Nos. 14-1521, 14-1522

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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IN RE NEXIUM ANTITRUST LITIGATION

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ASTRAZENECA AB, ET AL,

Appellants,

v.

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

Appellees.

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On Appeal from the United States
District Court for the District of Massachusetts
(MDL No. 12-2409) (Hon. William G. Young)

BRIEF OF *AMICI CURIAE* COMMUNITY CATALYST, INC., THE NATIONAL LEGISLATIVE ASSOCIATION FOR PRESCRIPTION DRUG PRICES ("NLARx"), THE UNITED STATES PUBLIC INTEREST RESEARCH GROUP ("U.S. PIRG") AND THE AMERICAN INDEPENDENT BUSINESS ALLIANCE ("AMIBA") IN SUPPORT OF APPELLEES

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June 26, 2014

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), *Amicus Curiae*, Community Catalyst, Inc., hereby states that it has no parent corporation or publicly held corporation that owns 10% or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 26.1(a), *Amicus Curiae*, The National Legislative Association for Prescription Drug Prices ("NLARx") hereby states that it has no parent corporation or publicly held corporation that owns 10% or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 26.1(a), *Amicus Curiae*, the United States Public Interest Research Group ("U.S. PIRG"), hereby states that it has no parent corporation or publicly held corporation that owns 10% or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 26.1(a), *Amicus Curiae*, the American Independent Business Alliance ("AMIBA"), hereby states that it has no parent corporation or publicly held corporation that owns 10% or more of its stock.

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae, Community Catalyst, Inc., the National Legislative Association for Prescription Drug Prices ("NLARx") and the United States Public Interest Research Group ("U.S. PIRG") and the American Independent Business Alliance ("AMIBA") respectfully submit this brief, as friends of the Court, in support of Plaintiffs-Appellees. This case addresses vitally important legal issues that may impact the delivery of low cost generic drugs to families and consumers in the United States.

The underlying lawsuit challenged "reverse-payment settlements" between the maker of the brand-name drug Nexium and generic drug companies that sought to enter the market with competing lower-priced versions of the drug. *See FTC* v. *Actavis, Inc.*, 133 S. Ct. 2223, 2227 (2013). According to Plaintiffs, the settlements delayed the entry of generic versions of Nexium into the market, causing Plaintiffs to pay supra-competitive prices for the brand-name version of the drug. The conduct challenged in the complaint can impose a substantial cost on society and consumers in terms of higher prices, less competition, and less innovation. This is a serious concern in the pharmaceutical industry, where there is the opportunity for

[1]No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no person except *amici*, their members, or their counsel contributed money intended to fund the preparation or submission of this brief. All parties consent to the filing of this brief.

tremendous consumer savings as over $40 billion in pharmaceuticals are scheduled to go off patent in the next few years.

It is vitally important that consumers and private plaintiffs retain the ability to bring suits to compensate them for injuries suffered from unlawful conduct and to ensure that the violators do not profit from their wrongdoing. Thus, Plaintiffs should not be required to disprove the hypothetical possibility that some small number of class members might have avoided injury as a prerequisite to obtaining class certification. This requirement would frustrate the purpose of Rule 23, and undermine the class action device by rendering it effectively unavailable in a wide array of cases in which it may be the only practical avenue for the vindication of rights.

1. Community Catalyst, Inc.

Community Catalyst, Inc. is a national non-profit organization committed to building consumer and community voice in health care. It has worked to promote expanded access to needed medicines while also challenging deceptive, fraudulent, or illegal promotional drug industry practices that inflate drug costs. Its predecessor, the Prescription Access Litigation (PAL) project built a nationwide coalition of over 130 organizations in 36 states and the District of Columbia, with a combined membership of over 13 million people, comprised of consumers, seniors, health care advocacy organizations, labor unions, health plans, and union benefit

funds. The PAL project facilitated its coalition members' active participation in over 30 class action lawsuits, including litigation concerning the deceptive advertising of Nexium, and pay-for-delay agreements concerning Cipro and Provigil.

2. NLARx

NLARx is a national nonprofit, nonpartisan organization of state legislators who support policies to reduce prescription drug prices and expand access to affordable medicines. Since 2000, it has promoted policies to expand access to generic drugs and increase competition in the marketplace.

3. U.S. PIRG

U.S. PIRG is a federation of State Public Interest Research Groups ("PIRGs"), organizations that stand up to powerful special interests on behalf of the American public, working to win concrete results for Americans' health and well-being. With a network of researchers, advocates, organizers and students in states across the country, U.S. PIRG advocates the public interest on issues such as product safety, public health, political corruption, tax and budget reform, and consumer protection.

4. AMIBA

AMIBA is a non-profit organization dedicated to helping independent businesses thrive and supporting community efforts to build vital local economies

based on locally-owned enterprise. In addition to providing direct assistance to local Independent Business Alliances nationwide, AMIBA seeks to ensure the legal rights of independent businesses are protected and that small businesses can compete on a level playing field.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over the past decade, health care consumers have paid ever-increasing prices for prescription medications. The total annual spending on prescription medications in the United States was $234.1 billion in 2008, more than double the spending in 1999. Qiuping Gu et al., *Prescription Drug Use Continues to Increase: U.S. Prescription Drug Data for 2007-2008*, 1 (Sept. 2010), *available at* http://www.cdc.gov/nchs/data/databriefs/db42.pdf. Consumer spending for pharmaceuticals in the United States continues to climb, reaching $329.2 billion in 2013. Press Release, IMS Institute for Healthcare Informatics, *IMS Health Study: Spending Growth Returns for U.S. Medicines in 2012* (Apr. 15, 2014), *available at* http://www.imshealth.com/portal/site/imshealth/menuitem.c76283e8bf81e98f53c753c71ad8c22a/?vgnextoid=d58b8b5776165410VgnVCM10000076192ca2RCRD.

With total prescription medication spending still at near-record highs, the use of generic substitutes is a critical factor in controlling cost. *See* Katie Thomas, *U.S. Drug Costs Dropped in 2012, but Rises Loom*, N.Y. TIMES, Mar. 18, 2013, at A1. Generic alternatives typically cost 80-85% less than brand-name medications. *See* Food and Drug Administration, *Facts About Generic Drugs*, 2, *available at* http://www.fda.gov/downloads/Drugs/ResourcesForYou/Consumers/BuyingUsingMedicineSafely/UnderstandingGenericDrugs/UCM305908.pdf

(hereinafter "FTC, *Facts About Generic Drugs*"). In fact, from 2003 through 2012, use of generic versions of name-brand drugs saved Americans $1.2 trillion: $217 billion in savings were achieved in 2012 alone. Generic Pharmaceutical Association, *Generic Drug Savings in the U.S.*, 1 (5th ed. 2013), *available at* http://www.gphaonline.org/media/cms/2013_Savings_Study_12.19.2013_FINAL.pdf.

When pharmaceutical companies restrain the competition provided by the entry of generics into the marketplace, consumers ultimately bear the costs. In their landmark 2011 study of authorized generics, the FTC discovered that generic markets without an authorized generic have retail prices that are 4 to 8 percent lower than their name-brand counterparts. In markets with competition from an authorized generic, wholesale generic prices are 7 to 14 percent lower than name-brand drugs. Federal Trade Commission, *Authorized Generic Drugs: Short-Term Effects and Long-Term Impact*, 33 at ii (2011), *available at* http://www.ftc.gov/sites/default/files/documents/reports/authorized-generic-drugs-short-term-effects-and-long-term-impact-report-federal-trade-commission/authorized-generic-drugs-short-term-effects-and-long-term-impact-report-federal-trade-commission.pdf. Competition between generic manufacturers and name-brand manufacturers helps bring prices down, which benefits consumers.

For these reasons, consumers have a vested interest in preventing anticompetitive and anti-consumer agreements that prevent generic entry. In many instances, the only practical and effective avenue for consumers to do so is though class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. It is critically important, therefore, that class actions remains a viable procedural tool for the protection of consumers and the enforcement of competition policy in the pharmaceutical industry.

Appellants' principal argument – that plaintiffs must show harm to every member of the class as a prerequisite to obtaining class certification – would eviscerate class actions, and seriously undermine private enforcement and the compensatory and deterrent functions it serves. Appellants' argument cannot be squared with the text and structure of Rule 23, or with decades of settled class action practice. Indeed, several courts of appeals have addressed this argument squarely in recent years, holding that a certified "class will often include persons who have not been injured by the defendant's conduct . . . . Such a possibility or indeed inevitability does not preclude class certification." *Kohen v. PIMCO, LLC*, 571 F.3d 672, 676 (7th Cir. 2009). Nor can defendants' argument be squared with the Supreme Court's recent decision in *Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317, 2014 WL 2807180 at *12 (U.S. June 23, 2014), which

recognized the possibility that uninjured persons would be included in the class, and confirmed that their presence would not destroy predominance under Rule 23.

The text of Rule 23 does not support Appellants' argument either. No language in the rule requires a demonstration of injury to every member of the class as a prerequisite to certification. Instead, the class certification inquiry focuses on whether the pivotal issues in the case can be resolved most fairly and efficiently on a class-wide basis, not on the merits of injury or any other substantive element of the claim. *See Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013) ("[T]he office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the method best suited to adjudication of the controversy fairly and efficiently."). In short, class certification is a procedural tool that asks the question "who may sue together?" It is not a substantive rule designed to determine who will win in that suit.

The fundamental purpose of Rule 23(b)(3) is to provide an avenue to vindicate "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all . . . ." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (internal citations and quotation marks omitted). Appellants' interpretation of Rule 23(b)(3)'s predominance requirement would defeat this purpose, foreclosing any effective class action remedy for

plaintiffs in a wide array of important matters. In this case, for example, the rule that Appellants urge here would permit them to avoid liability entirely merely by protecting a small segment of the class from injury. Rule 23 compels no such result.

This Court's precedents do not support Defendants' arguments. *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6 (1st Cir. 2008) did not squarely address the issue presented here, and this Court's later decision in *In re Pharmaceutical Industry Average Wholesale Price Litig.*, 582 F.3d 156, 197-98 (1st Cir. 2009) rejected the argument that plaintiffs were "required to prove that each class member was harmed" to satisfy predominance.

Finally, Defendants do not support their argument that certifying a class with potentially uninjured plaintiffs would abridge their substantive rights and run afoul of the Rules Enabling Act. As noted in *Halliburton*, nothing prevents defendants from "pick[ing] off the occasional class member here and there through individualized rebuttal" when the case proceeds to trial on the merits. 2014 WL 2807180, at *12. Moreover, Defendants do not explain how their aggregate liability to the class could be impacted by the inclusion of members whose damages are zero.

For all of these reasons, as discussed below, *Amici* respectfully urge this Court to reject Defendants' arguments and affirm the court below.

ARGUMENT

I. RULE 23(b)(3) PREDOMINANCE DOES NOT REQUIRE INJURY IN FACT FOR EVERY CLASS MEMBER.

A. Class certification focuses on the nature of the issues and proof—and whether common questions predominate—not on the merits of injury for particular class members.

Appellants' central argument that class certification must be denied unless all proposed class members were injured cannot be squared with the text and structure of Rule 23, or with decades of settled class action practice.

Several courts of appeals have addressed this argument squarely in recent years, holding that a certified "class will often include persons who have not been injured by the defendant's conduct . . . . Such a possibility or indeed inevitability does not preclude class certification." *Kohen v. PIMCO, LLC*, 571 F.3d 672, 676 (7th Cir. 2009); *see also Messner v. Northshore University Healthsystem*, 669 F.3d 802, 823, 826 (7th Cir. 2012) (it is "generally irrelevant" to certification whether "some class members' claims will fail on the merits if and when damages are decided"); *In re Deepwater Horizon*, 739 F.3d 790, 810-11, 813 (5th Cir. 2014) (same); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1201 (10th Cir. 2010) (same).[2]

[2] *See also In re Urethane Antitrust Litig.*, MDL No. 1616, 2013 WL 2097346, at *2 (D. Kan. May 15, 2013) (antitrust class certification does not require injury for all class members); *In re Chocolate Confectionary Antitrust Litig.*, 289 F.R.D. 200, 222 n.30 (M.D. Pa. 2012) (certifying class notwithstanding uninjured class members); *In re Flonase Antitrust Litig.*, 284 F.R.D. 207, 227

Defendants' argument that a court may not certify a class containing any uninjured class members cannot be squared with the Supreme Court's recent decision in *Halliburton Co.*, 2014 WL 2807180, at *12. There, in rejecting defendants' request that the Court overrule *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) and jettison the "fraud on the market" presumption of reliance, the Court acknowledged that class members who did not rely on defendants' misrepresentations, and therefore were not injured, may be included in the class:

> While this has the effect of 'leav[ing] individualized questions of reliance in the case,' [] there is no reason to

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(E.D. Pa. 2012) (same); *In re Neurontin Antitrust Litig.*, MDL No. 1479, 2011 WL 286118, at *8 n.23 (D.N.J. Jan. 25, 2011) (same); *In re K-Dur Antitrust Litig.*, No. CIV. A. 01-1652 JAG, 2008 WL 2699390, at *18 (D.N.J. Apr. 14, 2008) *aff'd*, 686 F.3d 197 (3d Cir. 2012) ("the possibility that Plaintiffs ultimately may be unable to show fact of injury as to a few class members does not defeat certification where the Plaintiffs can show widespread injury to the class"); *In re Wellbutrin SR Direct Purchaser Antitrust Litig*, No. 04-5525, 2008 WL 1946848, at *10 (E.D. Pa. May 2, 2008) ("'Even if it could be shown that some individual class members were not injured, class certification, nonetheless, is appropriate where the antitrust violation has caused widespread injury to the class.'") (citation omitted); *In re Nifedipine Antitrust Litig.*, 246 F.R.D. 365, 369 (D.D.C. 2007) ("to demonstrate that common evidence exists to prove class-wide impact or injury, plaintiffs do not need to prove that every class member was actually injured."); *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 252 (D. Del. 2002) (certification proper "even where some individual, absentee class members may later prove not to be injured"); *In re Nw. Airlines Corp. Antitrust Litig.*, 208 F.R.D. 174, 223 (E.D. Mich. 2002) (injury "need not be established as to each and every class member; rather, it is enough if the plaintiffs' proposed method of proof promises to establish 'widespread injury to the class' as a result of the defendant's antitrust violation.") (citation omitted); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 523 (S.D.N.Y. 1996) ("Even if it could be shown that some individual class members were not injured, class certification, nevertheless, is appropriate where the antitrust violation has caused widespread injury to the class.").

> think that these questions will overwhelm common ones and render class certification inappropriate under Rule 23(b)(3). *That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate.*

Id. (emphasis added, internal citation omitted). In short, in *Halliburton*, the Court not only acknowledged that uninjured class members may exist, it also confirmed that individualized questions relating to such class members "do[] not cause individual questions to predominate." *Id.*

The text of Rule 23 does not support Appellants' argument either. If the drafters of Rule 23 had intended to allow Rule 23(b)(3) certification only in cases in which all class members were injured in fact, it could have said so explicitly. But the Rule says no such thing. Instead, the class certification inquiry focuses on the familiar requirements of Rules 23(a) and (b)(3), including whether common *questions* predominate, *i.e.*, whether the central liability issues can be resolved most fairly and efficiently on a class-wide basis. This well-established framework does not turn on the merits of injury or any other substantive element of the claim, but rather on the nature of the issues and proof. *See Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013) ("[T]he office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the method best suited to adjudication of the controversy 'fairly and efficiently.'"); *id.* ("Rule 23(b)(3) requires a showing that *questions* common to the class

predominate, not that those questions will be answered, on the merits, in favor of the class.") (Emphasis in original). In short, class certification is a procedural tool that asks the question "who may sue together?" It is not a substantive rule designed to determine who will win in that suit.

Applying these standards, the question of "[h]ow many (if any) of the class members have a valid claim is the issue to be determined *after* the class is certified." *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1084-85 (7th Cir. 2014) (emphasis in original). That is what the merits stage of class litigation is all about—resolving all aspects of liability, including whether, and to what extent, class members actually were harmed. At the initial certification stage, however, "a court may not decline to certify a class merely because it believes the class's claims will fail" for lack of injury (or for any other substantive reason), *Messner*, 669 F.3d at 823, given that "Rule 23 allows certification of classes that are fated to lose as well as classes that are sure to win." *Schleicher v. Wendt*, 618 F.3d 679, 686 (7th Cir. 2010).

The fact that class certification can result in a class-wide judgment for *defendants* based on a merits finding of no injury underscores the flaw in Appellants' reading of Rule 23(b)(3) predominance, because clearly the Rule allows for certification of a class of individuals who may (or may not) have been injured in fact. *See, e.g., Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 799 (7th

Cir. 2013) (existence of uninjured class members presents "an argument not for refusing to certify the class but for certifying it and then entering a judgment that would largely exonerate" the defendant); *In re Whirlpool Corp. Front-Loading Washer Product Liability Litig.*, 722 F.3d 838, 857 (6th Cir. 2013) (same). If the Rule did not permit certification of a class including uninjured members, how else could a defendant obtain a favorable class-wide judgment?

To summarize, it makes perfect sense that Rule 23(b)(3) is structured in the way that it is, focusing not on the merits of injury at the class certification stage, but on whether common questions and proof predominate such that collective litigation is the superior means of resolving the claims. *See* Fed. R. Civ. P. 23(b)(3); *Amgen*, 133 S. Ct. at 1191. Based on the text and structure of the Rule and established Rule 23 standards, the possibility that the class may include some members who suffered no injury does not defeat class certification and indeed is not particularly relevant to the certification analysis at all.

B. Appellants' proposed rule would frustrate the purpose of Rule 23(b)(3) and defeat class certification in a wide array of cases long recognized as suitable for certification.

The founding premise of Rule 23(b)(3) is that class actions are often necessary to vindicate "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all . . . .The policy at the very core of the class action mechanism is to overcome the problem that

small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (internal citations and quotation marks omitted).

Appellants' interpretation of Rule 23(b)(3)'s predominance requirement would defeat this purpose, foreclosing any effective class action remedy for plaintiffs in a wide array of important matters. Consider just one type of case long considered to be a paradigm example of litigation suitable for class treatment: antitrust claims involving price-fixing by a cartel. Even in this textbook scenario—in which cartels often impose widespread overcharges on thousands of customers, causing hundreds of millions or even billions of dollars of damages to the economy—it is not uncommon for some small subset of class members to escape injury altogether. Should the existence of these potentially uninjured class members defeat class certification across the board for the thousands (sometimes millions) of customers who were in fact harmed?

The answer, of course, is no—because the alternative to a class action is no effective remedy at all for those victimized by wrongdoing that the Supreme Court has long recognized as the "supreme evil of antitrust: collusion." *Verizon Communications v. Law Office of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004);

see, e.g., *Amchem*, 521 U.S. at 625 ("Predominance is a test readily met in certain cases alleging . . . violations of the antitrust laws"); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 266 (1972) ("class actions . . . are definitely preferable in the antitrust arena"); *Messner*, 669 F.3d at 815 ("in antitrust cases, Rule 23, when applied rigorously, will frequently lead to certification"); *Butler*, 727 F.3d at 801 (absent certification, defendants "would be able to escape liability for tortious harms of enormous aggregate magnitude but so widely distributed as not to be remediable in individual suits").

Moreover, Appellants' suggested rule would lead to the absurd result that antitrust violators (including those involved in naked reverse payment conspiracies) could evade liability simply by taking care to avoid overcharging some small subset of customers, while reaping illicit profits from everyone else. The case below illustrates this very possibility. There, Defendants argued that their provision of "coupons" to certain purchasers shielded those purchasers from paying an overcharge and thus from being injured. Defendants then argued that having protected 2-4% of the class from injury, they could avoid certification of the class entirely, thereby escaping liability to the remaining 96% of the class. *In re Nexium (Esomeprazole) Antitrust Litig.*, 297 F.R.D. 168, 179 (D. Mass. 2013).

If this reasoning were accepted, it would have a far-reaching impact. The coupons employed by Defendants in this case to market and promote the wider use

of their drug product have become a staple marketing strategy for hundreds of different brand-name drugs. Joseph S. Ross, M.D. & Aaron S. Kesselheim, M.D., J.D., M.P.H., *Prescription-Drug Coupons – No Such Thing as a Free Lunch*, 369 N. Engl. J. Med. 1188-89 (Sept. 26, 2013), *available at* http://www.nejm.org/doi/full/10.1056/NEJMp1301993. Appellants' suggested rule would foreclose consumers from any financial recovery for antitrust or deceptive advertising conduct in relation to nearly all of the most widely used prescription drug products. Rule 23 compels no such result.

Efficient case management is another relevant consideration. As the Seventh Circuit has explained, Appellants essentially propose a Rule 23 framework under which exhaustive merits litigation would be required on the question of class-wide injury and damages *before* class certification, with the central liability issues (for example, the common factual and legal issues relating to collusion, or in this case, resolution of "reverse payment" liability issues) being deferred until *after* certification—a nonsensical approach the court aptly characterized as "put[ting] the cart before the horse":

> To require the district judge to determine whether each of the 150 members of the class has sustained an injury—on the theory that if 140 have not, and so lack standing, and so should be dropped from the class, certification should be denied and the 10 remaining plaintiffs be forced to sue (whether jointly or individually)—would make the class certification process unworkable; the process would require, in this case, 150 trials before the class could be certified.

> The defendants are thus asking us to put the cart before the horse.

Parko, 739 F.3d at 1084-85.

For all of these reasons, there is no basis for requiring a demonstration of injury to all class members as a prerequisite to obtaining class certification. Such a requirement is at odds with Rule 23, the case law interpreting it and would frustrate the very purpose of the Rule by making the class action device virtually inaccessible at the whim of defendants. Appellants' arguments should be rejected.

II. NEITHER THE CASE LAW, NOR THE OTHER AUTHORITIES CITED BY APPELLANTS SUPPORT A RULE THAT A COURT MAY NOT CERTIFY A CLASS CONTAINING POTENTIALLY UNINJURED MEMBERS.

A. Appellants misapprehend the relevant case law, including *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6 (1st Cir. 2008).

The decision by this Court in *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6 (1st Cir. 2008) does not compel the conclusion that a court may not certify a class containing uninjured members. The trial court's class certification order was reversed and remanded for several reasons in that case, including the novelty and complexity of the claims, the absence of a developed class certification record, and the lack of *any* probative common proof of injury for the vast majority of putative class members. *Id.* at 27-29. But the opinion did not address the question presented here, *i.e.*, whether the existence of some uninjured class members necessarily defeats predominance.

In re Pharmaceutical Industry Average Wholesale Price Litig., 582 F.3d 156, 197-98 (1st Cir. 2009) squarely rejected Appellants' reading of *New Motor Vehicles*, refusing to accept the defendant's argument that plaintiffs were "required to prove that each class member was harmed" to satisfy predominance. *See also In re Neurontin Mktg. & Sales Practice Litig.*, 712 F.3d 60, 69 (1st Cir. 2013) (reversing denial of class certification where certain class members may have been unharmed but "Pfizer's misinformation had a significant influence on thousands of other prescribing decisions"); *Gintis v. Bouchard Transportation Co.*, 596 F.3d 64, 66 (1st Cir. 2010) (Souter, J., sitting by designation) (no requirement that plaintiffs establish injury for every class member to support class certification; "[i]f that were the law, the point of the Rule 23(b)(3) provision for class treatment would be blunted beyond utility").

The other authorities cited by Appellants are likewise inapposite. *See* Appellants' Brief at 18-19. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008), for example, did not address let alone resolve the issue of certification where a portion of the class may not have been injured. The court simply set forth the required substantive elements of a cartel claim, noting that, *at the merits stage of the case*, class members must show injury to prevail. *Id.* at 311-12. Appellants take this passage out of context to suggest that *Hydrogen Peroxide* addressed a dispute about whether predominance required actual injury for all class

members at the class certification stage. *See* Appellants' Brief at 18-19. But that was not the issue in *Hydrogen Peroxide*, and the court said no such thing.[3]

B. A certified class that includes potentially uninjured class members does not abridge the defendants' substantive rights or create pressure to settle meritless claims.

Appellants assert that certifying a class encompassing potentially uninjured plaintiffs would somehow abridge their substantive rights and run afoul of the Rules Enabling Act. Appellants' Brief at 14-15. But Appellants do not explain why that is so, and the argument is wrong.

As noted above, class certification does not preclude defendants from litigating the substance of their case on the merits, including the merits of injury for supposedly uninjured customer groups. *Compare Halliburton Co.*, 2014 WL 2807181, at *12 ("That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause

[3] Appellants also cite the Supreme Court's recent decisions in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) for the proposition that these cases upset the decades of antitrust authority holding that class certification does not require injury in fact for every class member. *See, e.g., supra* at p.10 n.2 (collecting cases). But neither Supreme Court decision remotely addressed this question and, indeed, *Wal-Mart* if anything appears to *reject* Appellants' position. *See* 131 S. Ct. at 2554 (*Wal-Mart* class certification turned on "whether .5 percent or 95 percent of employment decisions" might have been influenced by discrimination). In suggesting that common proof of injury for 95% of class members would suffice, the Court decidedly did not say (as Appellants suggest) that class certification is proper only where 100% of class members were subjected to the alleged wrong. *Cf. Messner*, 669 F.3d at 814 ("There is no mathematical or mechanical test for evaluating predominance.").

individual questions to predominate.") Appellants, then, will have every opportunity to present their various "no injury" arguments at the appropriate time – after class certification. Indeed, as the Seventh Circuit recently explained, class action defendants "should welcome" a class definition that includes potentially uninjured class members, because such individuals make it more likely that defendants will be able to secure a favorable (and preclusive) class-wide judgment. *Butler*, 727 F.3d at 799; *see also In re Whirlpool*, 722 F.3d at 857 (6th Cir. 2013) (same).

Nor does including such individuals in the certified class increase the pressure to settle meritless claims. "Uninjured" class members are deemed uninjured for a reason: because their damages are necessarily zero, hence contribute zero dollars to the defendant's estimated liability. How is a class action defendant prejudiced by including within a class definition a subset of class members whose claims (i) potentially undermine the strength of the plaintiffs' overall case on the merits and (ii) in any event do not add a penny to the defendant's estimated liability (at least if the defendant is actually correct about these class members having zero damages)? Appellants do not say.

CONCLUSION

For the reasons hereinabove stated, *Amici Curiae*, Community Catalyst, Inc., the National Legislative Association for Prescription Drug Prices ("NLARx"), the United States Public Interest Research Group ("U.S. PIRG"), and the American Independent Business Alliance ("AMIBA") respectfully request this Court to reject the arguments of Appellants and affirm the decision of the court below certifying the class.

Respectfully submitted,

/s/ Ellen Meriwether

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June 26, 2014

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure rule 32(a)(7)(C), I certify that this brief complies with the length limitations set forth in Rule 32(a)(7)(B)(i) because it contains 4893 words, as counted by Microsoft Word, excluding the items that may be excluded under Rule 32(a)(7)(B)(iii).

/s/ Ellen Meriwether
Ellen Meriwether

CERTIFICATE OF SERVICE

Pursuant to Federal rule of Appellate Procedure 25, I certify that on June 26, 2014, I filed this brief with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Ellen Meriwether
Ellen Meriwether