No. 25-2220

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

In re Generic Pharmaceuticals Pricing Antitrust Litigation
No. 2:16-md-02724-CMR (MDL proceeding)
End-Payer Plaintiffs' Bellwether Action
No. 16-CB-27242 (clobetasol action)

[Proposed] BRIEF OF AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

On Petition for Review from the United States District Court
for the Eastern District of Pennsylvania
Honorable Cynthia M. Rufe

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Amicus Curiae represents that it does not have any parent entities and does not issue stock.

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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]

INTRODUCTION AND SUMMARY OF ARGUMENT

Complex supply chains, whether for smartphones or generic pharmaceuticals, are a hallmark of the modern economy. Multi-level distribution, for example, has become the norm, not the exception. *See generally*, Org. for Econ. Co-operation and Dev. ("OECD"), *Interconnected Economies: Benefiting from Global Supply Chains* (May 28, 2013) https://doi.org/10.1787/9789264189560-en. Such complexity can make illegal price-fixing more difficult to detect and

[1]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. Members of AAI's Advisory Board represent Plaintiffs, but those members played no role in AAI's deliberations with respect to the filing of the brief.

ultimately harder to punish. And as the complexity increases, the opportunity to reap lasting gains from undetected and highly profitable antitrust crimes increases in tandem, while the prospect of full and complete punishment declines. End-payors—the powerless customers at the end of the complex supply chain—are usually left holding the bag.

In this case, antitrust enforcers have already unearthed the criminally illegal conduct. In a "multi-year investigation, the Antitrust Division and its law enforcement partners uncovered price-fixing, bid-rigging and market-allocation schemes affecting many generic medicines." U.S. Dep't of Just., *Major Generic Drug Companies to Pay Over Quarter of a Billion Dollars to Resolve Price-Fixing Charges and Divest Key Drug at the Center of Their Conspiracy*, (Aug. 21, 2023), https://www.justice.gov/archives/opa/pr/major-generic-drug-companies-pay-over-quarter-billion-dollars-resolve-price-fixing-charges. Defendants, however, seek once again to take cover in the alleged complexity of multi-level payment systems and intermediaries in the health care system. This time, instead of using it to hide their illegal acts, they seek to prevent the fruits of their criminal conduct from being disgorged and used to make victims whole. Defendants seek to keep ill-gotten gains derived from antitrust violations for which their alleged co-conspirators have admitted guilt and already made good. Pls.' Br. at 2 ("Several

conspirators have now settled with Appellees for a total of more than $500 million in this MDL").

Their tool is the strategic class certification attack. Defendants here seek to revisit practically every angle of the district court's class certification order and overturn its factual determinations. See Defs.' Br. at 19 (challenging the district court's decision on ascertainability, predominance, causation, Article III standing and superiority). In so doing, they seek to weaponize the procedural aspects of class certification against the end-payors who bore the financial brunt of the conspiracy. If they succeed, it will send a message, particularly within the pharmaceutical industry: even if you are caught committing the most egregious of antitrust crimes against exceedingly vulnerable consumers, you may still hope to profit.

Unfortunately, this is not an isolated instance. Repeatedly over the past several years, conspirators have expressed remorse when it suits their criminal cases, only to fight, sometimes with claims verging on frivolous, to avoid full pay-outs to their victims on the civil side. An obvious example is the packaged seafood price fixers, who pleaded guilty to fixing the prices of canned tuna in 2015 and lobbied aggressively for reduced fines to guarantee sufficient funds for making restitution through overlapping civil class actions, only to fight class certification

and damage claims for another seven years until the Supreme Court rejected their petition for certiorari in 2022.

If efforts by defendants to use strategic class certification attacks to insulate ill-gotten profits are successful, it is a threat to the entire U.S. antitrust enforcement infrastructure. The attacks on damage claims threaten to chill private enforcement. Private enforcement has been a necessary part of the design of the U.S. antitrust laws from the beginning, and accounts today for the largest deterrent value against antitrust violations. *See infra, Section I.* Private enforcement also continues to be an integral underpinning of the U.S. criminal antitrust enforcement system. In antitrust prosecutions, damages claims are the primary means of securing victim restitution, a key goal of criminal enforcement. If the damage claims fail, an important component of the criminal program is lost. *See infra, Section II.*

Strategic attacks on class certification are so powerful a tool in protecting defendants' ill-gotten gains because the class action is the primary driver of private enforcement in the U.S. system. *See infra, Section III.* This is particularly so for indirect purchaser actions under state laws. The state laws help vindicate two important goals that the limits on indirect purchaser suits under federal law put at risk: victim compensation and avoidance of a "deterrence" gap where direct purchasers may not have an incentive or ability to bring a claim. Without the proper scope for end-payor class actions, the goals of the state laws—and what

they add to the national antitrust enforcement infrastructure—are at risk. *See infra, Section IV.*

Finally, the harms visited by the cartel at issue in this case are most acute for the end-payors—the patients who lose access to the most effective treatments when drug prices spike and where affordability can mean the difference between health and illness. These harms illustrate why courts cannot afford to allow for deterrence gaps by weakening any pillars in the U.S. antitrust enforcement structure. This is generally true, and particularly important in complex industries like pharmaceuticals.

Defendants here should not be permitted to hide from liability for straightforward, patently illegal criminal conduct by taking cover in strategic class certification attacks based on the supposed complexity of the U.S. healthcare system. If anything, the sometimes convoluted nature of the payments in the healthcare system counsels in favor of simple recoveries for end-payors—those who ultimately bear the brunt of the illegally inflated prices.

ARGUMENT

I. The U.S. Antitrust Enforcement Infrastructure Relies on Both Private and Public Enforcement to Root Out Price-Fixing Cartels

The U.S. antitrust laws are predicated on vigorous joint public and private enforcement. As the Supreme Court has emphasized, the multiple prongs of enforcement "were designed to be cumulative, not mutually exclusive." *United*

States v. Borden Co., 347 U.S. 514, 518 (1954). As recently as the decision in *Apple v. Pepper,* the Supreme Court has affirmed the "longstanding goal of effective private enforcement and consumer protection in antitrust cases." 139 S. Ct. 1514, 1524 (2019).

The success of private enforcement is a lynchpin of the U.S. antitrust laws. The Supreme Court has repeatedly acknowledged that private attorneys general are "an integral part of the congressional plan" undergirding the antitrust laws. *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990). Private enforcement was not just a means to "supplement government actions" but "in some cases to make them *unnecessary*." *N.J. Wood Finishing Co. v. Minn. Mining & Mfg. Co*., 332 F. 2d 346, 350 (3d Cir. 1964). In fact, as academics have noted, the initial lack of any Congressional budgetary appropriation for Sherman Act enforcement suggests Congress initially saw private enforcement, not public enforcement, as taking the laboring oar. *See* Christine Bartholomew, *Playing Nicely with Others: How and Why Antitrust Enforcers Should Work Together*, 85 Antitrust L. J. 241, 245 n.28 (2023).

Modern statistics affirm this historical view. Nine out of ten antitrust actions in the United States are private enforcement actions.*See, e.g.*, Hindelang Criminal Justice Research Ctr., Univ. at Albany, *Sourcebook of Criminal Justice Statistics Online: Antitrust Cases Filed in U.S. District Courts,* Table 5.41.2012 (2012),

https://www.albany.edu/sourcebook/pdf/t5412012.pdf (showing that, from 1975-2012, private litigation accounted for about 90% of antitrust cases filed each year in federal court). But beyond sheer numbers, analyses of cases from 1990 to 2011 have shown that private enforcement accounts for more than three times the deterrent value of government cases. *See* Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: the Case for Private Antitrust Enforcement*, 48 Ga. L. Rev. 1, 26 (2013). While the authors of that analysis estimate the combined sanctions of all government cases in that period to have a total deterrent value of $11.7 billion, the private cases tracked during that same period represent an estimated $34-$36 billion in deterrent value. *Id.*

Private enforcement also complements government actions and thus has a unique role in addressing wrongdoing. Contrary to assumptions that private cases largely pile further damages onto cases already unearthed by government enforcers, the 2013 Davis & Lande study also showed that more than half of the cases examined were not preceded by a government action or included substantially different claims than the government prosecutions. *Id*. at 30–31. Whether by capturing illegal conduct over a longer period of time, or in additional product areas, or by uncovering additional conspirators, private enforcement also extends the effective range of government enforcement.

The cases at issue here are an example of the beneficial synergy possible between public and private enforcement. Criminal proceedings were brought against two of the confessed participants in the clobetosal and clomipramine conspiracies, Taro and Sandoz. They both settled with the DOJ for significant sums of money and entered into Deferred Prosecution Agreements. This concurrent private action, however, also captures the alleged wrongdoing of other companies that allegedly participated in the conspiracy, including, for example, the remaining non-settling defendant in the clobetasol conspiracy, Actavis. While Actavis is not alleged to have initiated the conspiracy, its active participation once it entered the clobetasol market was necessary to the conspiracy's ongoing success. Private cases like this one can hold conspiracy participants accountable that the government, because of tradeoffs necessitated by its limited resources, may be unable to pursue.

One consequence of the Congressional design for protecting competition is certain: when private antitrust enforcement through class action damages claims is undermined by unnecessary procedural barriers, both criminal and civil enforcement of the antitrust laws suffer.

II. The U.S. Criminal Antitrust Enforcement Scheme is Predicated on Cooperation Between Private and Public Enforcement

Congress' original intent to create mutually reinforcing private and public enforcement is baked into the modern criminal enforcement strategies of the

Department of Justice. It often relies, for example, on private damages actions to meet its obligations to provide victims of antitrust violations with restitution.

In criminal matters, like price-fixing, the U.S. Sentencing Guidelines and the DOJ's internal policies emphasize the importance of ensuring that corporations found to have violated the antitrust laws make restitution to their victims. *See, e.g.,* U.S. Dep't of Just., Antitrust Div., *Overview of Victims' Rights* (Oct. 17, 2017), https://www.justice.gov/atr/overview-rights-federal-crime-victims. Ensuring victim restitution is a guiding principle of the Division in its criminal enforcement guidance, including its leniency program and its policy of granting offsets for foreign judgements. *See* U.S. Dep't of Just., Antitrust Div., *Frequently Asked Questions About the Antitrust Division's Leniency Program* 13 (Jan. 3, 2023), https://www.justice.gov/atr/page/file/1490311/dl?inline (requiring leniency application to make timely restitution to victims except when impossible due to, for example, court-ordered bankruptcy); Memorandum from Matthew R. Galeotti, Head of Criminal Division, U.S. Dep't of Just., Re: Guidance on Coordinating Corporate Resolution Penalties in Parallel Criminal, Civil, Regulatory, and Administrative Proceedings 5 (June 5, 2025) (When crediting payments made to other authorities, prosecutors should "prioritize compensation to victims of the underlying crime" and not credit penalties that fail to do so.).

The Antitrust Division's Model Corporate Plea Agreement explains that in most criminal antitrust cases, it is assumed that private civil damages actions will fill the role of restitution for victims. U.S. Dep't of Just., Antitrust Div., Model Annotated Corporate Plea Agreement – 11(c)(1)(C) 6–7 (April 4, 2022), https://www.justice.gov/file/1216496/dl ("[I]n most criminal antitrust cases, restitution is not sought or ordered because civil causes of action are filed to recover damages."); U.S. Dep't of Just., Antitrust Div., Antitrust Division Workload Statistics FY 2015–3035 4, https://www.justice.gov/atr/division-operations ("[F]requently restitution is not sought in criminal antitrust cases, as damages are obtained through separate treble damage actions filed by the victims."). This makes sense because of the challenges and burdens complex restitution can place on the government.

And in fact, it is commonplace for the Division to forego victim restitution explicitly in the plea agreements and deferred prosecution agreements entered into with criminal antitrust defendants, incorporating the overlapping civil damages action directly by reference into the text of the agreement. *See, e.g.,* StarKist Co.'s Sentencing Mem. at 11–12, *United States v. StarKist Co.,* No. 18-CR-0513 EMC (N.D. Cal. May 15, 2019), Dkt. No. 53.

That is exactly what happened in these cases. The Deferred Prosecution Agreements for Taro Pharmaceuticals and Sandoz, two criminally charged

members of the clobetasol and clomipramine conspiracies, contain the same language. The DOJ foregoes restitution "[i]n light of the availability of civil causes of action, and civil cases already filed against [Sandoz/Taro U.S.A.], including the multidistrict litigation in *In Re: Generic Pharmaceuticals Pricing Antitrust Litigation*, Case No. 2:16-md-2724, consolidated in the United States District Court for the Eastern District of Pennsylvania." Deferred Prosecution Agreement at 8, *United States v. Taro Pharms.*, No.2:20-cr-00214-RBS (E.D. Pa. July 23, 2020), Dkt. No. 2.

And yet, price-fixing defendants, like those here, often seek to avoid paying that restitution, in the form of damages. Unable to avoid liability on the merits, they instead launch all manner of attack on the procedural tool, class certification, that makes the vast majority of civil damage actions possible. As a recent letter from AAI to the leadership of the Antitrust Division notes, these strategic class certification challenges can permit even confessed price fixers to keep their ill-gotten gains. Even if they do not succeed, they "win for losing by simply prolonging litigation and delaying recovery." In the meantime, they can reduce the true cost of liability by investing and earning interest on the remaining cartel profits they hold during the proceedings. Letter from Randy Stutz, President of AAI to Hon. Abigail Slater, Assistant Att'y Gen. and Omeed Assefi, Esq., Deputy Assistant Att'y Gen. for Crim. Enf. Re: Fortifying DOJ Plea Agreements Against

Strategic Avoidance of Victim Restitution 4, n.20 (July 25, 2025) https://www.antitrustinstitute.org/wp-content/uploads/2025/07/AAI-Criminal-Restitution-Letter-7.25.25.pdf (citing the example of the tuna cartel, where seven years passed between when the defendants pleaded guilty in 2015 and the Supreme Court denied the plaintiffs' petition for certiorari on class certification.).

While there may be little downside for defendants, these "throw spaghetti at the wall" challenges have serious consequences for victims and the legal system. In the worst case, they deny—and most certainly greatly delay—relief to victims. This undermines not just the private cases but also the government's restitution policies and its criminal enforcement mission.

III. Attacking Class Certification Goes to the Heart of Private Enforcement

Attacking class certification has been a particularly fertile approach for defendants to avoid any victim compensation for criminal liability. The class action has been a popular target of hostility in the courts and in the legislature over the past twenty years. As Professor Christine Bartholomew, among others, has documented, "new barriers have arisen across a variety of contexts where formerly class certification had seemed automatic." Christine Bartholomew, *Antitrust Class Actions in the Wake of Procedural Reform*, 97 Indiana L.J. 4 1315, 1325 (Fall 2022) (noting manageability and predominance as two areas where some courts

have increased demands). *See also* Einer Elhauge, *Disgorgement as an Antitrust Remedy,* 76 Antitrust L. J. 79, 83–84 (2009) ("Where once courts recognized that, because antitrust cases involve market-wide injuries, they are uniquely suitable for class action treatments, many courts now seem willing to accept arguments that in markets with product differentiations, buyer negotiation, or price discrimination, injuries are individuated in a way that undermines common proof of injury, even when the case involves horizontal price fixing.").

There is evidence that the new obstacles are having a chilling effect on private enforcement. Even as a broadening swath of society is expressing concerns about potential antitrust violations, evidence suggests that antitrust court filings and orders consolidating putative class actions have declined. Bartholomew, *Antitrust Class Actions*, *supra*, 1341–2.

This is not very surprising as it is well recognized that private antitrust enforcement depends on the class action for its effectiveness. Antitrust actions often involve cartel overcharges that are relatively small at the level of any particular purchase, but that cumulatively cause a massive aggregate wealth transfer from consumers to producers. Accordingly, they are an excellent fit for "[t]he policy at the very core of the class action mechanism," which is "to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods.,*

Inc . v. Windsor, 521 U.S . 591, 617 (1997) (citation and internal quotations omitted). To put it more bluntly, as Judge Posner did, class actions are vitally important to private enforcement cases because "only a lunatic or a fanatic" brings a negative-value claim that would not repay the cost of suit. *Carnegie v. Household Int'l*, 376 F.3d 656, 661 (7th Cir. 2004).

Class actions are responsible for much of the antitrust laws' deterrence value. *See Reiter v. Sonotone Corp*., 442 U.S. 330, 344 (1979) (recognizing that class actions "provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations"). As the bipartisan Antitrust Modernization Commission concluded, "The vitality of private antitrust enforcement in the United States is largely attributed to two factors: (1) the availability of treble damages plus costs and attorneys' fees, and (2) the U.S. class action mechanism, which allows plaintiffs to sue on behalf of both themselves and similarly situated, absent plaintiffs." ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 241 (2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (hereinafter "AMC Report").

Without class actions, certain antitrust violations would not be pursued. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974). Cartels in particular, which are the subject of universal and worldwide condemnation, would have little to fear without

class actions because individual treble damages actions by customers are not common. II Phillip Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principes and Their Application ¶ 311 (3d ed. 2007 and Supp. 2012) (noting the "relative simplicity of class action treatment of simple price-fixing cases and the strong policy, now held worldwide, of condemning naked price fixing"). Private antitrust actions are extremely expensive to pursue because they involve "complicated question[s] of fact" and the application of "equally complex" law to those facts. *Kristian v. Comcast Corp.,* 446 F.3d 25, 58 (1st Cir. 2006). Attorney's fees and expert witness fees, even in garden-variety price-fixing cases, typically will be in the millions of dollars. *See, e.g.*, *In re Elec. Carbon Prods. Antitrust Litig.,* 447 F. Supp. 2d 389, 401, 409–10 (D.N.J. 2006) (fees and expenses exceeded $6 million in case that settled before class certification; approximately $400 million of purchases at issue). Given the expense of litigation, individual antitrust cases challenging cartel behavior are often negative value cases, i.e., cases "in which the stakes to each member are too slight to repay the cost of the suit." Alba Conte & Herbert B. Newberg, 2 Newberg on Class Actions § 4:33, p.290 (4th ed. 2002). "Economic reality dictates" that such actions "proceed as a class action or not at all." *Eisen*, 417 U.S. at 161; see *Amchem*, 521 U.S. at 617.

As a result, strategic class certification attacks have particularly potent ripple effects on private enforcement. Class certification decisions that foreclose

otherwise valid private claims do not only block the claim at issue; by making class actions less attainable they also have chilling effects on future private enforcement actions.

IV. Improperly Foreclosing Indirect Purchaser Actions Undermines Both Victim Compensation and Deterrence Objectives of the Antitrust Laws

The enforcement problems created when cartel defendants engage in strategic class certification challenges are particularly acute where, as here, the class is made up of end-payors. As a practical matter, it adds to procedural hurdles for indirect purchaser classes that are already higher than those for direct purchaser classes. One study of antitrust class action settlements notes an astonishing jump from 7.7 motions per case to 20.13 motions per case when an indirect purchaser claim is involved. *See* Bartholomew, *Antitrust Class Actions*, *supra*, at 1354. Unsurprisingly, this is reflected in substantially lower rates of indirect purchaser claims compared to direct purchaser claims. *Id.*

The chilling effect on end-payor claims is doubly pernicious. First, it means the ultimate victims of many antitrust violations go uncompensated. Second, it creates a significant gap in the antitrust laws' deterrent effect. Together, these consequences mean that foreclosing class certification in these cases is in direct opposition to the goals of the legislation upon which it is based—the state statutes that ensure end-payors can seek antitrust damages. The Supreme Court has already vindicated the states' ability to pursue these goals despite the indirect purchaser

restrictions on federal claims. *See California v. ARC Am. Corp.,* 490 U.S. 93, 105–06 (1989). Class action certification requirements should not be an end-run around that power.

A. Overly Stringent Indirect Purchaser Class Certification Standards Frustrate the Core Antitrust Goal of Victim Compensation

The Supreme Court's decision limiting indirect purchaser actions for Sherman Act violations in *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 726 (1977), was controversial from the start. Three of the Justices dissented, finding that a federal bar on these claims frustrated key goals of the antitrust laws, including victim compensation. *See, e.g., Illinois Brick*, 431 U.S. at 744 (Brennan, J., dissenting) (arguing indirect purchaser actions support "policies of insuring the continued effectiveness of the treble-damages action and preventing wrongdoers from retaining the spoils of their misdeeds"). Even the majority opinion recognized the decision's potential harms,noting that it will "den[y] recovery to those indirect purchasers who may have been actually injured by antitrust violations." *Id.* at 746.

Legislative and judicial reaction was swift. States began passing so-called "*Illinois Brick* repealer" laws almost immediately, and today, the majority of states have either amended or interpreted their antitrust statutes to permit indirect purchaser damages actions. *See* Newburg on Class Actions § 20:12, at 435-439

(5th ed. 2011) (noting that only 13 states adhere to *Illinois Brick*); AMC Report, *supra*, at 269, 279 n.22 (noting that "more than 35 states" permit indirect purchaser damages suits). In providing a cause of action for indirect purchasers, the legislatures adopting these statutes and courts interpreting them weighed the policy considerations differently from the Supreme Court, emphasizing the compensation objective of the antitrust laws, as did Justice Brennan. Indeed, the California Supreme Court has noted that "California's 1978 amendment to section 16750 in effect incorporates into the Cartwright Act the view of the dissenting opinion in Illinois Brick … that indirect purchasers are persons 'injured' by illegal overcharges passed on to them in the chain of distribution." *Union Carbide Corp. v. Superior Court*, 36 Cal. 3d 15, 20 (1984).

The compensation focus is also apparent in later *Illinois Brick* repealer statutes, such as the 1998 amendment to New York's Donnelley Act. The New York amendments were motivated by concerns that end-payors in the state were losing out on compensation in large nationwide antitrust class action settlements. In fact, one of the key cases cited by legislators as an example was, like the litigation here, brought by an indirect purchaser of prescription drugs. *See* Brief for Amicus Curiae State of New York, *Sperry v. Crompton Corp.*, (N.Y. App. Div.) No. 2004-06517, pp. 21–22, https://ur.ag.ny.gov/sites/default/files/amicus-curiae/OAG_Sperry_AD_Brief.pdf. The legislation was introduced to "overcome

this recurring scenario" and permit NY indirect purchasers to "sue in class actions," with the ultimate goal of securing financial redress. *Id. at* 22–23.

Academics have affirmed the logic and the importance of preserving compensation for end-payers. Professor Hebert Hovenkamp, for example, argues that *Illinois Brick*'s limitations on indirect purchaser damages are "plainly inconsistent with the antitrust damages statute, which gives an action to 'any person who shall be injured in his business or property' by an antitrust violation." Herbert Hovenkamp, *Apple v. Pepper: Rationalizing Antitrust's Indirect Purchaser Rule*, 120 Colum. L. Rev. Forum 14, 18–19 (Jan 13, 2020) (citing 15 U.S.C. §15(a)(2012)). Where there is ambiguity about how illegal overcharges are passed down the supply chain, Professor Hovenkamp continues, it makes the most sense to compensate the end-payor as "the only person in the distribution chain who is unable to pass anything on." *Id.* at 22. "The impact varies from one situation to another, but in many cases the largest losses are those absorbed by the end users, and often they absorb the entire overcharge." *Id.* Indeed, it is a "perverse result" to leave the buyer at the end of line holding the bag on damages. *Id*. at 18.

B. Overly Aggressive Denial of Indirect Purchaser Classes Undermines the Deterrence Goals of the Antitrust Laws

The issue of indirect purchaser recovery is not simply about compensating the real victims of cartels; it also implicates the antitrust laws' deterrence

objectives. Any gap in the recovery available to indirect purchasers undermines deterrence because direct purchasers are often reluctant to sue their suppliers. As Justice Brennan observed, "in many instances, consumers, although indirect purchasers, bear the brunt of antitrust violations. To deny them an opportunity for recovery is particularly indefensible when direct purchasers, acting as middlemen, and ordinarily reluctant to sue their suppliers pass on the bulk of their increased costs to consumers farther along the chain of distribution." *Illinois Brick*, 431 U.S. at 764 (Brennan, J., dissenting); *see also* AMC Report, *supra*, at 273 (noting that "indirect purchasers can bring actions in circumstances in which direct purchasers choose not to sue, for example, to avoid injuring business relationships with suppliers").

Ensuring deterrence is an animating concern in state *Illinois Brick* repealers. *See, e.g., Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 764 (2010) (describing the California legislature's "overarching goals" in amending the Cartwright Act to restore indirect purchaser actions to include "maximizing effective deterrence"); *see Lorix v. Crompton Corp.,* 736 N.W.2d 619, 631 (Minn. 2007), (noting that the end-payer plaintiff falls within Minnesota's indirect purchaser standing because to find otherwise "would be to deny an injured party the opportunity to recover while allowing a windfall to middlemen who passed on the overcharge or, more likely,

allowing the violator to escape liability entirely when the middlemen decline to pursue relief.").

Empirical studies of optimal deterrence suggest that depending on circumstances, either direct or indirect purchaser suits might be more effective at deterrence. *See* Robert H. Lande, *New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violations,* 61 Ala. L. R. 3, 451, 452 (2010). Direct purchasers may be closer to the market, have better information, and be more likely to discover the antitrust violation. *Id.* They might, for example, be better able to determine when a price hike is unjustified by higher costs. *Id.* But they may also lack the incentive to sue because, as noted by Justice Brennan, they do not wish to disrupt relationships with suppliers or because they were able to pass some or all of the overcharge downstream, or even because they, too, profit from the overcharges via cost-plus pricing, for example. *Id.*

It is clear, however, that if the scope of viable indirect purchaser suits is too narrow, deterrence will fall short in a range of cases where the direct purchasers lack the ability or the incentive to act as private attorneys general. Indeed, even if direct purchasers are fully incentivized to sue under federal law, "indirect purchaser suits can provide additional deterrence by increasing the liability faced by violators," *id*., which is important in light of the fact that direct purchasers rarely, if ever, recover actual treble damages under the Sherman Act; *see also,*

generally, Robert E. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 Ohio St. L.J. 115 (1993) (explaining that because the Sherman Act does not provide for recovery of prejudgment interest and other factors, "treble damages" provide for recovery of no more than the actual harm caused).

Moreover, time has shown that the fears that indirect purchaser actions would result in piling on of liability and over-deterrence were overblown. *See, e.g.,* AMC Report, *supra*, at 274 ("no one identified an instance of unfair or multiple recovery"). Professor Hovenkamp observes that, together with strong evidence that as a general rule, cartels are under-deterred rather than over-deterred, it would make sense, that courts be more inclined to honor the original statutory intent to allow "any person" injured by antitrust violations to recover the "damages by him sustained." Hovenkamp, *Apple v. Pepper*, *supra*, at 26. In the context of assessing indirect purchaser class certification challenges, this is consistent with what the California Supreme Court has said about the Cartwright Act's *Illinois Brick* repealer: "[t]he 1978 amendment ... implies legislative endorsement of those dissenting views […] and a mandate to avoid unnecessary procedural barriers to indirect purchasers' prosecution of California antitrust suits."). *Union Carbide*, 36 Cal. 3d at 21–22

V. The Harms Defendants' Price-Fixing Scheme Had on End-Users Shows Why Indirect Purchaser Cases Are So Important

Cases like this illustrate why it is important that this Court does not indulge procedural obstacles that artificially chill indirect purchaser suits. Simply put, there is no room for a "deterrence gap" that tolerates anticompetitive conduct in industries like pharmaceuticals. Illegal schemes that raise prices of necessary drugs directly harm individuals and their quality of life, even though they are not direct purchasers. *See* Marin Gemmill et al., *What Impact Do Prescription Drug Charges Have on Efficiency and Equity? Evidence from High-Income Countries*, 7 Int'l J. Equity in Health 1, 16 (2008) (finding that "[increasing] user charges lowered adherence to treatment and reduced the use of essential and non-essential drugs, strongly suggesting a negative impact on health").

Worse still, individuals affected by higher drug prices are among the most vulnerable to price harms. Even though demand for essential drugs is highly inelastic, this inelasticity depends on willingness-to-pay, not ability-to-pay. In other words, even though sick people will not make a choice to forego life-saving drugs regardless of price, they have no choice at all unless they can find a way to pay for their treatment. *See id.* at 12. Even for those who are insured, small increases in copays on drugs still impact the health of those who happen to be both sick and financially vulnerable. *See id.* at 9.

Congress enacted reforms in the 1980s meant to make it much easier to enter with new generic versions of drugs. *See* Michael Carrier et al., *Playing Both Sides?*

Branded Sales, Generic Drugs, and Antitrust Policy, 71 Hastings L.J. 307, 312 (2020). At the time, the promise was that "generic competition would save the federal and state governments millions of dollars each year." *Id*. The bill's sponsor bragged that the enhanced competition would "do more to contain the cost of elderly care than perhaps anything else this Congress has passed." *Id.* But antitrust violations like the price-fixing in which Defendants are alleged to have participated have prevented those promises from being kept. Anticompetitive efforts to diminish generic competition are one of the main contributors to skyrocketing drug costs. *See* Andrew Foreman, Deputy Assistant Attorney General, Dep't of Justice, Keynote at ABA's Antitrust in Healthcare Conference (June 3, 2022) (describing need for "extremely high bar" and "hard-line" for remedies in healthcare antitrust cases because of the "deeply personal harm in people's everyday lives and pocketbooks.").

Congress was correct that generic entry, when it is not tainted by antitrust violations, is one of the most "pivotal" factors in reducing pharmaceutical prices. *See* Carrier et al., *supra* at 312. The first generic entrant typically prices its product up to 25% lower than the brand drug, and in markets in which six or more generics enter, the price falls to a quarter of the brand price. *Id.* As a result of generic entry from 2018 to 2020, generic drug approvals accounted for over $55 billion in savings. FDA, *Estimating Cost Savings from New Generic Drug Approvals in*

2018, 2019, and 2020 9–10 (Aug. 2022), https://www.fda.gov/media/161540/download.

So it is no surprise that when generic competition is compromised, it hits end-payors, and ultimately patients, hardest. Press reports detail how the sudden and drastic price spikes for clomipramine during the alleged conspiracy—more than 1200% in some cases—shocked patients who had been taking the drug for years to treat the symptoms of Obsessive Compulsive Disorder. *See* Ben Elgin, *Drugmakers' Alleged Price-Fixing Pushed a Needed Pill Out of Reach* Bloomberg.com (July 31, 2019), https://www.bloomberg.com/news/articles/2019-07-31/drugmakers-alleged-price-fixing-pushed-a-needed-pill-out-of-reach. Some, according to reports, could no longer afford the drug and simply suffered the symptoms. Others considered trying to obtain the drug more cheaply in Canada, and still others thought about using cheaper, veterinary versions of the drug. *Id.* One patient profiled in the article described clomipramine as a "total lifesaver," but the patient was forced by high copays to switch to a different, less effective OCD treatment. She then "experienced a debilitating spike in anxiety and paranoia" and had to take a leave of absence from her job as she and her doctor struggled to find a new balance with alternative medications. *Id.*

Similar reports abound for clobetasol and other drugs alleged to be part of the price fixing scheme in the larger MDL. A dermatologist, in a trade press article

from 2015, described a vitiligo patient whose clobetasol had become off-formulary and too expensive. The dermatologist reluctantly substituted a cheaper cream that, while affordable, would not offer the patient the same re-pigmentation benefits as clobetasol. *See* Dermatology Times, *The Tale of the $220 Tube of Clobetasol Cream* (August 5, 2015) https://www.dermatologytimes.com/view/tale-220-tube-clobetasol-cream-3. Other reports quote pharmacists whose customers delayed picking up needed renewals in the face of price hikes. Gillian Mohney, *Generic Drug Price Spike Prompts Probe by Congress*, ABC News (November 21, 2014), https://abcnews.go.com/Health/generic-drug-prices-skyrocketing-lawmakers-warn/story?id=27060992 ("I've had people postpone getting a medication, so if they're supposed to get it this week and they don't have the funds to pay for it they'll say, 'Okay, let me wait a few days. Let me wait till this comes up. Let me see if I have more funds…So we see them slowly pushing back when they should be taking it.").

In cases like these, the anticompetitive harm is direct even if the supply chain link to the conspirator is not. Overly demanding class certification standards should not strip end-payers of claims in states that have rejected limitations on indirect purchaser suits precisely so such harms can be addressed. The interlocking and mutually reinforcing nature of private and public antitrust enforcement in the

United States means this is important not just to end-payers but to the effectiveness of the entire antitrust enforcement structure.

CONCLUSION

For the foregoing reasons, the district court's order certifying Plaintiffs' classes should be affirmed.

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Respectfully submitted,
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