No. 23-55742

In the United States Court of Appeals for the Ninth Circuit

PAINTERS & ALLIED TRADES DISTRICT COUNCIL 82 HEALTH, ET AL.,

Plaintiffs-Appellees,

v.

TAKEDA PHARMACEUTICAL COMPANY LIMITED, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California, Los Angeles
Case No. 2:17-cv-07223-JWH-AS (The Hon. John W. Holcomb)

BRIEF OF AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* the American Association for Justice states it is a non-profit organization. It has no parent corporation or publicly owned corporation that owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiffs' trial bar. AAJ members primarily represent plaintiffs in personal-injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its 77-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct, including through the class-action device.

AAJ files this brief to further its members' interests in protecting the class-action device as a tool for seeking justice in situations in which a defendant's conduct has resulted in injuries that affect a large number of people, but which are generally not cost-effective to redress individually. As the brief explains, the defendants in this case have asked this Court to erect various barriers to the class device. AAJ files this brief to explain that those barriers run afoul of longstanding class-action practice and the requirements of Federal Rule of Civil Procedure 23, and imperil the availability of the class device in many of the cases in which it is most necessary to compensate

[1] All parties consent to the filing of this brief, and no counsel for any party authored it in whole or in part. Apart from amicus curiae, no person, party, or party's counsel contributed money intended to fund the brief's preparation and submission.

consumers, deter unlawful conduct, and enable the federal court system to efficiently administer large numbers of claims.

INTRODUCTION

In this case, the district court certified a class of third-party health-care payors to litigate a civil RICO claim. The payors contend that the defendants misled the medical community as to the cancer risks of the diabetes drug Actos, causing the payors to make thousands of prescription reimbursements they wouldn't otherwise have paid. To hear the defendants and their amici tell it, that claim is an unclassable one. They do not dispute the district court's conclusions that the standard civil RICO elements are susceptible of classwide proof. Instead, they zero in on RICO standing. According to the defendants, the *only way* that the class could prove but-for causation and injury is by showing, one by one, "exactly which" doctors "relied on" the defendants' misrepresentations in writing Actos prescriptions—in other words, exactly which doctors wouldn't have prescribed the drug if they had known its risks. Because that inquiry is inherently individualized, the argument goes, it predominates over all the common questions this case presents, and the district court abused its discretion in concluding otherwise.

These arguments flout the ordinary rules of class-action litigation in two important respects. *First*, the defendants are simply wrong that RICO standing can only be proven with individualized evidence. To the contrary, the rule in a RICO

class action is the same as it is anywhere else: A *class* is entitled to employ any evidence that an *individual* plaintiff could employ. Over the long history of Rule 23, that has included all manner of aggregate proof, from representative studies to statistical regressions to classwide presumptions. And, as the First and Second Circuits have explained in similar contexts, that rule easily extends to the plaintiffs' evidence here. Fighting this conclusion, the defendants protest that the plaintiffs' evidence does not enable the parties to easily segregate injured and uninjured class members. The plaintiffs' brief explains why that charge is false. But even if it weren't, the same concern could be raised against most class actions, and it does not typically impede certification. With good reason: Such a rule would fly in the face of longstanding class-action practice. Adopting it anyway would make it far more difficult to certify a broad range of lawsuits that are frequently suitable for class treatment—from securities and antitrust violations to wage theft to consumer claims. Given the small-dollar individual value of many of these violations, that result would prevent many victims from ever obtaining relief and permit unlawful conduct to continue undeterred.

Second, even if the defendants might, eventually, develop their *own* individualized evidence to counter the plaintiffs' aggregate proof, that possibility does not stand in the way of the district court's class-certification decision. The defendants and their amici fault the district court for taking the evidence as the

parties presented it at the class-certification stage, and for declining to speculate as to what evidence the defendants might develop later. But as this Court has long explained, that is precisely what district courts are supposed to do. And that approach is hardly unfair to defendants. If the evidence should develop as they insist it will, Rule 23 provides a ready solution: narrow, segment, or decertify the class.

ARGUMENT

I. The use of aggregate evidence to establish the existence of a classwide issue is a commonplace and irreplaceable aspect of class-action litigation.

In their briefing before the Court, the defendants labor to portray the district court's decision as a novel one. According to the defendants, the district court sanctioned an unusual, punitive, and *in terrorem* sort of class. They focus on two purported defects with the plaintiff's aggregate evidence. That evidence, they say, cannot prove that every single class member was injured. And, they contend, the evidence does not provide a ready means to isolate injured class members from uninjured ones. But the district court's decision was nothing more than a straightforward application of the longstanding class-certification rules. So long as a plaintiff's aggregate evidence could have been used to prove RICO causation for that plaintiff alone, that evidence could be used to prove RICO causation for the class. And even if the aggregate evidence defers to the future the question *which* class members were in fact injured, that is a feature of most class actions, and does not

defeat predominance. A rule that plaintiffs' evidence "fails as a matter of law" on these grounds, as the defendants urge (at 2), would make many class actions all but impossible to litigate.

A. Plaintiffs routinely employ aggregate evidence to establish the existence of a common issue, and this case is no different.

Plaintiffs are entitled to use "any" admissible evidence "to prove that they meet the prerequisites of Rule 23(b)(3)." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 665 (9th Cir. 2022); *see also, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453–55 (2016).[2] As this Court recently observed, that "frequently" means "expert evidence, including statistical evidence or class-wide averages." *Olean*, 31 F.4th at 665. From wage-and-hour cases to antitrust suits, and from securities class actions to those claiming employment discrimination, plaintiffs pressing all sorts of claims regularly turn to aggregate forms of proof to show that a question is "capable" of being resolved "on a class-wide basis." *Id.* at 668. Over the years, defendants have repeatedly invited courts to curtail the sorts of aggregate proof on which classes may rely. But as the Supreme Court has explained, that approach would run afoul of Rule 23, which entitles class plaintiffs to make use of any evidence individual plaintiffs may employ.

[2] Unless otherwise noted, all quotations in this brief omit internal brackets, emphases, ellipses, and citations.

The aggregate evidence on which plaintiffs have relied comes in many forms. Sometimes it is representative exemplars. In *Tyson Foods*, for instance, the plaintiffs sought to certify a class on the ground that it posed the common question whether the time class members spent donning and doffing the protective gear their positions required was compensable work under the Fair Labor Standards Act. 577 U.S. at 454. To establish their employer's liability under the statute, the plaintiffs employed a representative study that calculated the amount of time, on average, that a sample of workers spent on their donning-and-doffing activities. *Id.* The plaintiffs then sought to apply that representative result to each individual class member. *Id.*

The defendant asked the Supreme Court to reject this sort of evidence out of hand, complaining that it enabled the plaintiffs to "manufacture[] predominance" by "assuming away the very differences" that made the class "inappropriate for classwide resolution." *Id.* The Supreme Court refused. Rule 23, it made clear, doesn't allow courts to rule particular forms of evidence categorically in or out just because a case is a class action. *Id.* at 455. "To so hold," the Court explained, "would ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge . . . any substantive right.'" *Id.* (quoting 28 U.S.C. § 2072(b)). So long as an *individual* class member could use representative evidence to prove his or her claim, the class could do so, too. *See id.*

Much the same logic applies to statistical models. Consider this Court's en banc decision in *Olean*. In that case, the plaintiffs employed two pieces of aggregate evidence to prove that a class of tuna purchasers suffered antitrust impact: a "pricing correlation test," which they argued "demonstrated that the prices of the Tuna Suppliers' products moved up or down together regardless of product or customer type," and a "statistical model" that employed "multiple regression analysis" to attempt to "test and isolate" the extent to which the prices the plaintiffs paid were higher because of the defendants' "collusive behavior." *Olean*, 31 F.4th at 671–73. Like the defendant in *Tyson Foods*, the defendants in *Olean* complained that various assumptions in this model, including "averaging assumptions" that "assumed" that all plaintiffs were "overcharged by the same uniform percentage," "paper[ed] over individualized differences among the class members." *Id.* at 677. But as this Court recognized, regression models are "widely accepted as a generally reliable econometric technique" in class actions just as they are anywhere else—even if those models necessarily draw assumptions about similarities across a class. *Id.* While such models might not ultimately persuade a jury of the veracity of the plaintiffs' claims, it is not an abuse of discretion for a district court to conclude that they are capable of establishing antitrust impact on a classwide basis. *Id.* at 675–76. To hold otherwise "would 'put the cart before the horse' by requiring plaintiffs to show at certification

that they will prevail on the merits." *Id.* at 667 (quoting *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013)).

There are countless other examples of class actions predicated on various forms of aggregate proof. In securities class actions, for instance, courts routinely rely on a classwide presumption to establish reliance as a common question capable of classwide resolution. Because financial markets are assumed to be "efficient processors of public information," courts may presume, on a classwide basis, that a defendant's public, material misrepresentations are "reflected" in its share price. *Amgen*, 568 U.S. at 462. As a result, the logic goes, any person who bought stocks may be presumed to have relied on those misrepresentations. *Id.* at 461–62; *see also Basic Inc. v. Levinson*, 485 U.S. 224, 246 (1988); *Halliburton Co. v. Eric P. John Fund, Inc.*, 573 U.S. 258, 268 (2014). Meanwhile, in cases alleging that a defendant engaged in a pattern or practice of discrimination, courts have long certified classes based solely on evidence that a defendant has a "broad-based policy of employment discrimination." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 (1977); *see also Franks v. Bowman Transp. Co.*, 424 U.S. 747, 771–73 (1976).

In this case, the plaintiffs did nothing more than follow this well-worn approach. As the plaintiffs' brief explains in detail (at 38–43, 61–62), their theory is an established method for an individual third-party payor to prove that it was injured and wouldn't have been so in the absence of a defendant's fraud. *See, e.g.*, *In re Celexa*

& Lexapro Mktg. & Sales Practs. Litig., 915 F.3d 1, 12–13 (1st Cir. 2019) (holding that similar evidence raised a genuine issue of material fact in an individual quantity-effect RICO action and questioning why the district court found it insufficient for class certification). Because the plaintiffs were entitled to employ that evidence to prove their own RICO standing, they can use that same evidence to prove the same elements for the class.

B. Aggregate evidence rarely supplies a means of segregating injured and uninjured class members, but that doesn't stop it from showing predominance.

The defendants nevertheless argue (at 49–53) that the plaintiffs can only employ aggregate evidence to prove that RICO standing may be resolved on a classwide basis if that evidence shows that every class member "was in fact injured." Otherwise, they claim, the plaintiffs are obligated to "*prove*" how it will isolate injured and uninjured class members. As the district court held, and as the plaintiffs explain in their brief, the plaintiffs have, in fact, identified such a mechanism. *See* 1-ER-23; Painters' Br. at 62–63. But this Court should reject the defendants' premise as squarely foreclosed by binding Supreme Court precedent and common sense.

1. Start with precedent. In *Tyson Foods*, the Supreme Court rejected the very argument the defendants make here. Recall that in that case the class relied on a representative sample to prove that the defendant failed to compensate each worker for all the hours that they worked. By its very nature, that evidence aggregated the

experiences of workers who donned their uniforms at all sorts of rates—from those who were unusually slow to those who were so quick as to be uninjured within the meaning of the FLSA. *See Tyson Foods*, 577 U.S. at 451. Rather than identifying which class members suffered an injury, the evidence made a different point: the *typical* class member had, at least, done so. *Id.* at 455–57. The plaintiffs then employed that evidence to try several common questions before a jury, including the question whether the defendant failed to compensate the class for the full extent of its work hours. *See id.* at 449–52.

On appeal following that verdict, the defendant argued, like the defendants here, that the fact that the plaintiffs could not "offer proof that all class members [were] injured" required them to "demonstrate instead that there is some mechanism to identify the uninjured class members." *Id.* at 460. But the Supreme Court disagreed. Even though the case had already been litigated to a *verdict* on common questions, the Court held that it was "premature" to demand that plaintiffs identify such a methodology. *Id.* at 461. Instead, that question was appropriately deferred to the next stage of the litigation. *Id.*

2. That conclusion makes sense. Aggregate evidence rarely applies to every class member. If it's representative evidence, like that at issue in *Tyson Foods*, it necessarily folds together injured and uninjured class members. And the same thing is true of other varieties of aggregate proof.

To take one example, consider securities class actions again. Although plaintiffs who make the requisite showings are entitled to a presumption of reliance at the class-certification stage, that presumption is explicitly subject to "individualized rebuttal": Defendants may show that a given class member did not, in fact, "rely on the integrity of the market price in trading stock." *Halliburton*, 573 U.S. at 276. In other words, the possibility that the presumption doesn't apply to a particular class member—indeed, conceivably, to *every* class member—is readily contemplated. But the prospect of that inquiry does not mean that individualized questions predominate over common ones such that the class can't be certified. *See id.* Quite the opposite: Securities classes have long been capable of class treatment precisely because the ability to invoke this form of common proof as to the class as a whole establishes predominance *notwithstanding* the likelihood of subsequent individualized inquiries. *Id.*; *see also, e.g.*, *Basic*, 485 U.S. at 248–49.

Antitrust litigation stands as another example. Under a common theory of proof, an antitrust plaintiff might rely on aggregate evidence that the price of the relevant good "fell significantly" when a competitive product finally entered the market to show that the defendants' behavior maintained an artificially high price to which the class members were exposed. *See, e.g.*, *In re Nexium Antitrust Litig.*, 777 F.3d 9, 16–17 (1st Cir. 2015); *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 197 (1st Cir. 2009). That evidence might be a means to prove injury on a classwide basis,

even though it would not prove that class members who were indifferent to price—for instance, those who bought on brand loyalty—had been injured. *See Nexium*, 777 F.3d at 17; *cf. Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 108 (2d Cir. 2007) (recognizing that predominance can be met even if "the issue of injury-in-fact presents individual questions").

These sorts of cases can't be distinguished from this one. If the plaintiffs have to prove precisely how they plan to isolate uninjured class members, the same obligation would apply to all sorts of class actions. But courts have by and large declined to impose that requirement.[3] Indeed, the Supreme Court itself has declined to apply it in two separate contexts—securities class actions and the FLSA. With good reason: If an individual could rely on the aggregate evidence to prove important elements of her claim, the class could, too, supplying powerful evidence of a common question even if individualized inquiries into injury would subsequently be required.

[3] The exception is the D.C. Circuit's decision in *In re Rail Fuel Surcharge Antitrust Litigation*, 934 F.3d 619 (D.C. Cir. 2019), but that outlier is neither controlling nor persuasive. That is because the D.C. Circuit's proof requirement was predicated on that circuit's rule that predominance demands a showing that "all class members were in fact injured by the alleged conspiracy," *id.* at 624—a rule this Court has rejected, *see Olean*, 31 F.4th at 669. A few other courts have suggested that it must, at least, be *possible* to establish a mechanism to identify uninjured class members. *See, e.g.*, *Nexium*, 777 F.3d at 19–20. But they have stopped short of requiring the plaintiffs to prove precisely how they intend to do so in order to obtain class certification.

C. Restricting plaintiffs' reliance on aggregate evidence would make many class actions all but impossible to litigate.

A rule restricting plaintiffs' use of aggregate evidence—or, at least, holding that plaintiffs may only employ aggregate evidence where they can prove precisely how they intend to exclude uninjured class members—would not simply contravene longstanding class-action precedent. It would also make many class actions extraordinarily difficult to litigate, barring individuals with small claims from any hope of relief and preventing the legal system from accessing the efficiencies of the class device in the very circumstances for which it was designed. To see the problem, consider the paradigmatic consumer or worker class action. Such a case typically brings together large numbers of consumers or workers whose claims are worth too little to pursue individually, however strong they may be on the merits. *See, e.g.*, *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 798 (7th Cir. 2013) (breach-of-warranty claims against washing-machine manufacturer); *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 677 (7th Cir. 2013) (claim that defendant violated Electronic Funds Transfer Act restrictions on ATM fees); *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 267 F.R.D. 549 (D. Minn. 2010) (products-liability litigation concerning brass plumbing fittings), *aff'd*, 644 F.3d 604 (8th Cir. 2011); *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 564 (S.D.N.Y. 2014) (breach-of-warranty claims against olive oil manufacturer); *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1153 (9th Cir. 2016) (wage-and-hour claims).

To bring these sorts of claims as a class, consumers and workers routinely rely on aggregate evidence—for instance, expert evidence that a product was susceptible to a particular defect, *see, e.g.*, *Zurn Pex Plumbing*, 267 F.R.D. at 556–57 (expert evidence that brass fittings were prone to fail); *In re Arris Cable Modem Consumer Litig.*, 327 F.R.D. 334, 362–64 (N.D. Cal. 2018) (Koh, J.) (expert evidence that defendant's modems had common latency defects), or representative or statistical evidence illustrating a fact relevant to injury, *see, e.g.*, *Vaquero*, 824 F.3d at 1153 (representative evidence of various employment violations); *In re: Syngenta AG MIR 162 Corn Litig.*, 2016 WL 5371856, at *7 (D. Kan. Sept. 26, 2016) (expert evidence concerning market-price decreases); *In re Myford Touch Consumer Litig.*, 2016 WL 7734558, at *4–5 (N.D. Cal. Sept. 14, 2016) (expert economic evidence concerning lost value).

But consumers and workers often lack access to the evidence that will identify precisely who was impacted by a defendant's misconduct. And that is frequently through no fault of their own: it is typically *defendants* who are best positioned to identify who purchased a particular good or worked a particular shift, but who have failed to maintain or retain the necessary records. *See Tyson Foods*, 577 U.S. at 456–57 (explaining that the plaintiffs' representative evidence "fill[ed] an evidentiary gap created by the employer's failure to keep adequate records"); *Myford Touch*, 2016 WL 7734558, at *8 (explaining that an auto company's failure "to maintain proper records . . . should not be held against" a putative class). To hold that the difficulty of proving

precisely who a defendant wronged prevents a class from relying on aggregate proof showing that the defendant wronged most of the class would be to "enable the wrongdoer to profit by his wrongdoing at the expense of his victim." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946); *see also Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 540 (6th Cir. 2012) (explaining that, if the need to conduct some individualized or manual review of files to determine class membership could defeat certification, "defendants against whom claims of wrongful conduct have been made could escape class-wide review due solely to the size of their businesses or the manner in which their business records were maintained"); *Hughes*, 731 F.3d at 677 ("A class action, like litigation in general, has a deterrent as well as a compensatory objective.").

And it would do so in the very circumstances for which the class device was designed. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("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."); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."); Fed. R. Civ. P. 23(b)(3) advisory committee's note, 39 F.R.D. 69, 103 (1966) ("[A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found,

for separate determination of the damages suffered by individuals within the class.") This Court should decline to erect an additional hurdle to class certification under these circumstances.

All the more so because there is simply no reason to do so. There are plenty of legitimate mechanisms for disaggregating injured and uninjured class members and the mechanism best suited to a particular case will depend on the way the evidence develops. Class members could submit affidavits to establish that they purchased a particular product. *See, e.g.*, *Nexium*, 777 F.3d at 20; *Myford Touch*, 2016 WL 7734558, at *8. They could be subjected to depositions or mini-trials at to the question of injury. *See, e.g.*, *Teamsters*, 431 U.S. at 360. Or they could use data to isolate those class members most likely to be uninjured—the very mechanism on which the plaintiffs propose to rely here. Courts are well-practiced at implementing each of these methods through the class and claims administrative process. Requiring them to forecast precisely which method will be best suited to a particular class before it can be certified deviates from this practice. And it erects an unnecessary procedural barrier to certification that will prevent aggrieved consumers from obtaining relief, while permitting unlawful conduct to continue undeterred.

II. Rule 23 does not require district courts to credit speculative individualized defenses.

The defendants are equally mistaken when they attack the district court for failing to conduct a "rigorous" analysis of the parties' evidence on class certification.

The district court, they contend, was improperly focused on the evidence the parties had placed before it, and gave short shrift to the possibility that the defendants ultimately will develop individualized defenses that overwhelm the plaintiffs' common proof. But it is the defendants, not the district court, that seek to upend the settled law of how to evaluate a class action. As this Court has explained, the class-certification inquiry trains a district court's "rigorous analysis" on the evidence the parties *have actually presented*. It does not require—or permit—courts to speculate that a defendant will develop at trial a defense that has not been developed at class certification. That rule imposes no unfairness on class defendants. If the district court makes the wrong prediction, and class defendants do develop individualized challenges to the class members' claims, they have a straightforward solution: Narrow or decertify the class. The district court did not abuse its discretion in certifying the class in the meantime.

A. This Court has laid out a clear roadmap for district courts to follow when considering class-certification motions. A putative class representative must establish each of Rule 23's requirements by a preponderance of the evidence. *Olean*, 31 F.4th at 664. When it comes to predominance, plaintiffs must show that there is a "common question" that "relates to a central issue" in their claims—typically by showing that "essential elements of the cause of action" are "capable of being

established through a common body of evidence, applicable to the whole class." *Id.* at 666.

If a plaintiff demonstrates that classable issues exist, a defendant can then "invoke individualized issues" to oppose a predominance finding. *Van v. LLR, Inc.*, 61 F.4th 1053, 1067 (9th Cir. 2023). But in doing so, a defendant must offer more than mere "speculation and surmise." *True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 932 (9th Cir. 2018); *see also Bridging Cmtys. Inc. v. Top Flite Fin. Inc.*, 843 F.3d 1119, 1125–26 (6th Cir. 2016) (refusing to speculate that consumers might have consented to receive junk faxes); *Torres v. S.G.E. Mgmt., L.L.C.*, 838 F.3d 629, 644 (5th Cir. 2016) (refusing to speculate that class members might have had knowledge of the defendants' fraud when they joined its multi-level marketing scheme). If a defendant wishes "to tip the decisional scales" on a class-certification ruling, it must "provide[] supporting evidence" that litigating its individualized defenses would predominate over the plaintiff's classwide showing. *True Health*, 896 F.3d at 932. Thus, a district court's task at class certification isn't to indulge in far-fetched hypotheticals or to credit long-tail probabilities in anticipating how a class conceivably could be litigated. It's to weigh the evidence, as the parties have presented it or given the Court reason to understand it will be presented.

That is for a very good reason. Individualized defenses cannot predominate over common questions unless those defenses are actually raised in the first place—

and unless they are in fact likely to bog down the litigation of the common issues. To hold otherwise would enable a defendant to defeat class certification based on defenses it never intends to raise. *See Bridging Cmtys.*, 843 F.3d at 1125 ("[A] *possible* defense, standing alone, does not automatically defeat predominance," and courts "are unwilling to allow such speculation and surmise to tip the decisional scales in a class certification ruling.") (emphasis added).

This case illustrates the danger of relying on purely hypothetical defenses. As the district court recognized, there is a possibility that the defendants will, eventually, gather the evidence to challenge the injuries sustained by each of the class members one by one. But as the evidence stood at class certification, there was no indication that they would in fact do so. In their materials opposing class certification, the defendants didn't bother to identify a *single* class member who failed to pay for a fraudulently induced Actos prescription, let alone enough examples to suggest that their defense presents a serious concern.[4] *See Miles v. Kirkland's Stores Inc.*, 89 F.4th 1217, 1222–24 (9th Cir. 2024) (reversing denial of class certification on the grounds that the district court gave too much weight to a "smattering of examples"); *Ruiz Torres v.*

[4] The defendants insist (at 17, 46–47) that they, in fact, supplied the district court with "a few representative examples" of the individualized defenses they intended to present, and they fault the court for giving those examples too little weight. But as the plaintiffs explain in their brief (at 57–59), the only evidence the defendants could muster concerned the consumer class, not the RICO class. And it didn't even show that the relevant prescribers were indifferent to Actos's bladder cancer risk.

Mercer Canyons Inc., 835 F.3d 1125, 1136–37, 1137 n.5 (9th Cir. 2016) (identification of two examples of "fortuitous non-injury" does not defeat certification). Indeed, the defendants may well never do so. As the defendants conceive of their defense, at a minimum, it would entail identifying all the physicians who wrote prescriptions a particular third-party payor paid for; deposing each of those physicians; and asking each to recollect the reasons why they wrote Actos prescriptions more than *two decades ago*. That is a tall order. It is not surprising that the defendants declined to make such a showing before the district court, and the court wasn't required to assume that they would do so as the litigation progressed.

The defendants complain (at 47) that this approach forces a defendant to "collect and introduce at the certification stage" all of the evidence on which it might eventually rely. Not so. The rule is that the defendant must muster *some* evidence. The defendants simply chose not to do so here.

B. And if a defendant declines to make such a showing at class certification, it is hardly out of luck. Rule 23 contemplates this exact situation in permitting the district court to exercise its discretion as the class litigation develops. If the evidence, as it unfolds before the court, eventually "shows that a defense is likely to bar claims against at least some class members," the court has many management options at its disposal. *Bridging Cmtys.*, 843 F.3d at 1126; *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 39–40 (1st Cir. 2003). It can "place class members with potentially barred claims

in a separate subclass." *Bridging Cmtys.*, 843 F.3d at 1126; *see also Butler*, 727 F.3d at 801; *Smilow*, 323 F.3d at 39–40. It can "exclude them from the class altogether." *Bridging Cmtys.*, 843 F.3d at 1126. It can "winnow out [] non-injured class members at the damages phase of the litigation." *Ruiz Torres*, 835 F.3d at 1137. And, of course, if litigating a defense becomes unmanageable, the court can always *decertify* the class. *See Young*, 693 F.3d at 544.

For this reason, the defendants and their amici are mistaken when they complain that the district court's decision will somehow "turn every drug-labeling dispute" into a RICO class action that threatens such "colossal liability" that defendants are forced to settle. *See* Defs.' Br. at 19. RICO defendants in fact have many options at their disposal. If they, in fact, have meaningful individualized defenses on causation, they can do what the defendants declined to do here and develop, at class certification, evidence of their contemplated defenses to illustrate to the district court how they will unfold. Or, if the defendants are unable to make such a showing, they can develop one following class certification, and invite the district court to narrow or decertify the class at that juncture.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

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 5,080 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 reply brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font.

/s/ Matthew W.H. Wessler
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