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

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* PUBLIC JUSTICE, P.C., IN SUPPORT OF PLAINTIFFS-APPELLEES

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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, as it does not issue stock.

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INTEREST OF AMICUS CURIAE[1]

Public Justice is a national public interest law firm 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 the *en banc* proceedings in this case because Defendants and their amici urge a dangerous conflation of class certification and merits questions that would make it difficult if not impossible for classes to be certified in many types of cases, including consumer class actions and class actions involving employment discrimination. Additionally, Defendants and their amici mischaracterize

[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 plaintiffs have consented to the filing of this brief. Defendants do not oppose the filing of this brief if the Court determines that it is not out of time under Circuit Rule 29-2(e)(2) but take the position that *amicus* briefs supporting Plaintiffs were due 21 days after the Court granted *en banc* review. *Amicus* does not believe that Rule 29-2(e)(2) governs timing in this situation when no petition for rehearing *en banc* was filed. *Amicus* is responding to the supplemental brief of Defendants that was authorized by this Court on August 20 and filed on August 31.

the significance to this case of the Supreme Court's recent decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), a case in which Public Justice also filed an *amicus* brief. Public Justice seeks to assist this Court by placing the *Ramirez* opinion in its proper context.

INTRODUCTION

The Supreme Court recently reiterated that what plaintiffs must prove to satisfy the case-and-controversy requirement of Article III differs throughout the stages of litigation. *Ramirez*, 141 S. Ct. at 2208 (describing what is required when a case proceeds to trial as *Ramirez* did). At the class certification stage, Article III is satisfied if "any named plaintiff sufficiently alleged standing in the operative complaint." *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1131 (9th Cir. 2017) (at certification stage, class must be able to prove that "at least one" named plaintiff meets the Article III requirements (quoting *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc)). Nothing in *Ramirez* alters this jurisdictional analysis. *Ramirez*, 141 S. Ct. at 2208 n.4.

Defendants and their amici argue that even if Article III does not require proof of every class member's injury at the certification stage—which it does not, according to Supreme Court precedent—the presence of class members who are potentially uninjured still defeats predominance. But the only classes that don't include at least some potentially uninjured members are those where injury is a required element of the class definition, making them impermissibly failsafe. It is up to the finder-of-fact to

determine which (if any) class members were injured by the defendant's conduct, and so long as the fact finder can make this determination using common evidence or in an administratively feasible manner, Rule 23(b)(3) is satisfied. Because the disputes between plaintiffs' and defendants' experts in this case turn on which regression model will most accurately measure the extent of classwide injury, they are by definition disputes over common evidence—specifically, whose common evidence to credit. That the parties' experts don't agree isn't a reason to deny class certification; it is evidence of a common merits question to be decided later in this case.

ARGUMENT

I. The Supreme Court's opinion in *Ramirez* arose in a different procedural context and says nothing about Rule 23(b)(3).

Defendants and their amici sprinkle references to Article III and *TransUnion v. Ramirez* throughout their briefs, suggesting ominously that the Supreme Court's intervening opinion raises a new "Article III dimension" to why the district court's class certification was wrong. Defs. Br. 12; Chamber Br. 9 (*Ramirez* "raises serious questions").

But *Ramirez* was a decision about whether a particular subset of class members had adduced sufficient evidence at trial to establish a concrete actual or imminent injury stemming from TransUnion's violations of the Fair Credit Reporting Act. 141 S. Ct. at 2211-12. To the extent it touched on standing principles more broadly, it discussed the types of analogies to injuries recognized at common law that would align a statutory

violation with an Article III injury in fact. *Id.* at 2200. Financial harm, the harm all members of the classes here claim they suffered, appeared on the Supreme Court's list of "traditionally recognized" common-law injuries. *Id.*

So *Ramirez* casts no doubt on the constitutional sufficiency of the injuries alleged here. And, as Defendants admit (Defs. Br. 13), it also has nothing to say about how the presence of potentially uninjured class members affects the Rule 23(b)(3) requirements, which is unsurprising since *Ramirez* case did not come to the Court at the class certification stage. All the Supreme Court said about uninjured class members in *Ramirez*, besides deciding that a large portion of the class in that case had not sufficiently proved injury at trial, was that "Article III does not give a federal court the power to award *relief* to any uninjured plaintiff." *Id.* at 2208 (emphasis added).

Defendants selectively quote this passage from *Ramirez* to suggest that certifying a class that contains potentially uninjured members poses a jurisdictional problem. Defs. Br. 13-14. But this stage-setting section of the opinion stood for the unremarkable proposition that uninjured class members may not recover damages. And since the class mechanism is merely a procedural device and does not enlarge substantive rights, granting class certification is not a form of "relief." Just as the class did in *Ramirez*, the class members here still need to prove they were injured before they will be entitled to any relief.

Finally, the Chamber points to the last sentence of the *Ramirez* majority opinion as further support for the notion that the Supreme Court said something obliquely

about uninjured class members and class certification even though footnote 4 of the opinion expressly stated that the Court was not reaching that issue. Chamber BR. 9 ("On remand, the Ninth Circuit may consider whether class certification is appropriate in light of our conclusion about standing." (quoting *Ramirez*, 141 S. Ct. at 2214)).

But the Chamber omits the preceding sentence, which puts the statement about remand in context. Much of the briefing before the Supreme Court had focused on whether named plaintiff Sergio Ramirez, who was unable to purchase a car and had to cancel a planned vacation because of TransUnion's conduct, was typical of the class he sought to represent. The Supreme Court noted that in light of its decision about standing, "we need not decide whether Ramirez's claims were typical of the claims of the class under Rule 23." *Ramirez*, 141 S. Ct. at 2214. It then remanded to this Court to conduct a new Rule 23 analysis, including a new analysis of typicality, informed by the conclusion that while Ramirez had suffered an Article III injury, over 80% of the class he sought to represent had not. Here, by contrast, if this Court affirms the certification order and the case goes to trial, with Defendants' position ultimately prevailing in the battle of the experts, then at most 28% of the class members would have been found uninjured, a far less damaging blow to typicality than the loss of 80% of the class that occurred in *Ramirez*. *See Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1141 (9th Cir. 2016) (including in typicality analysis whether "other class members have been injured by the same course of conduct" (internal quotations omitted)).

At class certification, only one named plaintiff need meet the requirements of Article III. *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011). To require more at this stage of the litigation would undermine the purpose of a class action, to aggregate the claims of many people who have purchased the same dangerous product or been subject to the same unlawful policy. Without the benefit of full merits discovery, class counsel may not know precisely how many laptop batteries caught fire and which class members purchased those incendiary devices. Nor would counsel in a case alleging a policy of sex discrimination in pay and promotion know at the time of class certification precisely which female employees were adversely affected by the policy. Litigation on the merits, and ultimately trial, are the crucible through which such claims will be tested. And if they can be tested using common evidence, as is the case here, then they can and should proceed on a class basis.

II. Common evidence, not individualized inquiries, will separate the injured purchasers of defendants' products from any who were uninjured.

Defendants argue that because Plaintiffs' experts' models for assessing antitrust impact are unreliable, individualized inquiries will necessarily predominate over common questions. Defs. Br. 10-11. They later make the same point more generally, contending that any time there are a large number of uninjured class members, "individualized inquiries will be required" to separate those who were injured from those who were not. Defs. Br. 13. Defendants don't explain why this should be the case, and the cases they cite don't help their cause.

Defendants cite to *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), but the Court found predominance lacking there not because there was a large number of uninjured class members but because the district court had approved only one model of antitrust impact and the plaintiffs' expert could not isolate damages attributable only to that model. *Id.* at 35. There is no such mismatch between model and damages here.

Similarly, Defendants and both their amici cite to *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259 (11th Cir. 2019), the case that the Supreme Court majority in *Ramirez* cited when stating that it would not reach the question of whether anyone besides the named plaintiff must establish standing before class certification. 141 S. Ct. at 2208 n.4. But none of the three briefs spend any time describing the facts of *Cordoba*.

Cordoba was an action under the Telephone Consumer Protection Act where the plaintiff had received eighteen calls from DIRECTV and its telemarketing contractor after asking to be placed on DIRECTV's internal do not call list. 942 F.3d at 1264. He sought to represent a class of all people who had received calls from DIRECTV and its contractor while it failed to maintain an internal do not call list, in violation of FCC regulations. *Id.* But the Eleventh Circuit held that this class should not have been certified, because those recipients of DIRECTV calls who had not asked DIRECTV to stop calling them could not trace their injuries to DIRECTV's failure to maintain an internal do not call list. *Id.*

Defendants' and their amici's sloppy shorthand about "uninjured class members" misses the mark in several respects with respect to *Cordoba*. For one thing,

the Eleventh Circuit did not vacate the class certification order based on Article III; like this Court, the Eleventh Circuit finds Article III satisfied at the class certification stage if the named plaintiff has demonstrated standing, which Mr. Cordoba unquestionably had. *Id.* at 1273. Second, the Eleventh Circuit did not find any of the class members in *Cordoba* to be uninjured, holding that receiving an unwanted phone call is an invasion of privacy sufficient to confer a concrete, actual injury. *Id.* at 1269-70. The problem for those class members who had not asked DIRECTV to stop calling them was not injury in fact but traceability, because their injuries could not be traced to DIRECTV's failure to follow the FCC regulation on internal do not call lists. *Id.* at 1271-72.

Finally, and most relevant for purposes of comparison to this case, the Eleventh Circuit found it fatal to predominance that "at some point in the litigation the district court will need to determine whether each of the absent class members has standing," and that each class member would need to prove their standing by providing individual evidence of their requests not to be called. *Id.* at 1274-75. Thus, establishing each absent class member's standing, in that case, was an individualized inquiry that risked overwhelming common questions. *Id.* at 1275.

In this case, by contrast, plaintiffs' counsel are not planning to submit individual evidence from each class member describing how Defendants' price-fixing scheme injured them. Instead, plaintiffs' experts have conducted pooled regression analyses to show how the defendants' conspiracy tainted the market, how much lower packaged tuna prices would have been but for their admitted antitrust violations, and how those

market manipulations affected each class member. Defendants' expert has responded with critiques of these models that analyze the same pool of data and reach different results. All of the evidence being analyzed by both sides' experts is common and pertains to the entire class.

As *amicus* noted in its earlier brief in this case, what makes this case unusual isn't that Plaintiffs and Defendants disagree about the number of uninjured members in the class. What's unusual is that the discrepancy is so small, with Defendants conceding that 72% of the class suffered injury. Defendants who haven't previously admitted liability through guilty pleas of their executives typically contest any injury to any class member. So long as these disputes over the number of uninjured class members are susceptible to classwide evidence, they are a feature, not a bug, of class litigation.

This court in *Torres* described the problem of definitional overbreadth that occurs when a class includes people who could not have been injured by the defendant's alleged misconduct because they were not exposed to it. 835 F.3d at 1137. Defendants and their amici also discuss definitional overbreadth, but they have failed to identify any class members who were not exposed to Defendants' illegal price-fixing. Thus, what Defendants seek to claim as overbreadth is that some class members were "fortuitously uninjured" because they managed to negotiate better prices than their competitors or priced products below the market price to drive customer demand. *See id.* (rejecting such "fortuitous non-injury" as a basis for denying class certification on grounds of predominance).

What Defendants are complaining about, at bottom, is that they don't agree with plaintiffs' experts and perceive flaws in their methodology. But these complaints don't reveal definitional overbreadth, nor do they necessitate the sort of individualized standing inquiries that would threaten predominance as in *Cordoba*. They are merits disputes. These merits disputes were properly left for another day by the district court, and this Court should not allow Defendants to import them into the class certification analysis in contravention of governing law. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 460 (2013).

CONCLUSION

For the reasons stated above and in the previous brief filed by *amicus* on May 19, the Court, sitting *en banc*, should affirm the district court's certification order.

Respectfully submitted,

September 10, 2021

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

This brief complies with the type-volume limitation of Ninth Circuit Rule 29-2(c)(3) because this brief contains 2,597 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.

September 10, 2021

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CERTIFICATE OF SERVICE

I certify that on September 10, 2021, the foregoing document was served on all parties or their counsel of record through CM/ECF system.

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My name is Karla Gilbride

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Sep 10, 2021.

Signature s/Karla Gilbride **Date** Sep 13, 2021

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