No. 22-131

IN THE
Supreme Court of the United States

STARKIST CO., ET AL.,
Petitioners,
v.

OLEAN WHOLESALE GROCERY COOPERATIVE, INC.,
ON BEHALF OF ITSELF AND ALL OTHERS
SIMILARLY SITUATED, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTION PRESENTED

Petitioners assert that this case presents questions about the presence of "uninjured class members" in a Rule 23(b)(3) class action and the use of "averaging assumptions to establish classwide proof of injury." This case does not present any such broad questions of law. If this Court were to grant review, the question presented instead would be:

Whether the district court abused its discretion in finding that, for each of the three classes certified in this particular antitrust case, "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3).

RULE 29.6 STATEMENTS

Pursuant to this Court's Rule 29.6, respondents state the following:

Direct Purchaser Plaintiff Class. Plaintiffs-Respondents Olean Wholesale Grocery Cooperative, Inc., Piggly Wiggly Alabama Distributing Co., Inc., Trepco Imports and Distribution Ltd., Benjamin Foods LLC, and Plaintiff Howard Samuels as Trustee in Bankruptcy for Central Grocers, Inc. hereby certify that none has a parent company. Plaintiff-Respondent Pacific Groservice Inc. d/b/a PITCO Foods hereby certifies that it is owned by Cadigan Groservice Holding Company (Delaware), which is in turn owned by Cadigan Holdings LLC.

Commercial Food Preparer Plaintiff Class. Plaintiffs-Respondents Thyme Café & Market Inc., Simon-Hindi LLC d/b/a Simon's, Capitol Hill Supermarket Inc., Confetti's, A-1 Diner Inc., Francis T. Enterprises d/b/a Erbert & Gerbert's, Sandee's Catering, Rushin Gold LLC d/b/a The Gold Rush, and Erbert & Gerbert's Inc. hereby certify that none has a parent company. Plaintiff-Respondent Maquoketa Care Center, Inc. hereby certifies that its parent company is Capstone Management, LLC. Plaintiff-Respondent Groucho's Deli of Five Points LLC hereby certifies that its parent company is Groucho's Ltd. Plaintiff-Respondent Groucho's Deli of Raleigh LLC hereby certifies that its parent company is Raleigh Deli, Inc.

All of the above Plaintiffs-Respondents hereby certify that no publicly held corporation holds 10% or more of their or their parents' stock.

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INTRODUCTION

Petitioners are StarKist Co., the largest seller of packaged tuna in the United States, and its corporate parent. StarKist has pleaded guilty to conspiring with the second- and third-largest packaged-tuna sellers to fix prices for packaged tuna. Respondents are three classes of tuna purchasers who seek to recover damages caused by that conspiracy. After a three-day evidentiary hearing, the district court certified all three classes, finding that common issues of law and fact predominate over any individualized issues. At issue is that court's discretionary finding that respondents' evidence – including petitioners' and other guilty pleas, evidence of market structure and industry practices, expert economic testimony, and three separate sets of regression models – was capable of showing classwide impact from petitioners' admitted conspiracy. The Ninth Circuit, sitting *en banc*, found that the district court acted within its discretion. That fact-bound determination does not warrant review.

Petitioners erroneously assert that the court of appeals' decision created two splits with three other circuits. *First*, they argue that the district court should have made an affirmative factual finding that all class members (or all but a *de minimis* number) are actually injured before certifying a class. As Judge Ikuta explained in her careful opinion for the *en banc* majority, no circuit applies such a rule. Instead, the circuits (including the Ninth) take the potential presence of uninjured class members into account in determining whether common issues predominate over individual ones. The Ninth Circuit's application of that approach to the facts of this case does not warrant review.

Second, petitioners argue that this Court should impose a rule restricting the use of statistical evidence

to show impact in antitrust cases. Again, no circuit applies such a rule. Instead, the circuits (including the Ninth) permit the use of statistical evidence by a class where a class member suing individually could use similar evidence to prove an element of a claim or defense. This Court applied that standard in *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016), and the Ninth Circuit's finding that the standard was met here does not warrant review.

The legal principles that the Ninth Circuit applied to affirm the district court's class-certification order in this case are neither unsettled nor uncertain. It is unsurprising that the district court certified classes seeking relief for an admitted nationwide price-fixing conspiracy – a conspiracy that already has led to two corporate criminal guilty pleas, an agreement to cooperate for leniency, and criminal convictions of corporate executives – in a concentrated market for a standardized product. Relief in such cases is among the core functions of the antitrust laws, and deterring such violations serves an important national policy.

Petitioners complain (at 33) that the "in terrorem effect" of class actions requires special safeguards to protect defendants like themselves from undue pressure to settle. Even if that policy concern had merit (which it does not), it should be directed to Congress or raised during the next revision of the Federal Rules of Civil Procedure. Review would offer this Court no opportunity to address the issue. Rather, this Court would get mired in a case-specific examination of whether the district court acted within its discretion in applying current law to the parties' competing evidence and their experts' opinions and testimony – an examination that would reveal ample support for the court of appeals' judgment.

STATEMENT

This case is about a price-fixing conspiracy by the three largest sellers of an American household staple: canned tuna. Those three sellers – StarKist, Bumble Bee Foods, LLC ("Bumble Bee"), and Tri-Union Seafoods LLC d/b/a Chicken of the Sea ("Chicken of the Sea") – historically have controlled more than 80% of the packaged-tuna market.[1] App. 77a. In December 2014, Bumble Bee sought consent from the Department of Justice to consolidate the industry further by merging with Chicken of the Sea. During its review, the government uncovered a years-long price-fixing conspiracy. The resulting investigation led to corporate guilty pleas by StarKist and Bumble Bee, three individual guilty pleas by StarKist and Bumble Bee executives, and a criminal jury verdict against Bumble Bee's former CEO. App. 6a. Chicken of the Sea cooperated, admitted guilt, and obtained leniency. *Id.* The government did not seek restitution from StarKist or Bumble Bee in connection with their guilty pleas because of these pending civil class actions against them. C.A. Supp. E.R. 11, 80.

A. District Court Proceedings

1. Respondents are purchasers of packaged tuna. In 2015, they brought state and federal antitrust claims against petitioners. The cases were stayed until the criminal investigation resolved and were then consolidated in the Southern District of California. In 2018, respondents sought certification of three classes: those who purchased tuna directly from

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[1] All three of the conspirators were defendants in the district court. Chicken of the Sea appealed the class certification but withdrew its appeal after settling with respondents. Pet. 12 n.3. Bumble Bee filed for and was sold in bankruptcy, and it did not participate in the appeal. App. 5a n.1.

petitioners ("Direct Purchasers"); those who purchased tuna indirectly to use it for food preparation ("Food Preparers"); and those who purchased tuna indirectly to consume it ("End Payers").

On January 14, 15, and 16, 2019, the district court held an evidentiary hearing on the class-certification motions. After the hearing, the court received about 1,500 pages of briefing. The "focus[]" of the hearing, App. 116a, was whether "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). At the court's direction, the parties focused on the economic experts' testimony. App. 113a. Respondents contended that common issues predominated because they could: (a) use common evidence to show that petitioners had conspired to fix prices; (b) use common evidence to show antitrust impact from the conspiracy on all class members; and (c) use a common methodology to quantify damages for all class members. App. 120a-121a. The petition focuses on the antitrust-impact element: the requirement that, in order to recover, each private antitrust plaintiff must prove that it "ha[s] in fact been injured to some extent" from an antitrust violation. *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 114 (1969); *see id.* at 114 n.9 (explaining that antitrust injury requires proving "the fact," as distinct from the "amount[,] . . . of damage").[2]

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[2] Petitioners suggest that this case also "presents [a] . . . predominance problem" in that determining "the *degree* of injury requires individualized damages determinations," Pet. 24 n.5, but their questions presented focus on the existence of injury, not its amount. *See* Pet. i. Also, petitioners failed to preserve any such argument in the court of appeals for review. App. 29a n.19, 48a.

2. Respondents and their expert witnesses relied on four types of evidence to show that impact could be proven on a classwide basis.[3] *First*, respondents relied on petitioners' corporate and officer guilty pleas, which included admissions that petitioners reached "agreements and mutual understandings . . . to fix, raise, and maintain the prices of packaged seafood sold in the United States"; and that petitioners' collective sales of more than a billion dollars of price-fixed tuna "affect[ed] U.S. customers." C.A. Supp. E.R. 7-8, 27, 40, 53, 76-77. Respondents' experts testified that the facts in the pleas "indicat[ed] . . . impact on all members of the class." App. 124a; *see* C.A. E.R. 584-85, 1832-34, 2177-80.

Second, respondents presented evidence about "the canned tuna market and [petitioners'] business practices." App. 124a. That evidence included petitioners' dominance of the relevant market; high barriers to entry that deterred price competition; the standardized, staple nature of the products at issue; low elasticity of demand; common costs shared by the conspirators; and petitioners' use of price lists and extensive collaboration. *Id.*; C.A. E.R. 585-90, 1835-50, 2153-63. Such market characteristics and industry practices make it more likely that a price-fixing conspiracy will succeed at raising prices for all purchasers rather than only some. C.A. E.R. 587-90, 1835, 1839, 1970-71, 2150-52.

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[3] The court of appeals' opinion primarily discusses the opinion of Dr. Russell Mangum, the expert for the Direct Purchasers. App. 24a-50a; *see also* App. 123a-141a. The district court also heard testimony from, and relied upon the opinions of, Dr. Michael Williams for the Food Preparers, App. 148a-160a, and Dr. David Sunding for the End Payers, App. 174a-182a.

Third, the Direct Purchasers' expert Mangum presented an analysis showing that prices for packaged tuna had high, positive correlation coefficients among (1) different packaged-tuna products; (2) different sellers; and (3) different types of customers. App. 124a-125a. Packaged-tuna prices tended to rise and fall together regardless of the products, sellers, and customers involved. As Mangum explained, correlation standing alone cannot prove the existence or impact of a price-fixing conspiracy, but is common evidence that, viewed with respondents' other evidence, supports a classwide showing of impact. App. 125a; C.A. E.R. 590, 1997-99.

Fourth, respondents' experts presented "regression model[s] to estimate overcharges of canned tuna" to each class. App. 125a-128a (Direct Purchasers); *see* App. 150a-154a (Food Preparers), 174a-177a (End Payers). Each expert compared prices from the period of the price-fixing conspiracy to prices from a benchmark period when pricing was competitive. App. 125a-126a, 150a-151a, 174a-175a. Each controlled for "factors other than anti-competitive behavior," such as input costs and customer type. App. 127a, 150a, 175a. Each found statistically significant overcharges to class members. App. 127a, 151a-152a, 175a-176a.

Respondents' experts also performed additional tests to confirm that their findings reliably showed impact across each class. Mangum estimated overcharges specific to each Direct Purchaser, to each fish type and package type, and to private label products. App. 127a-128a. The Food Preparers' expert Williams examined whether overcharges were paid at the class-member level. App. 154a. The End Payers' expert Sunding evaluated overcharges for specific products, for package types, and for large customers, including

Walmart. App. 176a. He found that the 10 largest retailers, together representing 57% of the market, experienced overcharges in all their purchases, including Walmart, which individually represented 19% of the market and experienced a statistically significant overcharge. *Id.*; C.A. E.R. 364-65, 2075.

3. Petitioners contested respondents' common-impact showing. They contended (as the petition asserts) that the market for packaged tuna exhibited pricing variation. They argued that: larger purchasers such as major grocery chains did not experience the same effect from price-fixing as smaller purchasers, App. 94a, 128a-129a; different pricing mechanisms in the market created different pass-through effects for different End Payers, App. 179a; and some packaged-tuna products, such as private-label tuna, were negotiated without reference to the list prices that had been fixed, App. 94a. Respondents replied that: even large purchasers paid overcharges, App. 176a; End Payers consistently paid at least some overcharges without regard to pricing mechanisms, App. 179a; and prices for private-label packaged tuna, like those for branded packaged tuna, increased because of the conspiracy, C.A. E.R. 2016-18.

Petitioners also presented experts who criticized respondents' experts. Most relevant here, their expert Dr. John Johnson targeted Mangum's regression model.[4] Johnson argued that Mangum's model found classwide impact only because it estimated a single overcharge for all Direct Purchasers. As an alternative, Johnson purported to modify Mangum's model to "determine[] the overcharge co-efficient individually

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[4] Petitioners also presented Dr. Laila Haider, who attempted to rebut Williams and Sunding. App. 154a-160a, 177a-181a.

for each Class member." App. 128a-129a. He reported that this approach found positive, statistically significant overcharges for 72% of class members, but not for the remaining 28%. App. 129a. Johnson's presentation was limited to a critique of Mangum's model; he did not independently estimate the number of injured or uninjured class members. App. 46a; App. 31a.

Mangum responded that Johnson's results showed not that 28% of class members were uninjured, but only that, when the model was used to calculate individual overcharges, the sample size for some class members became too small to obtain useful results. App. 129a-130a. To illustrate, Mangum recreated Johnson's model, but accounted for the problem of small sample size by excluding Direct Purchaser class members for whom there was insufficient data.

When Mangum included only members for whom the model had enough data for a statistically significant result, the recreated model indicated an overcharge in 98% of cases. *Id.* When he included members for whom the model had enough data for any result at all – whether or not statistically significant – the recreated model showed an overcharge in 94% of cases. App. 130a-131a. When he performed "robustness" checks on his model to verify that Direct Purchaser class members had at least one purchase *above* the predicted but-for price in a competitive market, he confirmed overcharges for 94.5% to 97.2% of class members, depending on how he conducted the check. C.A. E.R. 611-13. And he concluded that, even taking into account all of Johnson's criticisms, "all or nearly all of the class members in the direct purchaser class were impacted by this conspiracy." C.A. E.R. 639.

4. The district court (Sammartino, J.) issued a published opinion granting respondents' motion to

certify all three classes. App. 110a-187a. For each class, the court found that respondents satisfied the requirements of numerous class members, common questions of law or fact, class representatives with typical claims, and adequate representation. App. 116a-119a, 144a-148a, 171a-172a; *see* Fed. R. Civ. P. 23(a). And for each class, the court found that respondents satisfied the requirement that "questions of law or fact common to class members predominate[d] over any questions affecting only individual members." Fed. R. Civ. P. 23(b); *see* App. 119a-142a, 148a-161a, 172a-182a.

As support, the court found that each class had evidence capable of showing antitrust impact on a class-wide basis. App. 140a-141a, 160a, 181a-182a. As set out above, *supra* pp. 5-6, and as the court explained, that evidence included not only the experts' regression models, App. 123a-128a, 150a-154a, 174a-177a, but also petitioners' guilty pleas, App. 131a, 141a, the structure and characteristics of the packaged-tuna market, App. 124a, 131a, 141a, 153a-154a, 174a, and correlation of packaged-tuna prices, App. 141a.

The court considered in granular detail and rejected petitioners' challenges to respondents' regression models, including Johnson's challenge to Mangum. In doing so, the court accepted petitioners' legal premise that, where a class "'include[s] a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct,'" certification is not appropriate "if 'the uninjured parties represent [more than] a *de minimis* portion of the class.'" App. 129a (quoting *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1138 (9th Cir. 2016), and *In re Lidoderm Antitrust Litig.*, 2017 WL

679367, at *11 (N.D. Cal. Feb. 21, 2017)) (last alteration added). But the court rejected petitioners' factual premise that this case involves any such situation.

Instead, the court credited Mangum's explanation that Johnson's 72%-28% comparison reflected a "sample size problem," App. 130a, and did not indicate that 28% of class members were in fact uninjured. It rejected petitioners' argument that the class members for whom there was insufficient data would be unable to show impact with common evidence, explaining:

> [T]hese Class members would still be able to point to the same econometric model as it pertains to similarly situated Class members as proof. This, along with the record evidence, guilty pleas, and market characteristics, shows that all Class members will still use common evidence and that common questions will continue to predominate over the case.

App. 131a.

The court likewise rejected petitioners' arguments "that using a pooled model" – in which Mangum estimated a single overcharge for all class members – was "inappropriate." App. 132a-134a. The court did not apply any categorical rule about pooled models; it acknowledged that "[t]he use of a single overcharge applied to all class members can be problematic in some cases." App. 133a. It also stated that petitioners could argue "at trial" that Mangum's pooled model was flawed or not credible. App. 133a-134a. But on the class-certification record, the court found that petitioners' criticisms "are not fatal to a finding of class-wide impact." *Id.* It reached the same conclusion as to the Food Preparers, App. 160a, and the End Payers, App. 181a-182a; *see also* App. 180a (finding

that End Payers "have persuasive explanations for each of the purported deficiencies" in Sunding's model).

B. Ninth Circuit Proceedings

1. Petitioners sought, and the court of appeals granted, interlocutory review. A panel of the Ninth Circuit vacated and remanded. Writing for the panel majority, Judge Bumatay held that respondents' experts' regression models were the kind of evidence that "can prove the classwide impact element of Plaintiffs' price-fixing theory and, thus, may be used to establish predominance." App. 88a-89a. But the panel expressed concern that the record failed to show whether "the number of uninjured class members [was] *de minimis*" and held that the district court "failed to resolve the factual disputes as to how many uninjured class members are included in [respondents'] proposed class[es]." App. 99a-101a & n.12. Judge Hurwitz, concurring in part and dissenting in part, agreed that further fact-finding was needed, but disagreed that the district court should be required to "find that only a '*de minimis*' number of class members are uninjured." App. 102a-103a.

2. The court of appeals then granted *en banc* review and affirmed. The *en banc* court (Ikuta, J.) held that plaintiffs seeking class certification "must prove the facts necessary to carry the burden of establishing that the prerequisites of Rule 23 are satisfied by a preponderance of the evidence," App. 12a-13a, and that a district court "must make a 'rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the [class-wide] evidence to prove' the common question in one stroke," App. 15a (quoting *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 312 (3d Cir. 2008)) (alteration below). Unlike the panel, the *en banc* court

determined that the district court had conducted a "rigorous analysis of the expert evidence" and "did not abuse its discretion" in finding predominance. App. 37a.

The *en banc* court rejected petitioners' argument that, "to satisfy Rule 23(b)(3)'s predominance requirement, [respondents] must prove that all or nearly all class members were *in fact injured* by the alleged conspiracy, i.e., suffered antitrust impact." App. 45a. It reasoned that such a requirement would be inconsistent with this Court's instruction that a class does "not have to 'first establish that it will win the fray' in order to gain class certification under Rule 23(b)(3)." App. 46a (quoting *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 460 (2013)). Instead, it was sufficient that "[n]either Dr. Mangum's pooled regression model nor Dr. Johnson's critique required individualized inquiries into the class members' injuries," App. 47a, so that either petitioners or respondents would prevail at trial based on common evidence.

The *en banc* court rejected the contention that its judgment contradicted those of other circuits. It distinguished *In re Asacol Antitrust Litigation*, 907 F.3d 42 (1st Cir. 2018), and *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 934 F.3d 619 (D.C. Cir. 2019), as cases where the "need to identify uninjured class members" would have "'predominate[d] and render[ed] an adjudication unmanageable'" or where antitrust impact would have required "'full-blown, individual trials.'" App. 21a-22a n.13 (quoting *Asacol*, 907 F.3d at 53-54, and *Rail Freight*, 934 F.3d at 625). The court of appeals made clear that a district court "must consider whether the possible presence of uninjured class members means that [a] class definition is fatally overbroad," and if so must either

deny certification or (if possible) narrow the class. App. 22a n.14.

The *en banc* court rejected petitioners' arguments that Mangum's pooled regression model impermissibly relied on "averaging assumptions." App. 37a-44a. It observed that, "[i]n antitrust cases, regression models have been widely accepted as a generally reliable econometric technique to control for the effects of the differences among class members and isolate the impact of the alleged antitrust violations on the prices paid by class members." App. 38a. It read *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016), to "reject[] any categorical exclusion of representative or statistical evidence" in class actions. App. 38a-39a (footnote omitted). It further held that the district court "did not abuse its discretion" in concluding that Mangum's model could form part of a basis for a class-wide showing of impact. App. 40a. Like the district court, the court of appeals made clear that the ultimate "persuasiveness" of Mangum's regression in light of Johnson's criticisms would be a question "for the jury, not the court." App. 40a-41a.

The *en banc* court rejected the argument that "the district court erred by failing to resolve a dispute between the parties as to whether 28 percent of the class did not suffer antitrust impact." App. 44a. The court explained that petitioners had "mischaracterize[d] the import of . . . Johnson's critique," which did not involve any "factual finding that 28 percent of the [Direct Purchaser] class . . . w[as] uninjured." App. 46a. Johnson's point was "aimed at undermining confidence in . . . Mangum's pooled regression model" and supported "[a]t most . . . the more attenuated argument that . . . Mangum's model is unreliable, or would be unpersuasive to a jury." *Id.* That point, the

court of appeals reasoned, was adequately addressed when "the district court considered and resolved th[e] methodological dispute between the experts in favor of . . . Mangum by crediting his rebuttal." *Id.*

Judge Lee, dissenting, argued that a district court should determine "whether too many putative class members suffered no injury . . . at the class certification stage." App. 57a. He relied on the policy concern that, "as a practical matter, . . . class action cases almost always settle once a court certifies a class," so that district courts should act as "gatekeeper[s]" to protect defendants. *Id.* In this case, he argued, Mangum's opinion was "not persuasive" as a matter of "common sense and empirical evidence," pointing to the "significant power" that "[m]ajor retailers" wield, with Walmart as an example. App. 64a-65a. As the majority observed, the dissent did not address the part of Mangum's reply to Johnson that "provided an individualized overcharge estimate for Walmart" and "showed that Walmart paid statistically significant overcharges because of the conspiracy." App. 40a.

The dissent contended that "other circuits . . . have endorsed a *de minimis* rule" for the number of uninjured plaintiffs in a class. App. 70a. The dissent believed that *Rail Freight* and *Asacol* applied such a rule. The dissent did not respond to the majority's point that *Rail Freight* and *Asacol* turned not on the presence of uninjured class members, but on case-specific findings that a process for identifying those class members would require so many individualized inquiries as to defeat predominance.

REASONS FOR DENYING THE PETITION

I. THIS CASE DOES NOT PRESENT ANY QUESTION ON WHICH THE CIRCUITS ARE SPLIT

The petition fails to identify any circuit split that could support review. The legal principles applied by the court of appeals and the district court are well-settled. A common question under Rule 23(a) and 23(b) is one "capable of classwide resolution," so that its "truth or falsity" can be "determin[ed] . . . in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *see* App. 9a-10a, 117a. In determining whether common questions predominate under Rule 23(b)(3), a district court must conduct a "rigorous analysis," *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013); *see* App. 11a, 115a, and must require representatives of a proposed class to "*prove* – not simply plead" – that the Rule's requirements are met, *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014); *see* App. 11a, 115a. Petitioners' challenge to the court of appeals' judgment is a fact-bound disagreement with that court's assessment of expert testimony. The appellate court properly determined that the district court displayed sufficient rigor in finding that, contrary to the opinion of petitioners' experts, respondents' experts and other record evidence showed that antitrust impact was capable of classwide proof. That determination does not warrant review.

Petitioners mischaracterize the court of appeals' decision as establishing a rule about "the presence of uninjured class members." Pet. i. That court applied no such rule. It left district courts discretion to address disputes about class-member injury "on a case-by-case basis." App. 21a-22a & n.13. In this case, respondents presented evidence (including, but not

limited to, their three experts' regression models) that every member of all three classes suffered antitrust injury from petitioners' price-fixing. Petitioners presented no contrary evidence to show that any class member was uninjured. As the court of appeals explained, "Johnson's test attempted to show that . . . Mangum's model was flawed," but "Johnson did not show that 28 percent of the class potentially suffered no injury." App. 31a n.21. That reasoning was supported by Johnson's concession that he "ha[d] not come to a[n] . . . affirmative conclusion one way or the other whether common impact can be shown in this case or not." C.A. E.R. 743. Thus, although the court of appeals correctly rejected any "per se rule that a class cannot be certified if it includes more than a de minimis number of uninjured class members," App. 22a n.13, this appeal would not have come out differently under such a rule. "This Court . . . reviews judgments, not statements in opinions." *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956).

Nor does this case present any important legal question about the use of "representative evidence such as averaging assumptions." Pet. i. As the court of appeals explained, this case does not involve "representative evidence" in the sense of "a sample that represents the class as a whole." App. 39a n.24 (citing *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 454-55 (2016)). It involves "regression models" of a kind "widely accepted as a generally reliable econometric technique," especially "[i]n antitrust cases." App. 38a. Courts evaluate statistical evidence by hearing *Daubert* challenges (none was made here), by "subject[ing] the evidence to a rigorous examination," and by "full[y] consider[ing]" any "critique" proffered by an opposing expert. App. 37a n.22. No other circuit has a different approach.

A. There Is No Circuit Split About Certifying Classes With Uninjured Members

The petition fails to show a split about uninjured class members between the Ninth Circuit's decision in this case and the decisions of the D.C., First, and Third Circuits. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619 (D.C. Cir. 2019); *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018); *In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184 (3d Cir. 2020); Pet. 16-20. Each decision applied the same, accepted legal standards to different facts. None of petitioners' cases supports their position that before certifying a class a district court must determine, as finder of fact, that the members of the proposed class are injured.

1. In *Rail Freight*, a putative class of shippers alleged a price-fixing conspiracy among a group of railroads. 934 F.3d at 620. The shippers sought to prove classwide impact using a damages model. The district court found the model flawed in three ways: it predicted "highly inflated" charges for "intermodal traffic," *id.* at 621; it predicted positive damages for class members who could not have been injured by the conspiracy because they paid prices based on "legacy contracts" negotiated before the alleged price-fixing conspiracy, *id.*; and it predicted "negative overcharges" for 12.7% of class members, *id.* at 621-22, 623-24. The district court found that the model's flaws "defeat[ed] the [shippers'] argument for predominance," and denied class certification. *Id.* at 622.

The D.C. Circuit affirmed, observing that its review was "only for abuse of discretion" and "find[ing] no such abuse." *Id.* at 624. Focusing on the model's prediction of negative overcharges, it observed that the plaintiffs explained the negative figures as a "prediction error," but that the district court had rejected

that explanation. *Id.* The D.C. Circuit upheld the district court's "finding" that the shippers had failed to explain the negative-damage findings as "not clearly erroneous." *Id.* It also concluded that the district court did not "abuse [its] discretion" in rejecting the shippers' other evidence (such as "documentary evidence" of pricing policies) as insufficient. *Id.* at 626-27.

The D.C. Circuit assumed, without deciding, that predominance could be shown where "a '*de minimis*' number of cases" in an antitrust class action "requir[e] individualized proof of injury and causation." *Id.* at 624. It explained that the question was whether "the need for individualized proof of injury and causation destroy[ed] predominance." *Id.* And it determined that the district court in that case had not committed "an abuse of discretion" in declining to find predominance, noting the percentage of shippers affected by the negative-damages issue (12.7%); the large number of shippers that figure represented in absolute terms (2,037); and, perhaps most importantly, the "absence of any winnowing mechanism," other than "full-blown, individual trials," to distinguish injured from uninjured shippers. *Id.* at 625.

In this case, the court of appeals correctly observed that *Rail Freight* did not adopt any "per se rule" about "uninjured class members," but held only "on [its] particular facts" that predominance was not satisfied. App. 22a n.13 (responding to the dissent's reliance on *Rail Freight*). A case where a class has no persuasive response to challenges to its expert's model and in which other record evidence of classwide impact is lacking can and should yield a different result from a case where a class does have such responses and in which other record evidence is strong. Furthermore, as *Rail Freight*'s references to the abuse-of-discretion

standard of review make clear (934 F.3d at 624, 625, 626, 627), the D.C. Circuit did not hold even that the district court in that case could not have certified the class, had it found that the injury issue could be resolved manageably without individual trials.

Petitioners vaguely assert that *Rail Freight* "held that the inquiry over uninjured members was 'part-and-parcel of the "hard look" required by' this Court's precedent *before* any class can be certified." Pet. 18 (quoting 934 F.3d at 626). If by "the inquiry over uninjured members" petitioners mean a factual finding as to whether all members of the class were injured, that is incorrect. What *Rail Freight* held was "required" at the certification stage was a determination not of individual injuries, but of "the number and nature of any individualized inquiries." 934 F.3d at 626. That coheres with the same standard that the Ninth Circuit applied here: "injury must be 'capable of classwide resolution,'" *id.* at 624 (quoting *Wal-Mart*, 564 U.S. at 350); *see* App. 46a-47a, rather than actually resolved at certification.

2. In *Asacol*, a putative class of drug purchasers alleged that drug manufacturers had conspired to delay a less-expensive generic drug from reaching the market. The district court had concluded that 10% of a putative class alleging injury from a conspiracy to delay a generic "had not been injured" based on its finding, as a matter of fact, that those class members were loyal to a more-expensive branded drug. 907 F.3d at 46-47. Accordingly, "even had a lower-priced generic alternative been available, these consumers would not have switched to it." *Id.* The class representatives conceded that a meaningful percentage of the class was uninjured, disputing only whether that percentage was closer to 8% than to 10%. *Id.* at 47. Their proposed solution focused on process: liability

could be proved classwide, and then brand-loyal class members could be separated out during claims administration. *Id.* at 52. The district court found that proposal workable and certified the class. *Id.*

The First Circuit reversed. It reasoned that the district court would not be able to identify which class members were brand-loyal without individualized mini-trials. *See id.* at 53 ("[T]his is a case in which any class member may be uninjured, and there are apparently thousands who in fact suffered no injury."). Accordingly, it predicted that the need to identify uninjured class members would "predominate and render an adjudication unmanageable." *Id.* at 53-54. It also rejected the plaintiffs' fallback reliance on an expert opinion because the expert conceded that not all class members were injured. *See id.* at 54 (explaining that the expert's "opinion itself rejects" the "demonstrably wrong conclusion" that "one hundred percent of individuals were injured").

In this case, the court of appeals reasonably distinguished *Asacol*. App. 22a-23a n.14. Here, unlike *Asacol*, "[t]here is no factual dispute that the Tuna Suppliers engaged in a price-fixing scheme affecting the entire packaged tuna industry nation-wide." App. 46a-47a. Nor did petitioners' experts opine that any class members were in fact uninjured. *Id.*; C.A. E.R. 442-43. The petition contends that some members must have been uninjured because of variations in bargaining power across purchasers, but respondents' experts presented analyses rebutting that contention.[5] Also, respondents proffered record evidence of classwide impact in addition to a regression model, unlike

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[5] *See*, *e.g.*, App. 176a (finding 10 largest retailers experienced overcharges in all purchases); App. 40a (noting Walmart "paid statistically significant overcharges because of the conspiracy").

the *Asacol* plaintiffs who pointed "to no documents or admissions that would support a finding that all class members suffered injury." 907 F.3d at 54.

Petitioners erroneously assert that in *Asacol* "the court resolved the dispute between the parties' experts regarding plaintiffs' proffered classwide proof (instead of deferring it to a jury)." Pet. 19. The First Circuit's opinion makes clear that there was no such dispute to resolve because the experts in that case (and the district court) agreed that a substantial portion of brand-loyal class members had suffered no injury. *See* 907 F.3d at 53. Such a case is easily distinguishable from this one, where respondents submitted persuasive expert and record evidence capable of proving classwide injury that the district court found sufficient to carry their burden, and petitioners' experts did not opine that any class member was uninjured.

3. *Lamictal* also involved a putative class of drug purchasers alleging a conspiracy to delay a generic drug from reaching market. *See* 957 F.3d at 187-90. The drug manufacturers introduced evidence that, during the class period, the generic manufacturer had competed on price, but that the limited price competition had benefited only some (not all) purchasers. *Id.* at 193-94. The manufacturers' expert proffered an opinion that some (not all) purchasers "likely paid the same or lower prices" as they would have but for the antitrust violation. *Id.* at 193. The district court conducted a cursory predominance analysis and declined to resolve the factual dispute over whether the generic manufacturer had competed on price. *Id.* at 194.

The Third Circuit vacated. It faulted the district court for failing to conduct "a rigorous analysis of the competing expert reports." *Id.* at 195. It also determined that the district court had incorrectly applied

circuit precedent that permitted "a more lenient predominance standard for damages than for injury" and had "conflated injury with damages in its analysis." *Id.* at 194-95. Because of those errors, the Third Circuit found itself "unable in the first instance to determine whether the Direct Purchasers have met the predominance requirement by a preponderance of the evidence," *id.* at 195, and remanded for more fact-finding.

In this case, the Ninth Circuit did not disagree with *Lamictal*, but followed its holding that "plaintiffs must prove the facts necessary to carry the burden of establishing that the prerequisites of Rule 23 are satisfied by a preponderance of the evidence." App. 12a-13a & n.6 (citing *Lamictal*, among other cases). The Ninth Circuit reached a different result from the Third Circuit by concluding in this case that the district court had "conducted a rigorous analysis of the expert evidence presented by the parties," App. 37a, and had "fulfilled its obligation to resolve the disputes raised by the parties in order to satisfy itself that the evidence proves the prerequisite[] for Rule 23(b)(3) . . . that the evidence was capable of showing that the [Direct Purchasers] suffered antitrust impact on a class-wide basis," App. 47a. In addition, *Lamictal* featured defense-side evidence showing that a significant number of class members were uninjured. Petitioners here made no such showing. *Supra* p. 8.

In sum, each of petitioners' cases is consistent with the Ninth Circuit's reasoning that the district court must assess "'the method or methods by which plaintiffs propose . . . to prove' the common question in one stroke." App. 15a (quoting *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 312 (3d Cir. 2008)). In *Rail Freight* and *Asacol*, the district courts found (and the class representatives did not dispute) that the

class was not capable of proving classwide injury; in *Lamictal*, the district court failed to make the required finding. Here, the district court made the finding that respondents' proof was capable of proving injury on a classwide basis. App. 140a-141a, 160a, 181a-182a. Accordingly, petitioners fail to show that this case would have been decided differently in the D.C., First, or Third Circuit.

B. There Is No Circuit Split About The Use Of Statistical Evidence In Antitrust Cases

The petition also fails to show a circuit split over the use of statistical evidence in antitrust (or any) cases. Petitioners' claim of a split rests on a mischaracterization of the Ninth Circuit's *en banc* decision as "adopting a sweeping rule that would allow the use of representative evidence to satisfy Rule 23's requirements any time a minimal 'plausib[ility]' threshold is met." Pet. 21 (quoting App. 40a) (alteration below). That decision adopted no such rule. It rejected petitioners' argument that Mangum's model "cannot plausibly serve as common evidence," finding the model both "logical and plausible." App. 39a-40a. But it did not hold that any plausible model would support certification. Rather, the test it applied was that expert statistical evidence must be "admissible" – not contested here – and must, "after rigorous review," be shown "capable of establishing antitrust impact on a class-wide basis." App. 40a-41a. It further concluded, relying on *Tyson Foods*, that "'each class member could have relied on [Mangum's model] to establish liability if he or she had brought an individual action.'" App. 44a (quoting 577 U.S. at 455).

Neither *Asacol* nor *Lamictal* applied a different rule. In *Asacol*, as set forth above, it was undisputed that a significant number of class members had suffered no injury because they were brand-loyal. *Supra* p. 19.

Although the class nevertheless proposed to rely on an expert to show classwide injury, the First Circuit observed that they "point[ed] to no . . . substantive law that would make an opinion that ninety percent of class members were injured both admissible and sufficient to prove that any given individual class member was injured"; found it "far from self-evident" that "such evidence would actually be 'sufficient to sustain a jury finding'"; and concluded that the class representatives had not "me[t] their burden" to show predominance. 907 F.3d at 54-55 (quoting *Tyson Foods*, 577 U.S. at 459). In other words, the First Circuit and the court of appeals here reached different conclusions on different records about whether different expert opinions could have been used in an individual trial.

In *Lamictal*, the Third Circuit confronted an argument that *Tyson Foods* called for a lower standard of proof for predominance "whereby that criterion *is satisfied unless* no reasonable juror could believe the common proof at trial." 957 F.3d at 191 (emphasis added). That proffered approach would imply that a court must certify any class that can present triable common proof, regardless of countervailing individualized evidence. The Third Circuit rejected that notion, citing its precedent stating that "district courts are required . . . to resolve factual determinations by a preponderance of the evidence at the class certification stage." *Id.* at 192 (citing *Hydrogen Peroxide*, 552 F.3d at 311). The Ninth Circuit did not disagree. To the contrary, it recognized the broad discretion afforded district courts in resolving predominance issues, App. 22a, and cited *Lamictal* when it adopted a preponderance-of-the-evidence standard to prove predominance, App. 12a-13a & n.6. It also extensively cited and relied on the Third Circuit's *Hydrogen*

Peroxide case, which *Lamictal* followed. App. 14a-16a. None of that suggests conflict or even tension with the Third Circuit.

C. The Court Of Appeals' Decision Does Not Otherwise Warrant Review

Petitioners' contention that the court of appeals' judgment raises issues of extraordinary importance largely relies on their contention that it reflects a significant change in the Ninth Circuit's law or a departure from the law of other circuits. *See* Pet. 33-34. Given the lack of merit in that contention, petitioners offer no persuasive reason for urgency in the Court granting review.

The dissent's point that "'[a]round 10,000 class actions are filed annually,'" Pet. 33 (quoting App. 59a), cuts both ways. If petitioners are right that the Ninth Circuit's decision cannot be squared with those of three other circuits, the D.C., First, or Third Circuit likely will soon have an occasion to disagree expressly with it. If that does not happen, as the Ninth Circuit's opinion itself explains (App. 13a n.6, 22a n.13), the cases are consistent after all.

In addition, the Ninth Circuit's recent decision in *Harvey v. Morgan Stanley Smith Barney LLC*, 2022 WL 3359174 (9th Cir. Aug. 15, 2022), dispels any notion of a departure from accepted standards concerning class-member injury. In *Harvey*, Judge Ikuta (the author of the *en banc* opinion in this case) joined a panel opinion that vacated the approval of a class settlement because "evidence in the record indicat[ed] . . . that there were class members who had not suffered injury"; because "the district court did not make a factual finding that every class member suffered some injury"; and because, as a result, the court "lack[ed] assurance that every class member who

would receive damages under the settlement suffered an actual injury." *Id.* at *3. That decision confirms that the Ninth Circuit continues to give appropriate scrutiny to class cases where (unlike here) the record reflects a genuine barrier to proving classwide injury.

Petitioners' claim that this case is an "ideal vehicle to resolve the questions presented," Pet. 34, is also incorrect for two reasons. *First*, as the Ninth Circuit's opinion notes, this case does not present the question whether "the possible presence of a large number of uninjured class members raises an Article III issue," because respondents' evidence is capable of establishing Article III injury for all class members. App. 48a-49a.[6] If the Court wishes to take a case about uninjured class members, it should wait for one in which the Article III issue is cleanly presented. Otherwise, the Court can expect a merits brief from petitioners that (like the petition) makes ominous references to Article III, *see* Pet. 2, 8, 28, but does not actually present any opportunity to apply that provision.

Second, this case is not a good vehicle to resolve any question about "manageable, individualized process[es]" for "pick[ing] off" uninjured class members. *Asacol*, 907 F.3d at 53-54; *see* App. 22a (quoting the observation in *Ruiz-Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 (9th Cir. 2016), that the district court in that case was "'well suited to winnow out' a fortuitously non-injured subset of class members"). Here, no picking off or winnowing is necessary because every class member suffered Article III and antitrust injury

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[6] As the Ninth Circuit explained, because Article III standing must be shown "'with the manner and degree of evidence required at the successive stages of the litigation,'" it is sufficient to show at class certification that Article III standing is capable of proof at trial with common evidence. App. 49a (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

by purchasing packaged-tuna products in a market distorted by petitioners' criminal cartel. Accordingly, if this Court were to grant review, it would have no occasion to address whether or when winnowing processes are appropriate.

II. THE COURT OF APPEALS' DECISION IS CORRECT

Review also is not warranted because the court of appeals' decision was correct. The district court did not abuse its discretion in concluding that common issues, including the question of antitrust impact, would predominate at trial over any individualized issues; or in determining that respondents' expert opinions, despite petitioners' critiques, were capable – if credited by a jury – of proving classwide impact.

A. The District Court Did Not Abuse Its Discretion In Finding Predominance

Determining "whether 'questions of law or fact common to class members predominate' begins . . . with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011) (quoting Fed. R. Civ. P. 23(b)(3)). Here, the elements of respondents' causes of action are a violation of the antitrust laws; injury, or impact, to the class; and damages. App. 23a-24a. There never has been any dispute that the violation is a common question that will be shown at trial through common evidence, including petitioners' and their officers' guilty pleas. Petitioners also did not press on appeal, and do not present to this Court, any contention that, if impact can be shown on a classwide basis, damages inquiries still could defeat predominance. *Supra* p. 4 n.2. That leaves impact as the only disputed element.

Under familiar principles, showing antitrust impact requires a plaintiff only to establish some injury from

a violation, regardless of its extent. The extent of the harm goes to damages. *See Hydrogen Peroxide*, 552 F.3d at 311. Thus, respondents' common evidence need only be capable of showing, by a preponderance of the evidence, that all or nearly all class members[7] at least once paid a higher price (even a penny) more for packaged tuna because of petitioners' conspiracy. *See Nichols v. Mobile Bd. of Realtors, Inc.*, 675 F.2d 671, 676 (5th Cir. Unit B 1982) ("[I]n a price fixing case, impact may be shown simply by proof of purchase at a price higher than the competitive rate.") (footnote omitted). Put another way, because petitioners engaged in a nationwide price fixing conspiracy, all purchasers bought in a distorted marketplace.

The combination of different types of evidence that respondents will use to show antitrust impact at trial has been accepted by many courts. It includes: (1) evidence of a price-fixing conspiracy targeting a nationwide market, which petitioners have admitted caused massive losses; (2) evidence of market characteristics and industry practices, such as barriers to entry and standardized products, that make price-fixing likely to succeed at raising prices nationwide; (3) expert evidence of correlated prices to show that a price increase affecting some class members would likely be felt by all; and (4) regression models showing a price increase did actually occur. *See*, *e.g.*, *Kleen Prods. LLC v. International Paper Co.*, 831 F.3d 919, 928 (7th Cir. 2016) (affirming class certification in a price-fixing case where purchasers "show[ed] actual price increases, a mechanism for those increases, the communication channels the conspirators used,

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[7] Petitioners' counsel conceded in the district court that "[t]he legal standard . . . is whether you can prove impact to all or nearly all class members." C.A. E.R. 574.

and factors suggesting that cartel discipline can be maintained").

The district court did not abuse its discretion by concluding that respondents' evidence showed that antitrust impact was capable of classwide proof. Nor did it err in rejecting petitioners' claims that the packaged tuna market is characterized by individual price negotiations or that respondents' models incorporate incorrect assumptions or otherwise lack the ability to show impact. App. 140a-141a, 155a, 177a. Respondents' experts answered petitioners' objections in detail, App. 128a-140a, 155a-160a, 179a-181a, and the district court was entitled to credit their explanations. As the district court correctly observed, the upshot of petitioners' arguments (if a jury were to accept them) would be not that some class members can show antitrust impact while others cannot, but instead that the class as a whole cannot show impact. App. 140a-141a, 159a-160a, 181a-182a. Arguments of that kind do not defeat commonality or predominance because, whether the class wins or loses, it will win or lose "in one stroke." *Wal-Mart*, 564 U.S. at 350.

B. The Court Of Appeals' Analysis Is Consistent With *Wal-Mart* And *Comcast*

Petitioners fail to show that the court of appeals' decision departs from this Court's decision in *Wal-Mart*. In *Wal-Mart*, the Court concluded that the question whether store employees' discrimination claims presented a common issue of fact or law "necessarily overlap[ped] with [the employees'] merits contention that Wal-Mart engage[d] in a *pattern or practice* of discrimination." 564 U.S. at 352. Accordingly, to address commonality, the Court had to assess the employees' evidence that the company "'operated under a general policy of discrimination.'" *Id.* at 353-55 (quoting

General Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 159 n.15 (1982)). Accordingly, the Court did so and found that evidence insufficient.

The antitrust-impact inquiry here is distinct from the merits in a way that the pattern-or-practice inquiry in *Wal-Mart* was not. A jury may accept respondents' evidence and find impact on a classwide basis; or it may accept petitioners' criticisms of that evidence and find no impact on a classwide basis. Contrary to petitioners' assertion, the record shows no way for a jury to find that "up to a third of the class" – referring to Johnson's 28% figure – was "uninjured," Pet. 26, because Johnson never opined that 28% of the Direct Purchaser class was uninjured. Rather, Johnson's opinion was that, because Mangum's model could (according to Johnson) produce no results for 28% of the class, it was flawed and did not show that respondents were capable of proving impact on a class-wide basis. *Supra* p. 8.

Petitioners also fail to show that the court of appeals' judgment departs from this Court's decision in *Comcast*. *Comcast* involved an antitrust damages model calculated to estimate damages based on "four theories of antitrust impact." 569 U.S. at 36-37. Of those four theories, three were eliminated from the case, leaving only one at the class-certification stage. *See id.* Because the model could not isolate damages stemming from the "only surviving theory of antitrust impact," it included damages that were "not the result of the wrong" that the class would seek to prove at trial. *Id.* at 37-38. In reaching the conclusion that such a model cannot support class certification, this Court rejected the argument that it involved too much "inquiry into the merits of the claim," holding that it was necessary to consider whether the proffered model was "arbitrary" (as the Court found it to be) to

avoid "reduc[ing] Rule 23(b)(3)'s predominance requirement to a nullity." *Id.* at 35-36.

There is no *Comcast* problem here. Respondents' impact evidence and regression models match the same liability theory – a nationwide price-fixing conspiracy – to which StarKist and Bumble Bee, along with various corporate officers, already have pleaded guilty; which Chicken of the Sea admitted in seeking leniency; and which led to a trial conviction for Bumble Bee's CEO. Even the original panel opinion, now withdrawn, found "a sufficient nexus between [respondents'] . . . evidence and their price-fixing theory of liability," App. 91a-92a, to satisfy *Comcast*. Petitioners' recitation of *Comcast*'s general language, Pet. 26-27, neither shows error nor warrants review.

C. The Court Of Appeals Correctly Applied *Tyson Foods*

The court of appeals also correctly relied on this Court's rejection in *Tyson Foods* of any "broad rule against the use in class actions of what the parties call representative evidence." 577 U.S. at 454. It explained that the "permissibility" of using such evidence "turns not on the form a proceeding takes – be it a class or individual action – but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action." *Id.* at 455 (citing Fed. R. Evid. 401, 403, 702); *see* App. 55a. The court of appeals correctly interpreted this language to foreclose any "categorical exclusion of representative or statistical evidence" and to focus on whether "'each class member could have relied on'" a particular model to show impact "'if he or she had brought an individual action.'" App. 39a, 44a (quoting *Tyson Foods*, 577 U.S. at 455) (footnote omitted).

Petitioners have two unpersuasive criticisms of that reasoning. *First*, petitioners say *Tyson Foods* does

not apply here because "there is no substantive rule allowing a plaintiff to show antitrust impact through averaging assumptions in an individual case." Pet. 30. The reasoning of *Tyson Foods*, however, turns on whether the evidence is "reliable" and "relevant." 577 U.S. at 455. True, in *Tyson Foods* itself a statutory rule made certain evidence relevant. But the same reasoning applies where the evidence is reliable and relevant under the general principles that *Tyson Foods* itself cited: reliability under Rule 702 and relevancy under Rule 401. It long has been recognized that statistical analyses can meet those standards in antitrust cases. *See* App. 38a & n.23; *see also In re Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litig.*, 967 F.3d 264, 268-69, 271-72 (3d Cir. 2020); *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768, 789-90 (6th Cir. 2002) (finding use of expert statistical evidence sufficient to uphold jury verdict on antitrust-injury prong).

Second, petitioners assert that "the class members here are *not* similarly situated[because] there are innumerable individualized factors differentiating class members." Pet. 30. Even if this Court were to review that fact-bound assertion, it (like the court of appeals) still would owe deference to the district court's contrary determination that "Mangum gave persuasive reasons, grounded in economic theory, for why a pooled model is appropriate in this case." App. 132a. That determination was supported by the whole record, including Mangum's consistent findings of overcharges across different purchaser types and product types, *supra* p. 6; and Sunding's finding that the 10 largest retailers – the ones that petitioners say had the greatest bargaining power – experienced overcharges in all their purchases, *supra* p. 7. Petitioners offer no persuasive reason to believe that this Court,

after reviewing the record, would find any error in the Ninth Circuit's *en banc* decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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