate damages—are inherently common to the class. *Amchem Products v. Windsor*, 521 U.S. 591, 625 (1997). So if common evidence is *capable of* showing classwide impact, common issues predominate.[4] This point explains why the Supreme Court has held, "Predominance is a test readily met in certain cases alleging. . . violations of the antitrust laws." *Id.*

Materials Co., 273 U.S. 359, 377–379 (1927) (same)). And the panel correctly recognized that individual plaintiffs in antitrust cases may rely on representative evidence. *Bumble Bee*, 993 F.3d at 787–90.

Nor does Article III standing, due process, or the Rules Enabling Act prohibit certification of classes containing uninjured members. *See* Joshua P. Davis, Eric L. Cramer, & Caitlin May, *The Puzzle of Class Actions with Uninjured Members*, 82 Geo. Wash. L. Rev. 858 (2014).

[4] To be clear, as discussed below, common issues can predominate even if impact is not a common issue. For precision one might say that common impact is a sufficient but not a necessary condition for predominance in antitrust cases.

Nonetheless, the panel majority worried that if a jury were to accept defendants' evidence that only 72% of class members were injured—instead of plaintiffs' evidence of impact to 94.5%—individual trials would be necessary on impact for the remaining 28%. *Bumble Bee*, 993 F.3d at 791. That risk is illusory. For various reasons, individual trials on impact would not be necessary even if a jury were to find that defendants' figure is correct.

First, plaintiffs' experts in this case, and in many antitrust cases, use common evidence—in the form of a statistical model—to show that classwide impact is susceptible to proof on a class-member-by-class-member basis. *Bumble Bee*, 993 F.3d at 782–83; *see, e.g., In re Capacitors Antirust Litig.*, 2018 WL 5980139, at *7 (N.D. Cal. Nov. 14, 2018) (using econometric method to show common impact that allows for identification of potentially uninjured class members); *In re Domestic Drywall Antitrust Litig.*, 322 F.R.D. 188, 217 (E.D. Pa. 2017) (same); *In re Korean Ramen Antitrust Litig.*, 2017 WL 235052, at *6 (N.D. Cal. Jan. 19, 2017) (same); *In re Air Cargo Ship. Services Antitrust Litig.*, 2014 WL 7882100, *55 (E.D.N.Y. Oct. 15, 2014), *report and recommendation adopted,* 2015 WL 5093503 (E.D.N.Y. July 10, 2015) (same); *In re Chocolate Confectionary Antitrust Litig.*, 289 F.R.D. 200, 221 (M.D. Pa. 2012) (same). Defendants' experts similarly can use statistical analysis to identify the class members for whom they claim the plaintiffs' expert's model fails to show injury.

So a finding at trial that plaintiffs' evidence fails to prove impact to 28% of class members would mean those class members could not recover at all. No individualized inquiries would be necessary to allocate any recovery. The statistical model can identify, using common evidence, the class members who should not receive compensation.

Second, often the only way to establish impact to many class members in antitrust cases is through common evidence—typically employing the kind of statistical model the panel endorsed. *Bumble Bee*, 993 F.3d at 788-90. The very class members that defendants claim are uninjured generally have made too few purchases to use a statistical model or any other method to assess impact on an individual basis (again, as is true here). As a result, the class members that cannot win on impact with common evidence will simply lose; they lack the evidence to proceed individually. There is no threat of individualized proof of injury predominating at trial.

Third, defendants do not argue at trial in antitrust cases that some significant percentage of absent class members was uninjured. And juries do not make such findings. Defendants argue instead some combination of: they did not do the alleged acts; those acts did not violate the antitrust laws; the acts did not cause legally cognizable harm; and there were no damages to anyone. That is because what

defendants care about in reality is whether they are found liable and, if so, aggregate damages.[5] In antitrust cases, the allocation of damages among class members—or the determination of the percentage of class members injured, which can amount to the same thing—generally has no effect on aggregate damages. Defendants at class certification rarely contest that point. They argue instead that aggregate damages reflect *an average* and then dispute *what portion* of the class contributed to those aggregate damages. That issue disappears at trial. Defendants have no interest in raising it. They are liable for the same amount either way.

Fourth, the above considerations suggest that antitrust class action trials will not in practice degenerate into individual issues if plaintiffs provide reliable common evidence *capable of* showing classwide impact. And that is exactly what history shows. Amicus curiae is intimately familiar with various empirical studies of

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[5] *Torres*, 835 F.3d at 1141 ("*Hilao v. Estate of Marcos*, 103 F.3d 767, 786 (9th Cir. 1996)) (class-action defendant's interests are 'only in the total amount of damages for which it will be liable,' not 'the identities of those receiving damage awards')."). That explains in part why the ABA Model Jury Instructions in Civil Antitrust Cases (2016 ed.) do not contain any instruction on common impact. The relevant instruction for antitrust class actions addresses only aggregate damages. *See id*. at 314, ch. 6.B.7 (quoting, *inter alia*, *In re Pharm. Indus. Average Wholesale Price Litig*., 582 F.3d 156, 197 (1st Cir. 2009) ("The use of aggregate damages calculations is well established in federal court and implied by the very existence of the class action mechanism itself."). *See* Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification and the Politics of Procedure*, 17 Geo. Mason L. Rev. 969, 971, 990-93 (2010) (gathering jury instructions from antitrust trials and showing that they do not ask the jury to make a finding about the percentage of class members that were injured or otherwise to address common impact).

federal antitrust class actions—qualitative and quantitative[6]—but do not know of *a single case* in which a court certified an antitrust class and then was forced to adjudicate unmanageable individual issues regarding impact. Courts that apply the traditional class certification standard to find predominance appear never to regret doing so.

On the other hand, adjudicating the ultimate issue of classwide impact would make litigating class certification even more time-consuming and exorbitant than it already is. Doing so could involve live witnesses, evidentiary rulings, opening and closing statements, and the like. These procedural safeguards perform important functions. They also exact great costs. *Amgen*, 568 U.S. at 477 (rejecting merits determinations that would "necessitate a mini-trial. . . at the class-certification stage" that "would entail considerable expenditures of judicial time and resources").

So why impose an expensive and unprecedented standard that requires plaintiffs to prevail twice at trial on the merits—once before a judge, once before a jury—to solve a problem that will almost certainly never occur?

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[6] *See, e.g.*, Joshua P. Davis & Rose Kohles, *2019 Antitrust Annual Report: Class Action Filings in Federal Court* (Aug. 2020), *available at* https://ssrn.com/abstract=3696575; Joshua P. Davis & Rose Kohles, *2018 Antitrust Annual Report: Class Action Filings in Federal Court* (May 14, 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3386424; Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 Ga. L. Rev. 1 (2013); Joshua P. Davis & Robert H. Lande, *Towards an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 Seattle U. L. Rev. 1269 (2013).

II. THE PANEL MAJORITY IMPROPERLY REQUIRES HARM TO A FIXED PERCENTAGE OF CLASS MEMBERS

The panel majority also erred by setting a maximum percentage for uninjured class members. Rule 23(b)(3) requires that common issues predominate *in a case as a whole*, not that common issues predominate for each element of a claim, much less that the element of impact is uniformly or nearly uniformly satisfied across class members. The Supreme Court and Ninth Circuit have so held. *Tyson Foods*, 136 S. Ct. 1036 at 1045 ("When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members."); *Amgen*, 568 U.S. at 459 (Rule 23(b)(3) "does not require a plaintiff seeking class certification to prove that each element 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."); *Torres*, 835 F.3d at 1137 (holding common issues predominated in litigation as a whole, even though they did not predominate as to impact); *see also Leyva v. Medline Indus.*, 716 F.3d 510, 514 (9th Cir. 2013) ("the presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)"); *Cordes & Co. Fin. Servs. 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 [in an antitrust case] presents individual questions. . . , it does not necessarily follow that they predominate over common ones and that class action treatment is therefore unwarranted.").

Moreover, common issues can predominate with respect to impact even if more than a *de minimis* percentage of class members turn out to be uninjured. Predominance requires a qualitative, not a quantitative, analysis. *Torres*, 835 F.3d at 1134 ("Predominance is not. . . a matter of nose-counting. Rather, more important questions apt to drive the resolution of the litigation are given more weight in the predominance analysis over individualized questions which are of considerably less significance to the claims of the class.") (citing *Jimenez v. Allstate Ins. Co*., 765 F.3d 1161, 1165 (9th Cir. 2014)). As discussed above, plaintiffs in antitrust cases routinely rely only on common evidence to prove classwide impact. And defendants rely on common evidence to contest classwide impact, as they did here. As a result, if a jury were to determine that impact is not as widespread as plaintiffs claim, some class members would win, others would lose. But class members would not attempt to prove impact with individual evidence. So impact would depend wholly on common evidence.

* * *

The standard for predominance should be flexible and practical, not rigid and theoretical. That is why appellate courts review class certification only for

abuse of discretion. *Bumble Bee,* 993 F.3d at 791, 793, 796. Trial courts should not be hamstrung by a maximum percentage of uninjured class members—one that serves at best as a poor proxy for predominance. They should be permitted to exercise their sound judgment about whether common issues predominate in a proposed class action.

CONCLUSION

For the foregoing reasons, *en banc* review is appropriate in this case.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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I hereby certify that on this 19th day of May, 2021, 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: May 19, 2021