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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OLEAN WHOLESALE GROCERY COOPERATIVE, INC, ET AL.,

Plaintiffs-Appellees,

v.

BUMBLE BEE FOODS LLC, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of California, No. 3:15-md-02670-JLS-MDD

EN BANC BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

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September 10, 2021

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]

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[1] Plaintiffs consent to the filing of this amicus brief. Defendants do not oppose if the Court determines the brief is not out of time under Ninth Circuit Rule 29-2(e)(2). Defendants take the view that amicus briefs supporting Plaintiffs were due 21 days from the order of *en banc* review. Amicus submits that the Rule 29-2(e)(2) timing does not apply here. It applies to briefs supporting a "petitioning party," a "responding party," or neither party where a "petition for rehearing is granted." No such petition was filed here, and the court has not designated any party a "petitioner" or "respondent," nor does any party identify itself or its opponent as such. Even if Rule 29-2(e)(2) could be characterized as ambiguous as applied to *sua sponte* vote calls, an ambiguous rule should not be construed to require that amici be the first to file briefs in an appellate proceeding or file prior to the supported party. No Appellate Rule instructs amici to that effect. *See, e.g.,* Frap 29(a)(6) ("7 days after the principal brief"); 9th Cir. Rule 29(e)(1) ("10 days after the petition"); 9th Cir. Rule 29(e)(2) (21 or 35 days "after the petition"). Amicus submits that this brief is timely because it is filed on the same day as the brief of the party supported. 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

SUMMARY OF ARGUMENT

Defendants-Appellants StarKist Co. and Dongwon Industries Co., Ltd ("Defendants" or "StarKist") confessed to the crime of fixing prices on tuna fish, a packaged staple good that families rely on for healthy, affordable meals. They then asked the sentencing court to reduce their criminal fine based on the compensation they would pay in civil litigation. Now, Defendants come before this Court asking it to reverse certification of the plaintiff classes and thus to allow them largely to avoid making their victims whole. Their arguments are based on uncertainty about damages—uncertainty caused by the very crime they committed. If Defendants succeed, they will keep hundreds of millions of dollars they reaped from a confessed crime. That strategy, were it to prove successful, could pose a major threat to U.S. antitrust policy. Fortunately, Defendants' arguments conflict with Rule 23 and Supreme Court and Ninth Circuit precedent. They should be rejected, the trial court's class certification order should be affirmed, and Defendants should have to defend against the plaintiff classes' claims on the merits.

Defendants contend that this Court sitting *en banc* should reverse the trial court's grant of class certification. In doing so, they ask this Court to adopt a rule

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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.

that plaintiffs at class certification must prove harm to all but a *de minimis* percentage of class members (the "*De Minimis* Rule"). Otherwise, Defendants assert, plaintiffs cannot carry their burden of showing that common issues predominate over individual issues as required by Rule 23(b)(3), and courts would violate the requirements for Article III standing.

Defendants' proposed "*De Minimis* Rule" is inappropriate for three reasons. First, contrary to Defendants' argument, the predominance requirement of Rule 23(b)(3) does not support the *De Minimis* Rule. In many cases, common issues will predominate regardless of whether more than a *de minimis* percentage of class members were uninjured. That can be true because issues other than injury are common to the class and predominate in the litigation overall. *See Castillo v. Bank of Am., NA*, 980 F.3d 723, 730 (9th Cir. 2020); *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016); *see also Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1049 (2016); *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 459 (2013); *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 108 (2d Cir. 2007). It can also be true because the issue of injury is common to the class—that is, it can be resolved for class members using common evidence—even if more than a *de minimis* percentage of class members were ultimately found to be uninjured. *Tyson Foods*, 136 S. Ct. at 1049–50; *Torres*, 835 F.3d at 1134.

Second, Article III standing doctrine does not support Defendants' position. In arguing otherwise, Defendants rely on a novel approach to subject-matter jurisdiction that is at odds with Supreme Court and Ninth Circuit precedent. Defendants in effect suggest that federal courts must adjudicate the merits of claims to determine whether they have the power to adjudicate those claims on the merits.

Third, Defendants are wrong that plaintiffs at class certification must establish impact on the merits. According to Defendants, the predominance requirement of Rule 23(b)(3) requires plaintiffs' to show not merely that the issue of impact is common to the class, but rather than plaintiffs will win on the issue of impact on the merits. That is why Defendants assert that the trial court must resolve the so-called battle of the experts in applying Rule 23. That position is contrary to Supreme Court precedent, Ninth Circuit precedent, and the text of Rule 23. It would also place a heavy and unnecessary burden on trial courts.

In addition, Defendants claim that the representative evidence plaintiffs offered below cannot satisfy the *De Minimis* Rule. We will leave to the parties to delve into that evidence in detail, but we make two relevant points. First, Defendants' argument in this regard raises an issue common to the class. It thus supports—it does not undermine—a finding of predominance. Second, as in *Tyson Foods*, plaintiffs here would rely on representative evidence regardless of whether they were to proceed on a class or individual basis. If the representative evidence

fails, the affected class members would lose; they would not present individualized issues that could predominate over common issues.

ARGUMENT

I. STARKIST'S RULE 23 ARGUMENTS UNDERMINE ANTITRUST POLICY AND EVADE THE COMMITMENT TO VICTIM RECOVERY IT PLEDGED AT CRIMINAL SENTENCING

StarKist has pled guilty to criminal price fixing and expressed contrition for generating hundreds of millions of dollars in ill-gotten gains by inflating the grocery bills of millions of unsuspecting families who purchased a packaged staple good. *See, e.g.*, StarKist Co.'s Sentencing Mem. at 10, *United States v. StarKist Co.*, No. 18-CR-0513 EMC (N.D. Cal. filed May 15, 2019), ECF No. 53 ("SK Sentencing Mem.") (accepting responsibility for role of Senior VP of Sales); Def. Steven L. Hodge's Sentencing Mem., Ex. A at 2, *United States v. Steven L. Hodge*, No. 17-CR-00297-EMC (N.D. Cal. filed Dec. 23, 2020), ECF No. 44 ("For the rest of my life, I will feel remorseful and embarrassed …. This price fixing conspiracy harmed American consumers and I am sorry that I was a part of it."). In plea negotiations with the government, StarKist agreed to pay a $100 million criminal fine. United States' Sentencing Mem. at 1, *United States v. StarKist Co.*, No. 18-CR-0513 EMC (N.D. Cal. filed May 15, 2019), ECF No. 51 ("U.S. Sentencing Mem.").

However, at sentencing, StarKist reversed course. It argued that its criminal fine should be cut in half because it needed the money to make its victims whole. SK Sentencing Mem. at 1 ("StarKist cannot pay more than a $50 million fine, and even a fine of that amount may still impair its ability to make restitution …."). It asked the sentencing court to declare that its proposed fine reduction was not only permissible but mandatory under § 8C3.3(a) of the U.S. Sentencing Guidelines. *Id*. at 9–10. "Without a significant reduction of the criminal fine," it explained, "StarKist will not be able to fully compensate all of the civil plaintiffs from its projected free cash flow." *Id*. at 12; *see also id*. ("The same policy goals animating § 8C3.3(a) apply equally to criminal restitution and civil damages standing in lieu of criminal restitution" because the statute's intent is to avoid "undercut[ting] victim recovery."). StarKist specifically cited the instant case, which was also singled out in its plea agreement, in touting the critical significance of victim recovery in civil actions. *Id*. at 11 (noting that recommended sentence in plea agreement does not include restitution "'[i]n light of the civil cases filed against the defendant, including *In re: Packaged Seafood Products Antitrust Litigation*, (15-md-02670-JLS-MDD)") (quoting Plea Agreement at 7, *United States v. StarKist Co.*, No. 18-CR-0513 EMC (N.D. Cal filed Nov. 14, 2018), ECF No. 24).[3]

[3] This case is not unique in this respect. The DOJ routinely agrees to rely on private civil liability to accomplish restitution for criminal antitrust violations. *See*

The Department of Justice and the Probation Office vehemently disagreed. They rejected a mandatory reduction on grounds that § 8C3.3(a) applies only when the criminal fine would interfere with the defendant's ability to pay *criminal* restitution. *See id*. at 10. But StarKist countered that, under its plea agreement with the federal government, "the parties have expressly agreed that civil liability adequately substitutes for an order of restitution." *Id*. at 10. In practical effect, it argued, "civil liability stands in place of criminal restitution." *Id*. at 11. "The Court should consider civil liability the functional equivalent of criminal restitution," StarKist said, because "[t]he damages paid in the civil case will adequately compensate the civil plaintiffs." *Id*. at 11–12.

StarKist further attempted to support its proposed fine reduction by calculating the estimated amount of its liability to civil plaintiffs. The calculations are redacted from public view, *see* StarKist Sentencing Mem. at 17, but the government determined, upon studying them, that StarKist had gone so far as to "grossly *inflate* its hypothetical future civil damages" in an "attempt to escape punishment for the crime it committed." U.S. Sentencing Mem. at 1 (emphasis added). Moreover, the government introduced evidence that StarKist had depleted its cash reserves "by

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U.S. Dept. of Just, Antitrust Div., Model Annotated Corporate Plea Agreement at 7 (last updated Aug. 29, 2016), https://www.justice.gov/atr/file/889021/download.

accelerating business-related expenditures in an attempt to avoid paying a guidelines fine." *Id*. The government cautioned the sentencing court that StarKist "should not be permitted to spend money on itself at the expense of paying the price for its criminal acts." *Id*. The sentencing court agreed and followed the government's recommendation to impose the maximum Guidelines fine of $100 million.

Now, StarKist is charting the same course. After lobbying for austerity measures during criminal sentencing in the name of victim recovery in these civil matters, it has invested heavily in a lavish and prolonged class-action defense, *see* Pls. Op. to Sup. Br. 1–2, which would prevent any such victim recovery from actually occurring. Indeed, this defense doubtless is being funded by profits from StarKist's criminal activity, profits that are the rightful property of the victims that StarKist has repeatedly represented it intends to make whole. StarKist has not suggested how it would compensate victims procedurally without using the class-action device; it apparently intends to keep its ill-gotten gains if the classes here are decertified.

Notably, StarKist's objection to using the class device to achieve the victim recovery it trumpeted so loudly at criminal sentencing is not that affirming class certification would risk awarding any of the victim classes more than the aggregate damages it caused them. StarKist does not claim as a basis for this appeal that the

plaintiffs' experts overstated aggregate damages. StarKist's argument rests solely on the possibility that plaintiffs' experts are wrong about how those damages were spread *across* class members and what percentage of the class members who *did* purchase its price-fixed products *may* have experienced "fortuitous non-injury." *Torres*, 835 F.3d at 1137.

To be sure, "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," particularly in antitrust cases where "[t]he 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." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566–67 (1981). Consistent with the rule that "a wrongdoer should not profit from uncertainty caused by his own wrong," *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 73 (9th Cir. 1979), this Court recognizes that the fact "some class members' claims will fail on the merits *if and when damages are decided*" is "generally irrelevant to the district court's decision on class certification." *Torres*, 835 F.3d at 1136 (emphasis added; cleaned up).

But StarKist's arguments are wanting for more than good grace. If the classes are not certified in this case, StarKist will keep its ill-gotten gains, undermine its plea agreement with the federal government, and thwart the basic deterrence and compensation goals of the Clayton Act that StarKist attempted to leverage into

a reduced criminal fine. And StarKist makes these arguments notwithstanding that, even if they were correct, class certification would *not* result in plaintiffs recovering more in total damages than the law provides. It would just mean that some of the class members did not pay overcharges while others paid larger overcharges than plaintiffs' models suggest, with the net effect of StarKist paying the right amount of total damages.

As this Court parses StarKist's and its amici's latest round of arguments in further supplemental briefing ordered at StarKist's behest, it should be mindful that it does so against the backdrop of the Clayton Act's fundamental goals. Section 4 of the Clayton Act, which allows private victims of price fixing and other similar crimes to recover when they suffer measurable damages, "has two purposes: to deter violators and deprive them of the fruits of their illegality, and to compensate victims of antitrust violations for their injuries." *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 314 (1978) (cleaned up); *see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485–86 (1977).

A recurring challenge in realizing these twin goals, as StarKist and its amici surely know, is that per se illegal price-fixing schemes often generate high-volume, low-dollar injuries, in which victims' claims may allow for only "small recoveries that do not provide the incentive for any individual to bring a solo action." *Am-*

chem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (internal quotation omitted). In such cases, deterrence and compensation cannot be achieved without a procedural device to aggregate claims, thereby "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).

By reinvesting cartel profits belonging to victims into a class-action defense that would thwart the victims' recovery, StarKist is following a familiar playbook. Defendants and pro-business amici often attempt to ratchet up class-certification standards and layer enormous costs and uncertainty onto each successive private antitrust class claim, regardless of the merits, and regardless of admitted liability. They do so because this strategy forces class counsel, and victims, to internalize the spiraling risks and costs of pursuing class recoveries even when guilt is confirmed. Over time, as the economics of litigating class certification grow increasingly untenable, the ambit of behavior meaningfully punishable under the Clayton Act begins to shrink, and the inefficacy of the Act as a check on competitive abuses begins to erode the antitrust laws' promise of competitive markets.

This strategy has proved devastating. The state of cartel deterrence has become so anemic that economic studies now find "crime pays." That is, cartels often prove net profitable to conspirators even after they are caught. *See* 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 development is a serious problem for the U.S. economy. If deterrence and victim compensation cannot be achieved successfully in price-fixing cases like this one, where criminal guilt is confirmed, we will have lost "an integral part of the congressional plan for protecting competition." *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990). Here, however, StarKist's arguments also lack merit and can be easily rejected on their own terms. They are inconsistent with Rule 23 as well as with Supreme Court and Ninth Circuit precedent.

II. DEFENDANTS' PROPOSED "*DE MINIMIS* RULE" CONFLICTS WITH RULE 23

A. Rule 23(b)(3) Does Not Support the *De Minimis* Rule

In AAI's brief supporting *en banc* review, it provided two reasons the predominance requirement does not support the *De Minimis* Rule. First, under Supreme Court and Ninth Circuit precedent, common issues must predominate in a case as a whole, not in regard to each element of plaintiffs' claims. *See, e.g.*, *Tyson Foods*, 136 S. Ct. at 1045; *Amgen*, 568 U.S. at 459; *Castillo*, 980 F.3d at 730; *Torres*, 835 F.3d at 1137; *Leyva v. Medline Indus.*, 716 F.3d 510, 514 (9th Cir.

2013). Whether defendants engaged in the alleged conduct and, if so, whether that conduct violated the law often are common to the class and predominate in antitrust litigation. So common issues can predominate even if impact (or fact of injury) is not common to class members. Brief for the American Antitrust Institute as Amicus Curiae in Support of Rehearing *En Banc* ("AAI Br.") at 10–11. Second, the issue of impact can be common to the class even if more than a *de minimis* percentage of class members were uninjured. That would be true, for example, if common evidence established which class members were injured and which were not. In that case, impact would be resolved by common evidence and no individual issues would arise in regard to the uninjured class members. *Id*. at 10-11.

AAI also explained why those points apply, for example, to the direct purchaser plaintiffs in this litigation. First, common issues will predominate in the case as a whole, regardless of whether impact is a common issue. *Id*. at 7-8. That is because what Defendants care about is whether they are found to have engaged in a price-fixing conspiracy and, if so, the total damages they must pay. They have no inherent interest in the percentage of class members that will receive compensation or how any recovery will be allocated. *Id*.

Second, even if Defendants were right and plaintiffs could not show harm to 28% of the direct purchaser class, those class members would lose and would receive no share of the total damages; they would not rely on individualized evidence

or litigate individual defenses.[4] If the plaintiffs were to pursue their claims on their own, they would have to use the same sort of representative statistical evidence as the class put forward in support of class certification. It is not as if the packages of tuna that plaintiffs bought came labeled with a "conspiratorial" price and a "competitive" price. The plaintiffs have no way to prove they paid overcharges other than through economic and econometric analyses based on aggregate data. Their claims would rise or fall based on common evidence.

The class members for whom Defendants claim there is insufficient evidence of impact are unlike the large opt-out plaintiffs, such as Walmart. That is *why* they are represented in these class actions.[5] The allegedly uninjured 28% of the class are small buyers. They made too few purchases to allow for separate econometric analyses of impact based on their individual purchases. Indeed, that is Defendants' strategy—chop up the analysis so that they can use statistical noise

[4] As noted above, the presence of uninjured members in the class would not change *aggregate* damages. Defendants' argument is only that plaintiffs' experts are wrong about how widespread the aggregate damages are across the class; it is *not* that plaintiffs' experts have overstated those aggregate damages.

[5] Defendants emphasize that Walmart was able to use a "Walmart-specific analysis" to establish an overcharge in its opt-out case, *see* Defendants-Appellants' Supplemental *En Banc* Brief at 27, but this shows why their argument defies common sense. If a firm with Walmart's volume of individual purchases can show an overcharge based on firm-specific analysis, a finding that the small firms in the class did not pay an overcharge demands the inference that they commanded more bargaining power than Walmart.

and lack of statistical significance to try to make it appear as if some class members might not have been injured. In reality, of course, small class members had the *least* bargaining power and were *least* able to resist paying inflated prices. For those small class members, the realistic options are: (1) use the econometric evidence that class counsel put forward or (2) lose.

Defendants' supplemental brief is thus premised on a non sequitur. It assumes that if the classwide proof of injury does not establish harm to some class members, that would necessarily give rise to individual issues. For some of Defendants' arguments, that point is obviously wrong. Defendants claim, for example, that all members of each plaintiff class rely on impermissible averaging to prove impact. Defendants-Appellants' Supplemental *En Banc* Brief ("Defs.' Br.") at 21. If Defendants were right—they are not—then all of the plaintiffs should lose. If plaintiffs are right—they are—then they should all win on this issue. The issue is thus common to the class. *Amgen*, 568 U.S. at 460 ("[T]he class is entirely cohesive: it will prevail or fail in unison.").

Other arguments Defendants make apply to only some class members. They thus contend that the direct purchasers' evidence of impact does not work for 28% of class members. But, again, if the jury rejects evidence of impact for those 28%, all of those class members should lose on the merits. Defendants do not suggest those class members have available non-classwide evidence of impact or that they

have non-classwide defenses. To the contrary, Defendants' own expert analyses demonstrate there aren't any. So there is no risk of the litigation degenerating into predominantly individual issues.

Defendants also mischaracterize the case law. Supreme Court and Ninth Circuit precedent conflict with Defendants' proposed *De Minimis* Rule. Defendants do not explain how their proposed rule can be reconciled with numerous cases holding that common issues need to predominate in a case as a whole, not as to each element of plaintiffs' claims. *See, e.g., Tyson Foods*, 136 S. Ct. at 1045, 1049–50; *Amgen*, 568 U.S. at 469; *Castillo*, 980 F.3d at 780; *Torres*, 835 F.3d at 1137. Nor do Defendants account for the many opinions affirming certification of classes containing uninjured members without doing any inquiry into whether those class members constituted a *de minimis* percentage of the class. *Tyson Foods*, 136 S. Ct. at 1045–50; *Torres*, 835 F.3d at 1134; *Kohen v. Pac. Inv. Mgmt. Co. LLC & PIMCO Funds*, 571 F.3d 672 (7th Cir. 2009). As this Court and others have held, the predominance inquiry is qualitative, not quantitative, so bright line numerical rules are inappropriate. *Torres*, 835 F.3d at 1134 ("Predominance is not … a matter of nose-counting"; "more important questions apt to drive the resolution of the litigation are given more weight").

The main Ninth Circuit case on which Defendants rely is *Castillo*. Defs.' Br. at 17–18. They misconstrue that decision in various ways. *Castillo* recognized, for

example, that Rule 23(b)(3) "'does not require a plaintiff seeking class certification to prove that each element of their claim is susceptible to classwide proof,' so long as one or more common questions predominate." 980 F.3d at 730 (quoting *Amgen*, 568 U.S. at 469 (alterations in original). *Castillo* also did not adopt the *de minimis* standard but rather held that a "court must 'ensure that the class is not defined so broadly as to include a great number of members who for some reason *could not have been harmed* by the defendant's allegedly unlawful conduct.'" *Id*. (quoting *Torres*, 835 F.3d at 1138) (emphasis added).

Those holdings are inconsistent with—they do not support—Defendants' proposed *De Minimis* Rule. Defendants do not argue or attempt to support the proposition that buyers of a product subject to an admitted price-fixing conspiracy could not possibly have been harmed by that conspiracy. *Cf. Newman v. Universal Pictures*, 813 F.2d 1519, 1522 (9th Cir. 1987) ("[I]n analyzing a price-fixing conspiracy, an anti-competitive effect is presumed.").

B. Article III Standing Does Not Support the *De Minimis* Rule

Defendants also mischaracterize Article III standing doctrine. Defendants in effect suggest that if a party loses on the merits at any point in litigation, it no longer has Article III standing and a federal court lacks subject-matter jurisdiction over its claim. But courts have not adopted that novel and extraordinary position. It

would convert a threshold determination for whether a federal court has the power to hear a case into a trial on the merits.

Article III standing is jurisdictional. It limits the disputes that federal courts can adjudicate. It requires plaintiffs to show that litigation involves an actual "case or controversy" between the parties, that is, that the alleged legal violation affects the parties before a court. As such, plaintiffs cannot pursue litigation to resolve a general legal issue that could not affect them personally. As the Supreme Court put the matter in *TransUnion LLC v. Ramirez*, Article III requires plaintiffs to have "a personal interest" in federal litigation. 141 S. Ct. 2190, 2208 (2021).

But, as with other jurisdictional issues, to establish a controversy, plaintiffs need not show they will win. As Justice Scalia explained in *Steel Co. v. Citizens for a Better Environment*, in assessing Article III standing "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction." 523 U.S. 83, 89 (1998). He continued, "Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Id*. (quoting *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666 (1974)). In other words, the issue for Article III standing is whether a plaintiff has

raised an appropriate controversy, not whether that controversy will be ultimately resolved in its favor.

Yet Defendants propose that if plaintiffs at any point in litigation do not prevail on an element of their claim, they no longer have Article III standing. They emphasize injury or fact of damage, but their logic applies equally to whether defendants engaged in the alleged conduct and whether that conduct violated the law. If Defendants were right—they are not—a court would lack subject-matter jurisdiction if it rules at any time against a plaintiff on any of the elements of its claim. Defendants do not cite to a single case that has so held. *See Kohen*, 571 F.3d at 677 (Posner, J.) ("[W]hen a plaintiff loses a case because he cannot prove injury the suit is not dismissed for lack of jurisdiction. Jurisdiction established at the pleading stage by a claim of injury that is not successfully challenged at that stage is not lost when at trial the plaintiff fails to substantiate the allegation of injury; instead the suit is dismissed on the merits.") (citation omitted).

The actual rule is that plaintiffs must establish that they were exposed to the kind of harm that would confer on them Article III standing. In *Lujan*, for example, the Court held that the plaintiffs could not enforce the Endangered Species Act abroad because they could not have been personally harmed from the loss of a species outside of the U.S. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). Similarly, in *TransUnion*, the Court held some of the plaintiffs could not have been

personally injured because any incorrect information collected about them had never been disseminated. 141 S. Ct. at 2209. In both cases, plaintiffs had not been *exposed to the right kind of harm*. *Torres,* 835 F.3d at 1136 ("[T]he 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.") (emphasis in original); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012). Unlike here, even if plaintiffs in those cases prevailed, they could not establish that the alleged legal violations in fact injured them personally.

This formulation of Article III standing is confirmed by an example the Supreme Court offered in *TransUnion*. A Maine citizen files federal litigation alleging a nearby factory polluted her land. 141 S. Ct. at 2205. A Hawaii citizen with no personal connection to the incident also files federal litigation against the same factory based on pollution in Maine. *Id*. According to the Court, the Maine citizen would have suffered an injury in fact and would have Article III standing but the Hawaii citizen would not. *Id*. at 2206. But note that according to Defendants' reasoning, if the trial court were to determine at some point that the Maine citizen should lose on the merits—say, because the factory's conduct did not violate federal law or the Maine citizen cannot prove its damages—she would no longer have

Article III standing. The court would have to dismiss the case for lack of subject-matter jurisdiction. That outcome conflicts with the reasoning of *TransUnion*. It also lacks support in the cases Defendants cite.

Defendants' novel approach to Article III would also cause bizarre results. Plaintiffs would have to prevail before a federal court to establish that they can litigate before that court. Such a doctrine would be self-defeating—like swallowing a pill to test whether it contains a deadly poison. Courts would have to adjudicate claims on the merits to determine whether they have the power to adjudicate those claims on the merits.

Further, if Defendants were right, plaintiffs that lose at summary judgment, at trial, or even on appeal would lack Article III standing. Their claims thus should be dismissed for lack of subject-matter jurisdiction. *See, e.g.*, Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). But note that the plaintiffs would not then lose on the merits. The federal court would lack the power to impose such a result. So the absent class members whose claims were dismissed could pursue their litigation in state court. *See TransUnion*, 141 S. Ct. at 2224, n.9 (Thomas, J., dissenting). After all, many state courts, including in California, have the power to adjudicate claims that would lack Article III standing in federal court. In other words, plaintiffs could win on the merits but they could never lose. If they did,

their claims would be dismissed on jurisdictional grounds. *See Kohen*, 571 F.3d at 677 ("[Defendant's counsel argued] that if any class member were found not to have sustained damages, the court would have no jurisdiction over that class member, who would therefore not be bound by any judgment or settlement and so could bring his own suit for damages. That is to say that if a plaintiff loses his case, this shows that he had no standing to sue and therefore can start over. That would be an absurd result, and [the defendant] need not fear it.").

This Court need not worry about such bizarre possibilities. Defendants are wrong about Article III standing doctrine. The accepted inquiry, in relevant part, is whether plaintiffs were exposed to the right kind of harm such that they could have suffered injury in fact. *Kohen*, 571 F.3d at 677 ("[I]f the [class] definition is so broad that it sweeps within it persons who *could not have been injured* by the defendant's conduct, it is too broad.") (emphasis added); *see also TransUnion*, 141 S. Ct. at 2213 (noting a procedural violation "divorced from any concrete harm" cannot suffice for Article III standing) (quotation and citation omitted); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016) (same); *Castillo*, 980 F.3d at 730; *Torres*, 835 F. 3d at 1138 ("a great number of members who for some reason could not have been harmed"); *Mazza*, 666 F.3d at 594–95.

Here all of the members of the proposed plaintiff classes were exposed; they purchased price-fixed products. If they prove their case on the merits, they will

have shown they suffered the right kind of harm for Article III standing—monetary harm. *TransUnion*, 141 S. Ct. at 2204 ("certain harms readily qualify as concrete injuries under Article III. The most obvious are traditional tangible harms, such as physical harms and monetary harms."). Article III standing requires no more.

III. THIS COURT SHOULD NOT DIRECT THE TRIAL COURT TO DECIDE IMPACT ON THE MERITS

Defendants go further than asking this Court to hold that plaintiffs must offer proof capable of establishing impact to all but a *de minimis* percentage of class members. They want the Court to hold that plaintiffs must win on the merits of classwide impact to get a class certified. That is yet another way in which Defendants ask this Court to take an unprecedented position.

Rule 23 is a procedural device. It is a mechanism courts use to determine *whether* plaintiffs win. It would be backwards to require plaintiffs to prove their claims on the merits as a prerequisite to litigating a case on a class basis. The Supreme Court and Ninth Circuit thus have held that the issue regarding predominance is not whether plaintiffs should prevail. It is whether common issues will predominate as the plaintiffs *attempt* to do so. *Tyson Foods*, 136 S. Ct. 1045 ("susceptible to generalized, class-wide proof"); *Amgen,* 568 U.S. at 468-69 (2013) ("susceptible to classwide proof"); *Torres*, 835 F.3d at 1134 (same). As a result,

courts should avoid holding "a mini-trial" in assessing class certification. *Amgen*, 568 U.S. at 477.[6]

Indeed, Defendants all but concede this point in their reliance on *Tyson Foods*. *See* Defs.' Br. at 22–23. There the Supreme Court held that a class of plaintiffs may establish impact through representative evidence if it "*could* have been sufficient to sustain a jury finding … if it were introduced in each [class member's] individual action." *Tyson Foods*, 136 S. Ct. at 1048 (emphasis added).[7] The Court was clear that class members need not *win* on common evidence to try a case on a class basis; they need merely offer common evidence *sufficient to sustain a jury verdict*. *See, e.g., id*. at 1049 (question is whether it was "legal error to admit that evidence"; weighing probative value is "the near-exclusive province of the jury").

Here, as noted above, plaintiffs will rely on common evidence in attempting to prove their claims, including to establish fact of injury. That evidence will be

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[6] *Rail Freight* is inapposite. There, plaintiffs' own expert offered common evidence establishing harm to only 87.3% of the proposed class (that is, the evidence was that only 87.3% paid at least one overcharge). *In re Rail Freight Surcharge Antitrust Litig*., 934 F.3d 619, 623-24 (D.C. Cir. 2019); *In re Rail Freight Surcharge Antitrust Litig*., 292 F.Supp.3d 14, 137 (D.D.C. 2017). Further, in *Rail Freight* the appellate court held that the trial court's denial of class certification was not an abuse of discretion and its findings were not clearly erroneous. Here, this Court should assess whether the *grant* of class certification was an abuse of discretion and whether the trial court's findings in *support* of certification were clearly erroneous.

[7] Defendants selectively quote this passage and then misleadingly alter it by replacing "could" with "would." Defs.' Br. at 23, n.6.

common to the class whether it shows harm to all class members (as the plaintiffs claim) or all but a *de minimis* percentage of class members (the plaintiffs' alternative position) or all but about a quarter of the class members (as Defendants argue). In no event would those class members for whom common evidence might fail be able to rely on individualized evidence. So the appropriate standard in this case is whether plaintiffs have offered common evidence capable of establishing harm that is widespread across the class. If so, impact is an issue common to the proposed classes. The ultimate issue of whether plaintiffs should prevail based on that evidence is not relevant to predominance. It should be reserved for trial.

IV. CLASS AND INDIVIDUAL LITIGATION WOULD RELY ON REPRESENTATIVE EVIDENCE

Defendants also argue that plaintiffs here rely on improper representative evidence of impact. That argument fails as a basis for opposing class certification for two reasons. First, all members of each proposed class rely on the same representative evidence, respectively. If that evidence fails for any of them, it fails for all of them. It is thus a common issue as to each proposed class. *Amgen*, 568 U.S. at 460.

Second, if the plaintiffs were to pursue their claims on an individual basis, they would and could rely on the same representative evidence that their fellow

class members do. An analysis of the aggregate data is the only way to detect pricing patterns and calculate the effects of the Defendants' alleged price-fixing conspiracy.

An individual purchaser cannot otherwise calculate the impact of anticompetitive conduct. As noted above, packaged tuna does not list any conspiratorial overcharges in the ingredients or on the Nutrition Facts label. The Defendants' notion of putting forward individual evidence showing the injury to individual class members—especially the small purchasers that Defendants' model suggests were not harmed—is pure fancy.

Plaintiffs in individual cases are permitted to rely on the sort of econometric evidence that the plaintiff classes do here. To bar them from doing so—as Defendants suggest—would thus violate the Rules Enabling Act. Of course, whether plaintiffs should prevail on that evidence is a matter for trial.

Defendants' effort to distinguish *Tyson Foods* is also unavailing. *Tyson Foods* confirmed that plaintiffs *may* rely on representative evidence to establish individual impact. True, *Tyson Foods* applied the Fair Labor Standards Act, as did the primary precedent on which *Tyson Foods* relied, *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680 (1946). But *Mt. Clemens* gleaned the rule that the Court applied in *Tyson Foods* from antitrust precedents. *Mt. Clemens*, 328 U.S. at 688 (citing *Bigelow v. RKO Radio Pictures, Inc*. 327 U.S. 251, 263-66 (1946); *Story*

Parchment Co. v. Paterson Parchment Co., 282 U.S. 555, 563 (1931); *Eastman Kodak v. Southern Photo Materials Co*., 273 U.S. 359, 377-39 (1927)). Defendants' argument thus amounts to the claim that a rule derived from antitrust doctrine should not apply in antitrust cases.

CONCLUSION

For the foregoing reasons, the trial court's order granting class certification should be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I hereby certify that on this 10th day of September, 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.

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