No. 18-1065

In the United States Court of Appeals for the First Circuit

IN RE ASACOL ANTITRUST LITIGATION

UNITED FOOD & COMMERCIAL WORKERS UNIONS AND EMPLOYERS MIDWEST HEALTH BENEFITS FUND, ET AL.,
Plaintiffs,

TEAMSTERS UNION 25 HEALTH SERVICES & INSURANCE PLAN, ET AL.,
Plaintiffs-Appellees,

v.

WARNER CHILCOTT LIMITED, ET AL.,
Defendants-Appellants,

ZYDUS PHARMACEUTICALS USA, INC., ET AL.,
Defendants.

On Appeal from the United States District Court
for the District of Massachusetts (No. 1:15-cv-12730)

APPELLEES' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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INTRODUCTION AND RULE 35(B)(1) STATEMENT

This petition presents an issue that "strikes at the heart of the competing considerations" in class actions: "the proper treatment of uninjured class members at the class certification stage." Op. 19. As Judge Barron noted in his concurrence, the circuits have "struggled to develop a uniform mode of analyzing" this "vexing" issue, and this Court's "own precedent reflects a similar struggle." Op. 38–39.

Far from resolving this Court's struggle, however, the panel opinion in this case exacerbates it. Transforming a prior dissent into circuit precedent, the panel reversed class certification even though this case poses none of the problems that can sometimes exist when a class includes uninjured members. The key questions in the case—involving allegations that a brand-name-drug manufacturer violated antitrust law by preventing generic versions of the drug from coming to market—are all common: Was this conduct anticompetitive? Would a generic have come to market without it? And, if so, what would the prices have been? Aggregate damages would also be determined with common proof: expert testimony showing how many people would have switched to a generic (almost always north of 90% because state laws make the switch for them at the pharmacy). Further, the defendants would be able to contest this evidence before a jury. They wouldn't pay one cent more than their total liability. And class members would receive money only if they submitted a claim and could show that they're likely among the 90% who were injured.

Despite all this, the panel held that certification was prohibited. In doing so, it effectively adopted the dissent from *In re Nexium Antitrust Litigation*, 777 F.3d 9, 23 (1st Cir. 2015)—a virtually identical case that affirmed certification because classwide proceedings deliver "obvious utility" in this scenario, and carry no risk of "harm." And, worse, the panel did so without any serious briefing on the questions it found decisive. Indeed, the issue that drove the panel's holding (the defendants' Seventh Amendment rights) was a total afterthought for the parties—an argument perfunctorily tacked onto the last two pages of the defendants' brief.

There is a history here. In *Nexium*, the dissent had protested that, because there was no way to "reconcile the majority's holding with the approach taken by our circuit" in *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 522 F.3d 9 (1st Cir. 2008), the effect was that "the dissent in *New Motors Vehicles* has become the law without en banc review." *Nexium*, 777 F.3d at 35 (Kayatta, J., dissenting). Two years later, the same judge again criticized the *Nexium* majority—again in dissent. *Carter v. Dial Corp.*, 869 F.3d 13 (1st Cir. 2017). Now, if the panel's decision is left in place, these two dissents threaten to become the law of this circuit. At the very least, the see-saw nature of this Court's cases will create substantial confusion going forward, leaving lower-court judges and litigants alike either scratching their heads or throwing up their arms.

Had the issues been fully briefed, the panel might have realized that its holding also contravenes precedential opinions by Judge Howard and Judge Lynch. *See In re Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d 60, 68–69 (1st Cir. 2013) (Lynch, J.) (allowing plaintiffs to use "aggregate statistical evidence" to prove that a drug company caused injury); *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 197 (1st Cir. 2009) (Howard, J.) (rejecting the defendant's argument that "aggregate proof" of antitrust damages "violates [its] due process or jury trial rights to contest each member's claim individually").

The same is true of Supreme Court precedent. Whereas that Court has held that the potential for "individualized rebuttal" by defendants on one issue "does not cause individual questions to predominate," *Halliburton Co. v Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014), the panel held that the possibility of individualized rebuttal here was "fatal" to predominance, Op. 24. And whereas the Supreme Court has held that plaintiffs may use representative proof "to fill an evidentiary gap created by [a defendant's] failure" to follow the law—and that it is "premature" even at the *trial phase* to ask whether the plaintiffs have "demonstrated any mechanism for ensuring that uninjured class members do not recover damages," *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1047–50 (2016)—the panel held the opposite. It allowed the defendants, at the *certification stage*, to reap the benefits of their own antitrust violations

by faulting *the plaintiffs* for the "fatal gap in the evidence" that those violations created (foreclosing generic entry). Op. 24.

And the conflicts run deeper still. The panel opinion also adopts an unjustifiably skeptical view of the use of affidavits in class actions—a view that has been widely criticized across the circuits and by the scholarly community. Two weeks ago, for example, the Seventh Circuit adhered to its position (also reflected in *Nexium*) that affidavits are permissible in class actions notwithstanding "the defendant's right to challenge them with evidence." *Beaton v. SpeedyPC Software*, — F.3d —, 2018 WL 5623931, at *9 (7th Cir. Oct. 31, 2018). This circuit alone now disagrees.

If not corrected, this Court's dramatic turn will be felt not just in antitrust cases, but in a wide range of class actions—including consumer, wage-and-hour, and civil-rights cases. *See, e.g.*, *Carter*, 869 F.3d at 15 (Kayatta, J., dissenting) (applying same approach to consumer class action). Which is why the defense bar has responded with cheers. *See* Bronstad, *Defense Bar Gives 1st Circuit an 'A+' for Its Order on Uninjured Class Members*, National Law Journal, Oct. 23, 2018, https://perma.cc/NFK8-T3QG (attached). En banc review would allow the full Court to carefully consider the issues before such a consequential, outlier opinion becomes the law of this circuit. It would also allow the Court to speak with one voice, and put an end to the tug of war between panels that has characterized this Court's precedent in this area. At a minimum, the panel should permit additional briefing on the issue.

REASONS FOR GRANTING THE PETITION

I. The panel opinion cannot be reconciled with recent precedents of this Court and the Supreme Court.

A. The panel opinion is at odds with this Court's precedents.

The panel opinion contradicts circuit precedent in two distinct ways. *First*, it effectively nullifies *Nexium*. *Second*, it runs afoul of a separate line of cases by refusing to allow the plaintiffs to use aggregate proof to establish classwide damages and to use the claims process to see that uninjured class members are not compensated.

1. The parallels between this case and *Nexium* are striking. As here, the plaintiffs in *Nexium* sued a brand-name-drug maker, claiming that it conspired to prevent generic entry. As here, nearly every key question was common, including whether the conduct was anticompetitive and whether it affected drug prices. And as here, the defendants in *Nexium* identified only one individualized issue, opposing certification because the class may have included people "who would have continued to purchase [the] branded [drug] for the same price after generic entry." *Nexium*, 777 F.3d at 17. The question on appeal was whether this issue precluded certification.

This Court answered no. It began its analysis by considering how injury would be established in an individual case. The Court noted that, because of the defendants' unlawful conduct—preventing generic drugs from entering the market—there could be "no records concerning generic purchases." *Id.* at 20. So proving injury would require proving a counterfactual. The Court explained that there would be "at least

two ways" to establish injury in that scenario. *Id.* First, so as not to reward the defendants for their own unlawfulness, the consumer could be entitled to a presumption that she, like most consumers, would have purchased a cheaper drug if one were available—a conclusion that is particularly likely because state laws automatically make the switch for consumers who do not specifically request higher-priced brand-name drugs. Second, the consumer could testify to that effect. In either case, injury would be established unless the defendants could offer evidence showing that the consumer would've actually preferred to pay more for the brand name. *Id.*

Applying the same approach in the class context, this Court found it "difficult to understand why the presence of uninjured class members at the preliminary stage should defeat class certification"—particularly given that small-dollar claimants are "the very group that Rule 23(b)(3) was intended to protect." *Id.* at 21, 23. Injury was the only potential individual issue, and "Rule 23(b)(3) 'does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof.'" *Id.* at 21 (quoting *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 469 (2013)). Resolving that issue, moreover, would be manageable. Even assuming that a rebuttable presumption of injury did not exist as a legal matter (a question the Court did not reach), class members could still submit sworn affidavits that, as a practical matter, would achieve the same result: establishing injury absent

a credible rebuttal by the defendants. *Id.* Proving injury was therefore "compliant with the requirements of the Seventh Amendment and due process." *Id.*

In reaching that conclusion, the Court acknowledged the possibility that, should the class eventually establish the other common elements, the defendants would seek to rebut individual injury claims with individual evidence. But "speculat[ion]" of that sort "is not enough to overcome plaintiffs' case for having met the requirements of Rule 23," especially in light of "the obvious utility of allowing the inclusion of some uninjured class members in the certified class and the lack of harm in doing so." *Id.* at 21, 23.

The dissenting judge disagreed. Pointing to what he saw as the "persuasive force" of *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013)—a decision involving a related issue that has subsequently been rejected by five circuits and called into question by multiple Third Circuit judges[1]—he indicated that he thought "using affidavits in the manner proposed by the majority" was improper because defendants could not "challenge individual damage claims at trial." *Nexium*, 777 F.3d at 33–35 (Kayatta, J., dissenting). Invoking *New Motor Vehicles*, he added that "any attempt to reconcile the majority's holding with the approach taken by our circuit in *New Motor*

[1] *See, e.g.*, *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015) ("We see no reason to follow *Carrera*, particularly given the strong criticism it has attracted from other courts."); *In re Petrobras Sec.*, 862 F.3d 250, 265 (2d Cir. 2017) (joining a "growing consensus" in rejecting *Carrera*).

Vehicles will result in hopeless confusion unless one concludes that the dissent in *New Motor Vehicles* has become the law without en banc review." *Id.* at 35.

One could now say the same thing about the panel's opinion in this case and the dissent in *Nexium*. The panel distinguished *Nexium* based on the fact that the defendants here have "stated their intention to challenge any affidavits that might be gathered." Op. 23. For that reason, the panel believed, it could not "presume that these plaintiffs can rely on unrebutted testimony in affidavits to prove injury-in-fact." Op. 24. It found this to be "fatal" to certification. *Id.*

But if that's so, it is hard to see what is left of *Nexium*. All defendants may need to do to defeat certification going forward (and thus dodge liability in most cases) is state their intention to challenge any affidavits that might later be used. Never mind if the defendants would not actually do so—as *Nexium* itself shows, where the defendants prevailed as to the entire class, confirming the appropriateness of certification. And never mind if the total liability would be unaffected. Defendants need only say the magic words and *Nexium* gives way.

At the very least, the panel opinion will sow substantial confusion. To see why, put yourself in the shoes of a district judge facing a generic-exclusion case. The evidence shows that some slim set of the class (call it 5%) was likely uninjured. And the defendants' conduct is egregious—blatant pay-for-delay. Further, the plaintiffs propose to reduce the aggregate award by 5% to ensure that the defendants pay no

more than the harm they caused (as the plaintiffs here have done). In response, the defendants say that you must look past all that—and past all the common questions—because they express an intention to depose class members, at some later date, to examine whether they are *really* one of the 95%, as they will have sworn to, and not the 5%. What do you do?

Before the panel decision in this case, the answer seemed clear: certify. Under that approach, any manageability concerns could be addressed later, if they actually arose. You'd have an array of case-management tools available to you in that scenario, and you could always bifurcate the case into liability and damages stages, modify the class definition, certify an issue class under Rule 23(c)(4), or decertify altogether. The panel opinion here now seems to call for a different result.

2. The panel opinion also creates intra-circuit discord in another respect. The plaintiffs' primary path to establish classwide injury—expert testimony calculating aggregate damages based on how many people would've switched to a generic—has nothing to do with affidavits. The defendants will be able to contest that evidence at trial and won't pay more than their total liability, preserving their constitutional rights. And a claims process suffices to limit "the payout of the amount for which the defendants were held liable . . . to injured parties." *Nexium*, 777 F.3d at 19.

This Court's cases permit that approach. In *Pharmaceutical Industry Average Wholesale Price Litigation*, for example, the Court rejected the argument (accepted by

the panel here) that "aggregate proof" of damages "violates the defendant's due process or jury trial rights to contest each member's claim individually." 582 F.3d at 197. Even in other contexts, this Court has permitted plaintiffs to prove their case using aggregate evidence under ordinary tort principles. *See, e.g.*, *Neurontin*, 712 F.3d at 68–69 (allowing class in RICO fraud case to prove that drug company's conduct caused injury using "aggregate statistical evidence," without individual testimony).

This case is no different. Antitrust plaintiffs have long been permitted to rely on "probable and inferential" proof to establish their claims. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). And for good reason: "The vagaries of the marketplace," the Supreme Court has explained, "usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation." *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 567 (1981). The panel opinion cannot be squared with this line of cases.

B. The panel opinion conflicts with Supreme Court precedent.

The panel's casting aside of circuit precedent is reason enough to grant rehearing. But the panel's errors run much deeper. Its reasoning conflicts with at least two recent Supreme Court cases.

The first is *Halliburton*, 134 S. Ct. 2398. That case involved a class action asserting securities-fraud claims, which require plaintiffs to prove reliance on a defendant's misrepresentations. The Supreme Court previously held that plaintiffs

"could satisfy this reliance requirement by invoking a presumption that the price of stock traded in an efficient market reflects" all public, material misstatements. *Id.* at 2405. At the same time, defendants may rebut this presumption on an individual basis. *Id.* at 2408. In *Halliburton*, the Court acknowledged that "this has the effect of leaving individualized questions of reliance in the case." *Id.* at 2412. But no matter: The possibility of "individualized rebuttal does not cause individual questions to predominate." *Id.*

The panel attempted to distinguish *Halliburton* in a single sentence, holding that Rule 23 requires the exact opposite outcome in this case because "here we have no such presumption." Op. 25. That reasoning is doubly flawed. For one thing, it doesn't matter whether there's a rebuttable presumption of injury here. What matters is what *Nexium* held: that individual class members, if necessary, may submit affidavits at a later phase of the case, establishing rebuttable proof of injury. True, a defendant can always say that it plans to exercise its right to rebut each claim when the time comes, as the defendants here have said. But that's equally true for securities-fraud cases. And if all it takes for defendants to defeat certification is to state an intention to rebut claims and assert a right to a jury trial for each one, then the panel opinion doesn't just nullify *Nexium*, but *Halliburton* too.

For another thing, the panel's holding that no presumption exists contradicts basic principles of antitrust law, common sense, and the record in this case. The

district court found that had the defendants complied with the law and allowed a generic to come to market, some 90% of the class would've bought the generic and saved money. Meaning, there's a 90% chance that any given class member suffered injury, which easily satisfies the preponderance-of-the-evidence standard. Moreover, the only reason the plaintiffs are forced to rely on statistical evidence in the first place (rather than records of specific generic purchases) is that the defendants broke the law. Allowing a presumption of injury in such circumstances, at least when supported by aggregate proof, makes sense. Otherwise, the sheer effectiveness of anticompetitive conduct—exclusion of all competitors from the market—would be the very thing that would shield that conduct from liability.

Yet that is the upshot of the panel's opinion. Instead of making the defendant "suffer the uncertain consequences of its own undesirable conduct," *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc), its "rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim," *Bigelow*, 327 U.S. at 264. That is backwards. "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created"—not benefit from it. *Id.* at 265.

This leads to the second case contravened by the panel opinion: the Supreme Court's decision in *Tyson Foods*, 136 S. Ct. 1036. *Tyson Foods* also involved a situation in which the defendant's violation of the law made it impossible for the plaintiffs to

rely on individual records (a wage-and-hour class action in which the defendant had failed to keep employee time records). For that reason, the plaintiffs could rely on representative testimony to establish how long it took each employee to complete tasks that had been uncompensated. The Supreme Court held that this approach was permissible even though the case was a class action, the actual amount of uncompensated time varied from person to person, and the representative proof itself indicated that some members didn't qualify for overtime and were thus uninjured.

The Court reasoned that certification was appropriate because representative evidence is permissible in individual actions, so it must also be permissible in class actions. *Id.* at 1047. "Since there were no alternative means for the employees to establish" injury, the plaintiffs could "introduce a representative sample to fill an evidentiary gap created by the employer's failure" to follow federal law. *Id.* That the sample's applicability could be rebutted by the defendant on an individual basis did not preclude certification. *Id.* Rule 23(b)(3), the Court explained, permits certification even when "important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Id.* at 1045.

The Supreme Court also declined to adopt the defendant's argument that the plaintiffs "ha[d] not demonstrated any mechanism for ensuring that uninjured class members do not recover damages here." *Id.* at 1049. The Court held that the question was "premature." *Id.* at 1050. Even though there was already a jury verdict, the issue

was not "yet fairly presented by this case, because the damages award has not yet been disbursed, nor does the record indicate how it will be disbursed." *Id.*

The panel opinion runs afoul of *Tyson Foods* for two different reasons. *First*, it fails to recognize that representative evidence would be (or at least should be) permissible in an individual action of this kind, and so should suffice in a class action. The panel tried to distinguish *Tyson Foods* (at 27) based on the fact that the representative proof in *Tyson Foods* "likely equal[ed] the actual total time spent by all." But the same is true here: the representative proof would establish the actual total injury suffered by all members. Thus, in both cases, the representative proof would yield an aggregate award that does not exceed the defendants' total liability. In both, the class would include uninjured members. And in both, the representative evidence (necessary only because of the defendants' wrongdoing) could be used to establish injury in an individual case under the preponderance standard.[2]

Second, the panel's administrability concern is premature and is based on the hypothetical possibility of what might happen in the future. If even a post-verdict objection is premature, then *a fortiori* a certification-stage objection is premature as

[2] Although the panel determined that it would be "demonstrably wrong" to conclude that 100% of the class is injured, a 90% likelihood of harm satisfies the preponderance standard. So unless there's an easy way to determine which plaintiffs are less likely to have been harmed—and the entire premise of the panel opinion is that there isn't—the panel is wrong on this key point as well. If all class members brought actions of their own, they *all* might be able to prove injury.

well. *See also Mullins v. Direct Digital, LLC*, 795 F.3d 654, 667–68 (7th Cir. 2015) (holding in this context that "a district judge has discretion to [certify the class and] say let's wait until we know more and see how big a problem this turns out to be").

II. The panel opinion deals a serious blow to class actions.

The panel's errors are far from trivial. Commentators immediately recognized that this is an "extremely significant" opinion with consequences for class actions of many different stripes. Bronstad, *Defense Bar Gives 1st Circuit an 'A+'*. Members of the defense bar jumped to "praise[] the decision" and announce that "they plan to use [it] in future cases to defeat class certification." *Id.* If so, the panel opinion could be used to evade liability in a wide range of different contexts—not just antitrust class actions, but wage-and-hour, civil-rights, and consumer class actions, to name just a few—where classes inevitably include some people who might not have been injured. *See Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009) (noting that it's "almost inevitable" that a class will include uninjured members, and affirming certification).

To illustrate the point, last year Judge Kayatta dissented from the denial of interlocutory review in "a consumer class action." *Carter*, 869 F.3d at 15. Citing the dissent in *Nexium*, he expressed his belief that the same understanding of the law precludes certification in both cases. *Id.* That this view has now been converted into the law of this circuit—on such an important question, without en banc review or serious briefing—only underscores the need for rehearing.

CONCLUSION

The petition for rehearing and rehearing en banc should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 3,897 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14 point Baskerville font.

/s/ Matthew W.H. Wessler
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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2018, I electronically filed the foregoing rehearing petition with the Clerk of the Court for the U.S. Court of Appeals for the First Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system:

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