No. 19-56514

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
Case No. 3:15-md-02670-JLS
Hon. Janis L. Sammartino

BRIEF OF *AMICUS CURIAE* PUBLIC JUSTICE, P.C. IN SUPPORT OF REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Public Justice, P.C. certifies that it does not have a parent corporation and that no publicly held corporation owns stock in it.

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INTEREST OF AMICUS CURIAE[1]

Public Justice is a national legal advocacy organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate misconduct. As part of its mission, Public Justice has sought to ensure that the civil court system remains an effective tool for workers, consumers, and other small-claims litigants to correct and deter corporate wrongdoing. Through its Access to Justice Project, Public Justice has thus sought both to preserve the availability of the class mechanism and prevent its abuse, such that it may serve its intended purpose: to hold accountable those who break the law and whose misconduct harms large numbers of people.

Public Justice has an interest in supporting rehearing *en banc* in this particular case because the panel majority's holding—that a district court must determine that a proposed class includes no more than a *de minimis* number of uninjured members before finding that the predominance requirement is satisfied—threatens to improperly transform class certification into a merits adjudication and create an unwarranted hurdle for otherwise legitimate class actions. As explained below, a nuanced analysis of the

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus* states that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *amicus*, their members, or their counsel—contributed money that was intended to fund preparation or submission of this brief. All parties have consented to the filing of this brief.

term "uninjured parties" reveals that only in rare circumstances may their presence cause a Rule 23(b)(3) predominance concern.

INTRODUCTION

The Court should rehear this case *en banc* because the panel majority's decision threatens to give district courts "license to engage in free-ranging merits inquiries" at the certification stage, and in fact it all but requires premature merits determinations. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013). As the Supreme Court and this Court have made clear, a district court is not tasked with determining which side will ultimately prevail at the certification stage. Rather, the court is assessing whether the elements of Rule 23 are established such that the defendants' liability can be resolved through the class action mechanism. Because the panel majority's decision impermissibly heightens the Rule 23 predominance inquiry, it will cause serious mischief if allowed to stand.

The panel majority's imprecise use of the term "uninjured parties" sweeps in a host of analytically distinct categories: individuals immune from injury, individuals who were injured but are unable to prove damages, and individuals who may turn out to have been uninjured after a final determination on the merits. Only proposed class members who fall into the first of these categories, parties immune from injury, may properly be excluded from a class at the outset. And even then, only by refining the appropriate class definition—not by denying class certification altogether on the grounds that the predominance requirement has not been satisfied. Yet the panel

majority's decision would require a court to determine the number of "uninjured" parties during class certification proceedings, and preclude class treatment entirely if it found more than a *de minimis* number. That would require a district court to make merits and damages determinations long before the appropriate stage of the litigation. And it would prevent class treatment where common questions—such as whether a defendant's common course of conduct resulted in a legal violation as to the class—predominate.

True, a proposed class may not meet the predominance requirement if there is no economical mechanism for sorting out injured from uninjured class members. In such circumstances, individualized inquiries overwhelm common questions. But that is not this case. Here, as in other class actions where the ultimate number of "uninjured" parties may turn out to be lower than the plaintiffs contend, the finder-of-fact can make that determination based on common evidence. The panel decision thus must be vacated for rehearing *en banc*.

ARGUMENT

I. The possibility that members of a proposed class may ultimately be found not to have been injured by a defendant's misconduct does not preclude class certification.

The panel majority's broad strokes discussion of "uninjured" class members elides key distinctions that cannot be ignored in the Rule 23 analysis. The question whether a class member *could have* been injured by a defendant's alleged misconduct is

relevant to determining the proper scope of a class definition. But whether members of a proposed class *actually* suffered injury is an issue that must be resolved on the merits and is thus not relevant to whether class certification is appropriate.

As an initial matter, a certified class may properly include "uninjured" parties. Certification entails no guarantee that plaintiffs will ultimately win their case. And symmetrically, a proposed class is not required to prove that all of its members will prevail on the merits of their claims at the certification stage. That is because "the office of a Rule 23(b)(3) certification ruling is not to adjudicate the case." *Amgen*, 568 U.S. at 460. Rather, it is to "select the method best suited to adjudication of the controversy fairly and efficiently." *Id.* (internal quotation marks and brackets omitted). The fact that a class action may reach trial and result in a verdict for the defendant on all counts in no way indicates that the class was improperly certified. That is, all members of a class may ultimately be found to be "uninjured."

Courts facing challenges to the presence of "uninjured" class members—including the Ninth Circuit—have thus recognized the need to distinguish between two "analytically distinct categories": parties who *could not* have been injured by a defendant's alleged misconduct and those who *may not* turn out to have been injured following a determination on the merits. *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 822 (7th Cir. 2012); *see Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1136-38 (9th Cir. 2016). While parties immune from injury may justifiably be excluded from a class at the outset, those that are only potentially uninjured may not. Conflating these categories, as the

panel majority did, causes courts to address at the certification stage issues that are properly left for resolution on the merits.

The Seventh Circuit's decision in *Messner* explored the importance of this distinction to the question of whether a class may be certified. The case concerned allegations that a hospital merger caused inflated prices for inpatient services in violation of antitrust law. *Messner*, 669 F.3d at 808. The defendant objected to certification on two grounds. First, it asserted that the class included "many individuals who were not injured" by the misconduct because, for example, they had not paid inflated prices. *Id.* at 822. The court found that this amounted "at best [to] an argument that some class members' claims will fail on the merits if and when damages are decided." *Id.* at 823. Yet such a determination could only be made after discovery and jury fact-finding, or—at minimum—with the ordinary procedural protections that accompany "early judicial evaluations of the merits" that are not available during Rule 23 proceedings. *Id.* The court thus made clear that the "possibility or indeed inevitability" that a class would "include persons who have not been injured by the defendant's conduct. . . . does not preclude class certification." *Id.* (quoting *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009)).

Second, the defendant objected to the presence of class members who "could not have been harmed" by the alleged price increases because they had already met their out-of-pocket plan maximums or deductibles. *Id.* at 824. The Seventh Circuit recognized that *this* category of proposed class members, comprising those who are

"immune" from injury caused by the defendant's alleged misconduct, stands on a different footing. *Id.* Where a proposed class "consists largely (or entirely, for that matter) of members who are ultimately shown to have suffered no harm, that may not mean that the class was improperly certified but only that the class failed to meet its burden of proof on the merits." *Id.* By contrast, a proposed class that includes "a great number of members who for some reason *could not* have been harmed" suggests a fatally overbroad class definition. *Id.* (emphasis added). This matters: if the size of a proposed class were inflated by members who "could not bring a valid claim even under the best of circumstances," certification would place undue settlement pressure on a defendant. *Id.* at 825.

The term "uninjured" parties used uncritically throughout the panel opinion thus papers over the "critical" distinction between parties immune from injury (whose presence in "great number[s]" in the class may pose an obstacle to class certification) and parties who ultimately may not prevail on the merits of their claim (whose presence poses no such obstacle). *Id.* at 824.

This Court has keyed its analysis of "uninjured" class members at the certification stage to this distinction as well. *See Torres*, 835 F.3d at 1136-38. *Torres* involved the alleged failure of the defendant-corporation to disclose to certain domestic farmworkers the availability of H2-A work, or pay them for such work at the appropriate wage, as required by law. *Id.* at 1131-32. The defendant protested that the class definition improperly swept in farmworkers who would not have obtained H2-A

work even if its conditions had been disclosed to them, and who (the defendant argued) had therefore not been "injured.". *Id.* at 1137.

The Court in *Torres* rejected the defendant's blanket notion that a "class cannot be certified if it contains both injured and non-injured parties." *Id.* at 1136. The Court contrasted individuals who "were never exposed" to the defendant's alleged misconduct and thus "could not have been harmed," *id.* at 1136-38 (quoting *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012)), with individuals "exposed to—yet ultimately not harmed by" the defendant's misconduct, *id.* at 1136. Tracking *Messner*, the Court in *Torres* recognized that inclusion of the former—parties "immune" from injury caused by the defendant's actions—would lead to an overbroad class definition. *Id.* at 1138. But the purportedly "non-injured" class members identified by the defendant in that case did not fall into this category. Their presence merely reflected the "potential for unlawful conduct in the absence of harm"—that is, the possibility that some class members would not ultimately prevail on their claims. *Id.* at 1137. Such a possibility could not, in and of itself, preclude class certification.

Notably, both the Seventh Circuit in *Messner* and this Court in *Torres* framed the problem of "uninjured" class members as one of settling on an appropriate class definition. *See Messner*, 669 F.3d at 824; *Torres*, 835 F.3d at 1138. As discussed above, the presence of too many class members "immune" from injury may indicate that a class has been defined too broadly. On the other hand, a class cannot be defined to exclude all "uninjured" parties without creating a "fail-safe class." *Messner*, 669 F.3d at

825; *see Kamar v. RadioShack Corp.*, 375 F. App'x 734, 736 (9th Cir. 2010) (discussing fail-safe classes generally). "A fail-safe class is improper because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Messner*, 669 F.3d at 825. Yet navigating these two poles is well within a court's power to "define the class," which may be altered or amended at a later stage of the litigation as more facts come to light. Fed. R. Civ. P. 23(c)(1)(B), (C). Accordingly, the presence of even large numbers of potentially "uninjured" parties is not grounds for a court to deny class certification altogether.

The panel majority opinion, if adopted by this Circuit, would effectively require either a fail-safe class or none at all. Under the panel's reasoning, unless "substantially all" members of a proposed class can prove injury as a result of the defendant's misconduct—that is, prove they will prevail on the merits—the class may not be certified. *Olean Wholesale Grocery Coop. v. Bumble Bee Foods, LLC*, 993 F.3d 774, 792-94 (9th Cir. 2021). Such a requirement would lead to "circular" class definitions, which "determine[] the scope of the class only once it is decided that [each] class member was actually wronged." *Kamar*, 375 F. App'x at 736. Indeed, such circularity flows directly from the panel majority's imprecise use of the term "uninjured," which collapses questions relevant to the class certification decision (like the proper scope of the class definition) with issues properly left for resolution on the merits (like whether class members in fact suffered injury as a result of the defendant's misconduct).

That is not the law of this circuit. This Court makes clear that the proper course is to fine tune a class definition to ensure that "membership of the class is largely co-extensive with those who *could have* been injured by [the defendant's] conduct." *Torres*, 835 F.3d at 1139 (emphasis added). Individuals who *could not have* been injured, those who are "immune" from injury, may thus be excluded from a class. But the merits question of whether some or even all class members will ultimately be found to be "uninjured" is, for class certification purposes, irrelevant.

II. The entitlement of class members to damages, and the amount of damages each class member will recover, are post-certification questions that do not destroy predominance.

The panel majority also conflated a second pair of distinct but related concepts: injury and damages. A party may have suffered legal injury as a result of a defendant's misconduct yet, for one reason or another, be unable to prove up damages. Such an individual is not, however, "uninjured," and their presence in the class does not affect the predominance of common questions under Rule 23(b)(3). Moreover, issues about the damages due to each class member are determined after a class is certified and, typically, flow from a finding delimiting the scope of the defendant's liability to the class.

The analytical distinction between legal injury and damages is laid bare in the context of disputes over Article III standing. As the Supreme Court detailed in *Uzuegbunam v. Preczewski*, a court may properly exercise jurisdiction over claims "based on a completed violation of a legal right," even where the plaintiff cannot prove an

entitlement to monetary damages. 141 S. Ct. 792, 802 (2021); *see also Sierra v. City of Hallendale Beach*, No. 19-13694, 2021 WL 1799848, at *13 (11th Cir. May 6, 2021) (Newsom, J., concurring) ("[T]he existence of a legal injury . . . [is] *both* a necessary *and* a sufficient condition [for an Article III 'Case']."). This principle derives from the common law understanding that "every violation imports damage," *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 509 (Story, Circuit Justice, C.C.D. Me. 1838), and hence suffices for Article III standing even in the absence of a showing of factual harm. *See Uzuegbunam*, 141 S. Ct. at 798-99 (collecting common law examples); *Sierra*, 2021 WL 1799898, at *12 (Newsom, J., concurring) (noting that "[a]ctions for trespass, libel, breach of contract, assault, and battery were all cognizable even in the absence of observable harm"). And it equally applies to cases involving congressionally created statutory rights. *See, e.g.*, *Whittemore v. Cutter*, 29 F. Cas. 1120, 1121 (Story, Circuit Justice C.C.D. Mass. 1813) (permitting action for violation of an early patent law despite the absence of a showing of actual damages). In sum, no party is "uninjured" simply by dint of the fact that their legal injury is "not readily reducible to monetary valuation." *Uzuegbunam*, 141 S. Ct. at 800.

The key question for purposes of determining predominance under Rule 23, therefore, is whether the defendant has engaged in a "common course of conduct" towards the class, such that its liability to the members of the class will turn on the answers to common questions of law and fact. *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 559 (9th Cir. 2019). In other words, may a reasonable jury find the defendant

caused class-wide injury such that it is liable to the class for "violation[s] of a legal right"? *Uzuegbunam*, 141 S. Ct. at 802; *see also Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (damages to be calculated "once the common liability questions are adjudicated").

Damages determinations are secondary to such common liability questions, and as the panel majority itself acknowledged, may be individualized without defeating class certification. *Olean*, 993 F.3d at 790. Indeed, "Rule 23 specifically contemplates the need for [] individualized claim determinations *after* a finding of liability." *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1131 (9th Cir. 2017) (emphasis added) (citing Fed. R. Civ. P. 23 advisory committee's note to the 1966 amendments). And insofar as "[d]amages may well vary," *Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 943 (9th Cir. 2019), zero damages falls within the permissible range, *see Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 427 n.5 (4th Cir. 2003) (finding certification appropriate even where a defendant may be able to "show than an individual class member did not suffer any damages"). That is, a class member may indeed have been "injured" insofar as the defendant is liable to her for misconduct, but may not be able to prove an entitlement to damages. Yet that does not preclude her inclusion in the class.[2]

[2] The Supreme Court has spoken to the opposite situation in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), holding that there must be a method for allocating damages so that only those who suffered a legal injury from the defendant's misconduct share in the damages recovery. *Id.* at 1049-50. This separation of the injured from the uninjured for purposes of awarding damages necessarily occurs at the end of the case, however, after the fact-finder has determined the scope of the

In fact, a contrary conclusion—that a class may not be certified where some members may have difficulty demonstrating an entitlement to damages—would contravene the purposes underlying Rule 23. The Court underscored this point in *Briseno*, a consumer class action. The defendant there challenged certification on the grounds that there would be no administratively feasible method for identifying members of the proposed class who had purchased its product—Wesson-brand "100% Natural" cooking oil. 844 F.3d at 1123-25. In support, the defendant pointed out that "consumers do not generally save receipts and are unlikely to remember details about individual purchases of a low-cost product like cooking oil." *Id.* at 1125. The Court rejected this argument. *Id.* at 1126. Just because some—or even the majority—of individuals injured by the defendant's misconduct would not be able to prove damages did not make class certification inappropriate. The Court observed that "ensuring perfect recovery at the expense of any recovery would undermine the very purpose of Rule 23(b)(3)." *Id.* at 1129. It is precisely where "recoveries [are] too small to incentivize individual litigation," such as in consumer cases like *Briseno*, that class members are unlikely to have taken care to preserve proof of injury—yet those are the cases "that depend most on the class mechanism." *Id.* This Court held that the Rule 23 prerequisites were met in *Briseno* and that the defendant would have an adequate opportunity to

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defendant's liability and answered the question of which class members were injured. *See Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1023 (9th Cir. 2020), *cert. granted*, 141 S. Ct. 972.

challenge class members' entitlement to damages at the subsequent, claims administration stage. *Id.* at 1131.

III. While the presence of potentially uninjured class members may impact predominance if separating the injured from the uninjured requires individualized inquiries that overwhelm common issues, that is not the case here.

Some circuits, though—until the panel decision in this case, not this Court—have pointed to another potential predominance problem (apart from the definitional overbreadth problem discussed in *Torres* and *Messner* of classes including members "immune" from injury) stemming from the presence in a proposed class of what both parties concede are a large number of members who will turn out to be uninjured. If there is no classwide method for determining who was and was not injured by the defendant's conduct, such that separating the injured from the uninjured will require individualized testimony from each class member, then common questions of fact and law may not predominate, and a class action may not be the superior method for resolving the dispute. *See In re Asacol Antitrust Litig.*, 907 F.3d 42, 53-54 (1st Cir. 2018) (only reliable method of determining who would have purchased the brand-name drug independent of its price, an essential element for separating the injured from the uninjured, was through trial testimony); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013) (finding predominance not satisfied when the plaintiffs could not demonstrate a method of proving injury "through common evidence"). At least some judges on this Court have suggested this concern is

overblown. *Olean*, 993 F.3d at 795 (Hurwitz, J., dissenting) (noting that the mere presence of uninjured class members does not defeat predominance so long as the "district court can economically 'winnow out' uninjured plaintiffs to make sure they do not recover for injuries they did not suffer.").

But the panel majority here went far beyond the concerns expressed by these other circuits, creating a rule against more than a *de minimis* number of "uninjured" class members and pegging this rule to predominance without even addressing whether the injured-versus-uninjured question was susceptible to classwide proof. Because the injury question is a common one here, it raises none of the issues of proof that troubled the courts in *Asacol* and *Rail Freight*.

Here, Plaintiffs' econometric model identified the extent of class members' overpayment attributable to Defendants' admitted price-fixing conspiracy. To the extent that Defendants contested the accuracy of that model as to certain class members because of small sample sizes and lack of statistical significance, the identity of those potentially uninjured class members could also be determined from the statistical evidence, as analyzed by Defendants. *Olean*, 993 F.3d at 783. Thus, the answer to the question of how many, and which, class members were injured would necessitate no individualized class-member-by-class-member testimony that would overwhelm common issues. The jury might decide that virtually every class member was injured, as Plaintiffs argued, or that there is statistically significant proof of injury for "only" 72%

of the class, as Defendants posited, but in either instance could rely for its decision on common evidence applied to the class as a whole.

The fact that the low end of the proven injury range—the position staked out by Defendants here—still concedes that at least 72% of the proposed class suffered injury may have confounded the panel majority, for it is the unusual case in which a "win" for the defendants entails a jury verdict that over two-thirds of the class suffered injury. Typically, the fact-finder is asked to choose between plaintiffs' contention that 100% of class members were injured by the defendant's misconduct and the defendant's contrary view that *none* were injured because it did not violate the law as plaintiffs allege. When faced with the question whether all or none (100% or zero) class members were injured, it becomes apparent that the class certification proceeding is not the proper setting for deciding the ultimate merits issue. A court need only ensure that the ultimate question of liability be susceptible to classwide proof.

Just because the defendants' previous guilty pleas presented a uniquely clear-cut answer to the common question of liability in this case, that anomaly is no reason to raise the burden on what plaintiffs must prove to satisfy predominance at the class certification stage. *See Vaquero v. Ashley Furniture Indus.*, 824 F.3d 1150, 1154-55 (9th Cir. 2016) (predominance satisfied in this circuit where plaintiffs can establish that damages, if any are proved, resulted from the defendant's conduct). Plaintiffs offered admissible common evidence that traces classwide injury to the defendants' admitted misconduct. If the jury ultimately finds that the defendants' criticisms of the plaintiffs' evidentiary

model were valid, then it can credit those objections and exclude certain members from the class, again relying on common statistical evidence. None of these scenarios creates individualized questions that would defeat predominance. But more importantly, they are merits questions that can and should be answered at a later stage of this case.

The panel majority's conflation of class certification questions with merits questions, through its imprecise use of the term "uninjured," will cause confusion to litigants and district courts alike. This Court should step in and prevent such confusion by granting en banc rehearing.

CONCLUSION

For the reasons stated above, the Court should grant rehearing *en banc*.

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This brief complies with the type-volume limitation of Ninth Circuit Rule 29-2(c)(2) because this brief contains 4,144 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by Microsoft Word 2016. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a) because this brief has been prepared in proportionally spaced typeface using 14-point Garamond font.

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I certify that on May 19, 2021, the foregoing document was served on all parties or their counsel of record through CM/ECF system.

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