No. 14-577

IN THE
Supreme Court of the United States

CARPENTER CO., ET AL.,

Petitioners,

v.

ACE FOAM, INC., ET AL., individually and on behalf of all others similarly situated,

and

GREG BEASTROM, ET AL., individually and on behalf all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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Pursuant to Supreme Court Rule 15.8, Petitioners respectfully submit for the Court's consideration the First Circuit's recent decision in *In re Nexium Antitrust Litigation*, Nos. 14-1521, 14-1522, — F.3d —, 2015 WL 265548 (1st Cir. Jan. 21, 2015), which deepens the conflict in the courts of appeals over whether the standing requirements of Article III apply to all members of a certified class, and over the impact of individualized damages issues on Rule 23(b)(3)'s predominance requirement after *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013). As *Nexium* demonstrates, this Court's guidance is urgently needed to resolve these important and persistent conflicts on issues that impact countless class actions but continue to evade this Court's review.

I. THE FIRST CIRCUIT'S DECISION IN *NEXIUM* DEEPENS THE ENTRENCHED SPLIT OVER WHETHER ABSENT CLASS MEMBERS MUST HAVE ARTICLE III STANDING.

The courts of appeals are sharply divided over whether all class members must satisfy the standing requirements of Article III. The Second, Eighth, Ninth, and D.C. Circuits have held that all class members, including absent class members, must have standing to have their claims adjudicated by a federal court, and thus must have suffered an injury fairly traceable to the defendant's conduct. *Denney* v. *Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006); *Halvorson* v. *Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013); *Mazza* v. *Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012); *In re Rail*

Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252 (D.C. Cir. 2013). By contrast, the Third, Seventh, and Tenth Circuits have all held that absent class members do not need to satisfy the standing requirements of Article III. *Krell* v. *Prudential Ins. Co. of Am.*, 148 F.3d 283, 306–07 (3d Cir. 1998); *Kohen* v. *Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 676–77 (7th Cir. 2009); *DG ex rel. Stricklin* v. *Devaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010). Accordingly, in those jurisdictions, classes certified under Rule 23 may include persons who have suffered no injury at all.

In *Nexium*, a divided panel of the First Circuit joined those courts of appeals that have exempted absent class members from Article III's constitutional requirements. In affirming certification of a class that indisputably contained uninjured persons, the First Circuit rejected the defendants' argument that "because each putative class member has not suffered injury, the class does not have standing." *Nexium*, 2015 WL 265548, at *17. As with the certification order here, the First Circuit based its decision on the Seventh Circuit's conclusion in *Kohen* that "'as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied.'" *Ibid.* (alteration omitted) (quoting *Kohen*, 571 F.3d at 676). The court thus held that standing was "establish[ed]" because it was "undisputed that the named plaintiffs have shown that they were overcharged for at least one Nexium transaction during the class period." *Ibid.* The First Circuit also cited with approval the Third Circuit's decision in *Krell* and the Tenth Circuit's de-

cision in *Stricklin*, *ibid.*, deepening the conflict with the Second, Eighth, Ninth, and D.C. Circuits.

The First Circuit blessed certification of class actions containing "uninjured parties" so long as the number of uninjured class members is purportedly less than an arbitrary "de minimis" threshold. *Nexium*, 2015 WL 265548, at *2; *see also id.* at *20 (Kayatta, J., dissenting) (criticizing majority's "de minimis" uninjured class members reasoning; "If 2.4% is okay, why not 5.7%? Or any number under 50%?"). Again agreeing with the Seventh Circuit's decision in *Kohen*, the court attempted to justify its holding on the ground that it is "'almost inevitable'" that "'a class will often include persons who have not been injured by the defendant's conduct.'" *Id.* at *11 (majority opinion) (quoting *Kohen*, 571 F.3d at 677).

Although the First Circuit acknowledged that "[s]ome circuits have suggested" that "each and every member of the class" must have standing, *Nexium*, 2015 WL 265548, at *17 & n.27 (citing *Denney*, 443 F.3d at 263–64, and *Halvorson*, 718 F.3d at 778), it did not meaningfully grapple with those decisions. Instead, the court flatly rejected the defendants' "objections to certifying a class including uninjured members" as running "counter to fundamental class action policies." *Id.* at *9.

The First Circuit's decision in *Nexium*, like the decisions of several other courts of appeals, has thus sanctioned the manipulation of the class action procedural device to impermissibly dispense with the "irreducible constitutional minimum of standing." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also Amchem Prods., Inc.* v. *Windsor*, 521

U.S. 591, 613 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints . . . ."). The Court should grant review to resolve this pressing conflict and restore proper constitutional limits to class action litigation.

II. *NEXIUM* ADDS TO THE GROWING CONFUSION AND CONFLICT OVER THE IMPACT OF DAMAGES ISSUES ON RULE 23(B)(3)'S PREDOMINANCE REQUIREMENT POST-*COMCAST*.

This Court held in *Comcast* that "[q]uestions of individual damage calculations" can preclude a finding that common issues predominate. 133 S. Ct. at 1433. The Tenth and D.C. Circuits have faithfully applied this holding and recognized that damages issues are relevant to assessing whether Rule 23(b)(3)'s predominance requirement is satisfied. *Wallace B. Roderick Revocable Living Trust* v. *XTO Energy, Inc*., 725 F.3d 1213, 1220 (10th Cir. 2013); *Rail Freight*, 725 F.3d at 252–53. Yet notwithstanding *Comcast*, the Fifth, Sixth, Seventh, and Ninth Circuits continue to treat damages issues as irrelevant to the predominance requirement. *In re Deepwater Horizon*, 739 F.3d 790, 798–802 (5th Cir.), *cert. denied*, 135 S. Ct. 754 (2014); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig*., 722 F.3d 838, 860–61 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); *Butler* v. *Sears, Roebuck & Co*., 727 F.3d 796, 801–02 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); *Leyva* v. *Medline Indus. Inc.*, 716 F.3d 510, 513–14 (9th Cir. 2013).

The First Circuit in *Nexium* flatly ignored this Court's holding in *Comcast*, claiming it was a "black letter rule . . . that individual damage calculations

generally do not defeat a finding that common issues predominate." 2015 WL 265548, at *8 (alteration in original) (internal quotation marks omitted). The First Circuit also cited with approval the flawed "understanding" of *Comcast* applied by the Fifth, Seventh, and Ninth Circuits in *Deepwater Horizon*, *Butler*, and *Leyva*, respectively, *id.* at *5 n.15, and deepened the conflict with the Tenth and D.C. Circuits.

The First Circuit's failure to follow *Comcast* adds to the substantial confusion and conflict over the relevance of individualized damages issues to Rule 23(b)(3)'s predominance requirement. The courts of appeals continue to undermine this Court's efforts in *Comcast* to establish uniformity on this important question of class certification law. The Court should grant review to make clear that Rule 23(b)(3) does not authorize courts to ignore individualized damages issues.

III. THE COURT SHOULD RESOLVE THESE CONFLICTS NOW.

This case—which is likely the largest class action ever certified—provides the Court with the perfect opportunity to resolve these two entrenched conflicts on important issues that continue to vex the lower courts, but have so far evaded this Court's review.

Although the *Nexium* case implicates these same issues, it is highly unlikely that the defendants will seek review from this Court because a jury has found them not liable. *Nexium*, 2015 WL 265548, at *2 n.8. Indeed, after prevailing at trial, the defendants moved to dismiss the appeal of the class certification order, but the First Circuit denied the motion and issued its opinion. *See In re Nexium Antitrust Litig.*,

Nos. 14-1521, 14-1522, — F.3d —, 2015 WL 321818 (1st Cir. Jan. 21, 2015).

Nexium demonstrates that class certification orders are likely to evade this Court's review, even in the rare circumstance when a certified class proceeds to trial. *See, e.g.*, *Hughes* v. *Kore of Ind. Enter., Inc.*, 731 F.3d 672, 676 (7th Cir. 2013) (noting that it is a "rare case in which a class action not dismissed pretrial goes to trial rather than being settled"); *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 17 n.20 (1st Cir. 2005) ("Very few class actions go to trial.").

As *Nexium* shows, this Court's guidance on this issue is needed now. And this case is the ideal vehicle for addressing these circuit splits. There are no barriers to review at this stage, as the Court unquestionably has jurisdiction, *see Dart Cherokee Basin Operating Co.* v. *Owens*, 135 S. Ct. 547, 554–58 (2014), and the Sixth Circuit has already issued a substantive order approving class certification despite the presence of uninjured class members and intractable individualized damages issues. The Court should seize the opportunity that this case presents and grant review before defendants are forced to proceed to an unnecessary and unconstitutional trial or capitulate to the immense settlement pressure created by the potential for a $9 billion damages award.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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