No. 22-131

In the Supreme Court of the United States

STARKIST CO.;
DONGWON INDUSTRIES CO., LTD.,
Petitioners,

v.

OLEAN WHOLESALE GROCERY COOPERATIVE, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

After declaring below that "[t]his case presents questions of exceptional importance," C.A. Doc. No. 117, at 13, Plaintiffs now try to pass off this case as a mere "fact-bound" dispute about "[]settled" legal principles. BIO 1-2. Few cases reaching this Court so starkly refute such a claim. This case produced sharply conflicting decisions in the Ninth Circuit—splitting the members of the initial panel and en banc panel. Judges on both of those panels—on both sides of the debate—explicitly recognized the circuit conflict over the "*de minimis* rule." Pet. App. 69a-71a (Lee, J., joined by Kleinfeld, J., dissenting); *id.* at 107a-08a (Hurwitz, J. dissenting). And the dispute over this legal rule flipped the result in this case from the initial panel decision (which adopted the de minimis rule, *id.* at 99a-100a) to the en banc decision (which "reject[ed]" it, *id.* at 21a). The Ninth Circuit's decision in this case also creates a separate circuit conflict on the use of averaging assumptions to manufacture classwide injury. As the wide array of amici urging certiorari have stressed, this Court's review is now needed to resolve the conflict over these undeniably important and recurring questions.

ARGUMENT

A. The Circuit Conflicts Are Real

1. Plaintiffs concede (at 16) that the Ninth Circuit expressly "reject[ed]" any requirement that a class cannot be certified when it includes "more than a de minimis number of uninjured class members." Pet. App. 21a. That unequivocal ruling "creates a circuit split" on the first question presented, as Judge Lee explained below. *Id.* at 69a-71a (dissenting).

As Defendants explained (Pet. 16-19)—and as multiple judges recognized below, *see* Pet. App. 99a-100a (Bumatay, joined by Kleinfeld, JJ.); *id.* at 107a-08a (Hurwitz, J.); *id.* at 69a-71a (Lee, joined by Kleinfeld, JJ.)—the D.C. Circuit and the First Circuit have held that, even assuming not all class members must be injured, classes could not be certified where the number of uninjured putative class members exceeded "a *de minimis* number." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 625 (D.C. Cir. 2019) (Katsas, J.) (citation omitted); *see In re Asacol Antitrust Litig.*, 907 F.3d 42, 53-55 (1st Cir. 2018) (Kayatta, J.). Numerous district courts have also heeded that rule. *See* CCIA Br. 5 n.3. The en banc majority's emphatic "reject[ion]" of that rule, Pet. App. 21a, thus "creates a split with [those] circuits," *id.* at 70a (Lee, J., dissenting).

Seeking to mask this acknowledged conflict, Plaintiffs engage (at 17-21) in a laborious recitation of the particular facts of both cases, and repeatedly stress the "abuse of discretion" standard in class certification decisions. But the conflict concerns the different *legal* rules adopted by those courts. In *Rail Freight* and *Asacol*, the D.C. Circuit and the First Circuit—applying the de minimis rule—held that similar antitrust classes *could not* be certified because 10-12% of the classes (a more than de minimis amount) were uninjured. Pet. 17-19. The initial Ninth Circuit panel—after embracing *Rail Freight* and *Asacol* and adopting the same de minimis rule—held that the direct purchaser class here could not be certified because nearly one third of the class (28%) may be uninjured. Pet. App. 99a-100a. Yet, the en banc majority *rejected* the de minimis rule and affirmed class certification. *Id.* at 21a.

Plaintiffs note (at 18-19) the Ninth Circuit's statement that neither *Rail Freight* nor *Asacol* adopted "a per se rule." Pet. App. 22a n.13. But they *do* adopt the de minimis rule. That statement simply reflects that—like the initial panel majority below—neither of those courts adopted a precise limit on "what is *de minimis*." Pet. App. 100a. Rather, the de minimis rule is a proxy for when individualized injury determinations will predominate. Pet. 23. And just as it was clear in *Asacol* and *Rail Freight* that 10% and 12.7% of a putative class was more than de minimis—and thus created a fatal predominance defect—it is likewise clear that 28% is more than de minimis and would create the same predominance defect. Pet. App. 99a-100a; *see id.* at 129a ("A model unable to show impact to over 28% of the class members would unquestionably surpass the *de minimis* standard." (citing *Asacol*)).

Plaintiffs also deny the related conflict on the first question over whether a district court must determine the extent of uninjured class members "*before* certifying a class." BIO 17 (emphasis added). But here again, the conflict is clear. The district court expressly declined to resolve the experts' "serious" dispute about whether Plaintiffs' model failed to show injury for up to 28% of the class, reasoning that this was "'a merits decision'" for a class trial. Pet. App. 140a. The initial Ninth Circuit panel unanimously held that the failure to do so was error. *Id.* at 101a-02a; *see id.* at 102a-03a (Hurwitz, J.). But the en banc majority reached the opposite conclusion, affirming the district court's ruling that this was a "merits" issue for a jury. *Id.* at 18a, 46a-47a.

That decision directly conflicts with decisions of the D.C. Circuit, First Circuit, and Third Circuit,

which hold that resolving whether a plaintiff's model is capable of establishing classwide injury is "part-and-parcel of the 'hard look' required by [*Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), and *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013)]," and thus must be resolved *before* any class is certified. *Rail Freight*, 934 F.3d at 624-26; *see Asacol*, 907 F.3d at 53-57; *In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 191-92 (3d Cir. 2020); *see also Cordoba v. DIRECTV, LLC,* 942 F.3d 1259, 1277 (11th Cir. 2019) (adopting same rule).

The conflict with *Lamictal* is particularly stark. There, the Third Circuit reversed class certification precisely because the district court failed to resolve a battle of the experts over whether "up to one-third of the entire class" was uninjured. 957 F.3d at 192. Plaintiffs inexplicably claim that the district court here actually made "the required finding." BIO 23. But, as noted, the district court explicitly *declined* to resolve the experts' dispute over the extent of uninjured members in the class, Pet. App. 140a-41a, and the en banc majority affirmed that ruling, reasoning that this was a merits inquiry "for the jury" at trial, *id.* at 46a-47a. Again, the conflict is clear.[1]

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[1] Plaintiffs wrongly suggest (at 8, 16, 20) that this case is different in that Defendants did not put on their *own* proof of how many class members are uninjured. But it is Plaintiffs who bore the burden of establishing a method of classwide proof of antitrust impact. *See Wal-Mart*, 564 U.S. at 350; *Rail Freight*, 934 F.3d at 623; *Asacol*, 907 F.3d at 54. Defendants' expert showed that Plaintiffs' expert's model was incapable of showing injury for nearly a third of the class. Accordingly, this case is just like *Rail Freight*, 934 F.3d at 623, and *Asacol*, 907 F.3d at 54, where the key dispute was whether the *plaintiffs' models* established injury to all or nearly all class members.

2. The decision below likewise creates a circuit conflict on the second question presented regarding the limits imposed by *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016), on the use of representative evidence—including averages—to satisfy Rule 23's requirements. Pet. 20-22.

Plaintiffs acknowledge that, in *Lamictal* (in which the plaintiffs' expert relied on averages to claim classwide impact), the Third Circuit rejected "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.'" BIO 24 (emphasis omitted) (quoting *Lamictal*, 957 F.3d at 191). But that is the argument that the Ninth Circuit *accepted* below. In blessing the averaging assumptions here, the en banc majority stated no less than three times that representative evidence is sufficient for class certification simply because it would be "plausible" (or "not implausible") to a jury. Pet. App. 39a-43a. That is the very standard rejected by *Lamictal*.

The same goes for *Asacol*. The expert's opinion in *Asacol* was certainly a "plausible" piece of evidence that could persuade a jury that any given class member was injured, thus meeting the Ninth Circuit's test. But—applying *Tyson Foods*—the First Circuit refused to allow the evidence to establish classwide impact because it would not "be '*sufficient to* sustain a jury finding'" in an individual action by a class member. *Asacol*, 907 F.3d at 54 (emphasis added) (quoting *Tyson Foods*, 577 U.S. at 459). The Ninth Circuit reached the opposite conclusion—and allowed the representative evidence here—by

substituting *Tyson Foods*' and *Asacol*'s "sufficient to sustain" standard with its own "plausibility" test.[2]

Moreover, as the First Circuit explained, *Tyson Foods* held that "controlling substantive law"—namely, the FLSA-specific, *Mt. Clemens* rule—allowed a plaintiff to rely on the representative evidence at issue in *Tyson Foods* in an individual case to establish liability. *Asacol,* 907 F.3d at 54. Here, as in *Asacol,* Plaintiffs "point to no such" substantive law. *Id.* But the Ninth Circuit—unlike the First Circuit—nevertheless allowed Plaintiffs' representative evidence to sustain class certification.

That conflict independently warrants review.

B. The Decision Below Is Wrong

Plaintiffs' passing attempt (at 27-32) to defend the Ninth Circuit's decision fares no better.

1. Tellingly, Plaintiffs' lead argument (at 27-29) just attempts to shift the focus away from the Ninth Circuit's decision, arguing that the district court correctly certified the classes because Plaintiffs proffered evidence *other* than the models at issue, such as general evidence of an alleged "price-fixing" conspiracy. But the district court's analysis of classwide injury, affirmed by the Ninth Circuit, rested entirely on Plaintiffs' expert models, which is unsurprising given that Plaintiffs themselves "primarily rel[ied]" on those models "to meet their burden" on this element. Pet. App. 121a-40a.

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[2] Plaintiffs quote the Ninth Circuit's statement that class members could have "relied" on Plaintiffs' models to establish liability in an individual action. BIO 23 (quoting Pet. App. 44a). But the preceding discussion makes clear that the court used "relied" to mean "permitted to use as evidence"—not *sufficient* to sustain a jury finding in an individual case.

Plaintiffs never argued below that they could satisfy Rule 23 *without* their models, and no court below suggested that Plaintiffs' generalized statements about price-fixing conspiracies or the market for tuna products could show classwide injury.[3] Plaintiffs' attempt to shift the focus of their claim now is simply a transparent attempt to evade certiorari.

2. Plaintiffs' attempt (at 29-31) to whistle past *Wal-Mart* and *Comcast* also fails. Once again, Plaintiffs cling to irrelevant factual distinctions, ignoring the legal holdings of these landmark precedents. That is especially true for *Wal-Mart*. The Ninth Circuit's conclusion—that the experts' dispute over the extent of uninjured class members is a merits issue for trial—repeats the central error identified in *Wal-Mart*. Pet. 25-26. The parallels between the Ninth Circuit's en banc decision below and its en banc decision in *Wal-Mart* are striking. *Id.*; WLF Br. 9. Plaintiffs belittle *Wal-Mart* as a "pattern-or-practice" case, with no application beyond its facts. BIO 30. But *Comcast* itself confirms that *Wal-Mart* is not confined to its particular facts. Adopting that

[3] Nor is there any Rule 23 exception for price-fixing cases. Indeed, *Rail Freight* itself involved an alleged "price-fixing conspiracy." 934 F.3d at 620. And, even when price-fixing is alleged, it does not follow that *all* purchasers paid a higher price. Here, for example, most direct purchasers individually negotiated prices, nearly 20% of the packaged tuna sold comprised private label products that were not even subject to the price lists at issue, and numerous class members—including mega buyers like Costco—paid *less* than what Plaintiffs claim they would have paid absent the alleged price-fixing. Pet. 4-6.

reading—and allowing the decision below to stand—would drive a stake through *Wal-Mart*.[4]

3. Plaintiffs' attempt (at 31-32) to square the decision below with *Tyson Foods* also rings hollow. In their telling, *Tyson Foods* merely requires that representative evidence be "reliable" and "relevant" under the Federal Rules of Evidence. But, as discussed, *Tyson Foods* holds that averaging assumptions are permissible only if they "could have been used to establish liability"—and thus would be "sufficient to *sustain* a jury finding"—"in an individual action." 577 U.S. at 458-59 (emphasis added); *see Asacol*, 907 F.3d at 54. Indeed, *Tyson Foods* carefully explains that the statistical analysis in *Wal-Mart* did *not* satisfy Rule 23 and the Rules Enabling Act, 577 U.S. at 457-59, even though it may have been "reliable" and "relevant" in an evidentiary sense. Moreover, if all that was required was to satisfy the Federal Rules of Evidence's liberal reliability and relevance rules, then there would have been no need for the Court to devote its attention to explaining why the *Mt. Clemens* rule allowed the use of representative evidence to establish liability. *Id.*

The Ninth Circuit's decision upends *Tyson Foods*' careful limits on the use of representative evidence to secure class certification and, if allowed to stand, will

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[4] Plaintiffs argue (at 29) that deferring the experts' dispute over the extent of uninjured class members to the jury is appropriate because "if a jury were to accept" "petitioners' arguments," that would dispose of the injury question "'in one stroke.'" But the opposite is true. A jury finding that a third of the class is uninjured would require countless individualized determinations to identify *which* of the class members are actually injured, making any class proceeding unmanageable. *See Asacol*, 907 F.3d at 53-54; *Rail Freight*, 934 F.3d at 624.

enable plaintiffs to paper over plainly individualized inquiries with (often dubious) averaging assumptions. *See* WLF Br. 3-4; CCIA Br. 12-13.

C. The Court's Intervention Is Warranted

The "exceptional importance" of the questions presented is undisputed. Pet. 32. And the briefs filed by the broad cross-section of amici explain why this Court's review is so critical. *See* Chamber Br. 6, 14-19; CCIA Br. 14-17; WLF Br. 11-15.

Plaintiffs urge the Court to wait for a court to "expressly" disagree with the Ninth Circuit's decision. BIO 25. But the Ninth Circuit's decision *already* creates a conflict; there is no reason to wait for that conflict to deepen (or to believe that the circuits going the other way will backtrack on their own precedent). Moreover, this is just a delay tactic. Appellate review of class certification decisions is rare given that interlocutory appeals are discretionary and defendants are typically forced to settle when classes are certified. *See* Pet. 32-33; *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1709-10 (2017). Denying review here would simply allow the deeply flawed decision below to take root and precipitate a flood of class actions in the Ninth Circuit. Pet. 33-34; CCIA Br. 17.

Plaintiffs suggest (at 25-26) that the problems raised by the published en banc decision in this case are somehow quelled by the unpublished memorandum disposition in *Harvey v. Morgan Stanley Smith Barney LLC*, No. 19-16955, 2022 WL 3359174 (9th Cir. Aug. 15, 2022). But that non-precedential decision concerned whether an approved settlement in a class action should be vacated. *Id.* at *3. That issue is distinct from the questions

presented here, as evidenced by the fact that *Harvey* does not even mention the decision below.

Nor is there anything to Plaintiffs' suggestion (at 26-27) that the decision below is somehow limited to the packaged tuna market. The "implications" of the Ninth Circuit's broadly written en banc decision "extend beyond [the tuna market] to a wide sea of class actions." Pet. App. 71a (Lee, J., dissenting). Any doubt about that is dispelled by the number of lower-court opinions that have already cited the panel and en banc rulings in this case—more than 80 to date.

Plaintiffs' vehicle arguments are equally unpersuasive. BIO 26-27. Indeed, this case is an exceptionally strong vehicle given that the questions presented were fully ventilated by the multiple decisions below. Remarkably, Plaintiffs try to simply assume away the questions presented by claiming (at 26) that review is unnecessary because "every class member suffered [an] injury." But whether the classes can be certified despite the presence of uninjured class members is the central issue in this case. And, as explained, the district court "failed to resolve" (Pet. App. 100a-01a) that issue, even though Plaintiffs' expert's *own* model failed to show injury for 5.5% of the direct purchaser class, and Defendants' expert showed that there was no proof of injury for nearly *one-third* of that class. Pet. 10-12. All this explains why the multiple decisions below focused on whether the presence of uninjured class members precludes certification. That issue is squarely presented here.

Plaintiffs' repeated references (at 1-5, 27) to the separate criminal pleas are also a red herring. A prior criminal judgment does not vitiate Plaintiffs' obligation to satisfy Rule 23 in this civil class action,

much less establish that the grossly inflated classes at issue are proper. Indeed, the criminal convictions did not require a showing that *anyone* suffered antitrust impact; impact is only a required element of Plaintiffs' civil claim for damages. Pet. 8. And here, the impact of the alleged conspiracy on any specific purchaser was far from obvious, given the numerous individualized factors affecting the prices actually paid. *Id.* at 3-7. As a result, the ability to show injury to all or nearly all of the *millions* of direct and indirect purchasers swept up in the enormous classes at issue—ranging from mega stores like Amazon to local grocery stores to individual consumers—has always been the central issue on class certification.

As Judge Lee observed, and as the amici underscore, the Ninth Circuit's en banc decision in this case upholding the certification of the enormous classes at issue not only "creates a circuit split," but "will unleash a tidal wave of monstrously oversized classes designed to pressure and extract settlements." Pet. App. 69a, 71a. Certiorari is warranted.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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October 25, 2022