CASE NO. 19-15159

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE QUALCOMM ANTITRUST LITIGATION

Appeal from the United States District Court
for the Northern District of California,
Docket No. 17-md-02774-LHK,
The Honorable Lucy H. Koh, District Judge

BRIEF OF AMICI CURIAE PUBLIC JUSTICE, P.C., AMERICAN ASSOCIATION FOR JUSTICE, AND THE OPEN MARKETS INSTITUTE IN SUPPORT OF RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a) and 9th Cir. R. 29(4)(a), the undersigned certifies that amici curiae Public Justice, P.C., the American Association for Justice, and the Open Markets Institute (collectively, "amici") certify that they are non-profit corporations that do not have parent corporations. No publicly held corporation owns any stock in them. Amici do not have a financial interest in the outcome of this case.

CERTIFICATE OF AUTHORSHIP & CONSENT

Pursuant to Fed. R. App P. 29(a)(4)(E), amici curiae hereby certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submittal of this brief; and no person—other than amici curiae, their members, or their counsel—contributed money that was intended to fund the preparation or submittal of this brief. Pursuant to Fed. R. App. P. 29(a)(2) and 9th Cir. R. 29-2(a), amici curiae attest that all parties to this appeal have consented to the filing of this brief.

/s/ Emmy L. Levens
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Dated: August 9, 2019

INTEREST OF AMICI CURIAE

Public Justice is a national non-profit legal organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting to preserve access to justice for victims of corporate and governmental misconduct. To further this goal, Public Justice has a project devoted to preserving and protecting the class action device, which it sees as a crucial tool for justice. Class actions make it economically possible for injured consumers, civil rights plaintiffs, and low-wage workers to pursue claims for wrongs that would otherwise go unremedied.

The American Association for Justice ("AAJ") is a national, voluntary, non-profit 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. Throughout its more than seventy-year history, AAJ has served as the world's largest plaintiff trial bar and a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

The Open Markets Institute is a non-profit organization dedicated to promoting fair and competitive markets whose mission is to safeguard our political economy from concentrations of private power that undermine competition and threaten liberty, democracy, and prosperity. The Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

INTRODUCTION AND SUMMARY OF ARGUMENT

Qualcomm and its amici adopt a "sky-is-falling" approach to this case, arguing that the district court erred in certifying this indirect purchaser antitrust class action because (they contend) California law cannot legally be applied to class members in other states; the class is riddled with individualized issues of fact; and the class size renders it inherently unmanageable. Stripped of hyperbole, these arguments amount to nothing more than disagreement with the district court's decision, which is insufficient to show an abuse of discretion.

Turning **first** to choice-of-law, the district court properly determined that California's antitrust law can be applied to all members of this nationwide class—a fact that eliminates choice-of-law issues that have proven fatal to some nationwide classes in other contexts. Unlike *Mazza v. American Honda Motor Co.*, 666 F.3d 581, 593 (9th Cir. 2012), this case involves anticompetitive conduct that was committed entirely in California by a corporation headquartered in this state. That being so, it made perfect sense—and was perfectly correct—for the district court to hold that this entire case is governed by California law—a fact that greatly simplifies issues of liability.

Second, the district court's certification order was based on an exhaustive review of the substantial record Respondents submitted, which demonstrated that "common questions predominate overall and with regard to all three elements [of an

antitrust claim:] antitrust violation, antitrust impact, and damages." *In re Qualcomm Antitrust Litig.*, 328 F.R.D. 280, 296 (N.D. Cal. 2018). Neither Qualcomm nor its amici dispute the lower court's conclusion that the heart of the case—whether Qualcomm's conduct constituted an antitrust violation—presents a common question of law and fact that predominates over other issues. Instead, their predominance challenge focuses on whether the calculation of damages presents individual issues. As Respondents explain, however, that argument fails as a matter of fact. But even if it did not, it is well established in this Circuit (and elsewhere) that the existence of individualized damages issues does *not* defeat predominance under Federal Rule 23.

Third, the contention that a class of this size is "inherently unmanageable" is wrong as a matter of law *and* fact. Qualcomm's and its amici's arguments on this score all suffer from a fatal legal defect: they assume, wrongly, that class action manageability should be evaluated in a vacuum, without regard to any of the other superiority criteria of Rule 23(b)(3)— including whether the claims are sufficiently large to support binary litigation.

That crabbed approach to manageability is not only contrary to the plain language of Rule 23(b)(3), it also runs directly contrary to the core purposes of Rule 23: to allow aggregate litigation against wrongdoing defendants who have harmed a large number of people in amounts insufficient to support individual lawsuits. *See*

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997). Indeed, this is exactly the kind of case the class action device was intended to make possible: a case where (1) the defendant committed widespread wrongdoing; (2) liability can be determined on a class-wide basis; (3) damages are largely uniform and, to the limited extent they differ, can readily be sorted out at the remedial phase; and (4) the individual claims are too small to support binary litigation. Under these circumstances, not only is a class action a superior form of adjudication, but a class action is the *only* realistic form of adjudicating plaintiffs' injuries.

That alone weighs in favor of a finding of superiority, regardless of any possible manageability concerns. But there is no reason to believe that this case will present intractable manageability problems. As the district court found, Respondents provided overwhelming evidence that antitrust liability, impact, and damages can be determined using common, class-wide evidence. The size of the class is immaterial given that all these issues are susceptible to common evidence. Qualcomm's and its amici's rhetoric cannot disguise this central fact.

At bottom, what Qualcomm and its amici really want is immunity for corporate misconduct that has harmed millions of consumers nationwide. But prior to certifying this class, the district court took a long, hard look at the facts and the law and found that this class satisfies the certification criteria of Rule 23. That decision was well within the lower court's discretion and should not be disturbed.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion in Applying California Law to a California Corporation for Conduct That Occurred in California.

Qualcomm and its amici agree that, under applicable choice-of-law rules, Qualcomm has the burden of rebutting the presumption that California law applies to this nationwide class. *Wash. Mut. Bank, FA v. Super. Ct. of Orange Cty.*, 15 P.3d 1071, 1080-81 (Cal. 2001). Nor is there any disagreement that there is a material difference between the laws of "non-repealer" states such as Louisiana and Texas, which follow the federal rule in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (limiting standing to "direct purchasers" injured by anticompetitive conduct), and "repealer" jurisdictions like California that have rejected *Illinois Brick* (allowing indirect purchasers to recover).

The dispute here centers on part two of the choice-of-law test: whether non-repealer states have a sufficiently strong interest in applying their laws to create a "true conflict" of law with California. As explained below, the district court did not abuse its discretion in holding that they do not.

A. California Has a Strong Interest in Holding California Businesses Accountable.

To begin, California has a powerful interest in holding California businesses like Qualcomm accountable for anticompetitive conduct that takes place in California. California recognizes that "with respect to regulating or affecting

conduct within its borders, the place of the wrong has the predominant interest." *Hernandez v. Burger*, 102 Cal. App. 3d 795, 796 (Ct. App. 1980). The "place of the wrong" is *not* synonymous with the place of injury. Rather, it is the "state where the last event necessary to make the actor liable occurred" that matters. *Mazza*, 666 F.3d at 593.

Qualcomm's and its amici's argument that the "place of the wrong" is the place of injury, where class members *purchased* cellphones from third parties, is incorrect. While Plaintiffs may have felt the effects of Qualcomm's wrongful conduct outside of California, all of Qualcomm's *relevant anticompetitive conduct* occurred in California: Qualcomm devised its anticompetitive scheme in California, negotiated its anticompetitive licenses in California, extracted unlawful royalty payments in California, made anticompetitive business decisions in California, and extracted unlawful profits in California. *See* Pls.' Consol. Class Action Compl. at 48-49, *In re Qualcomm Antitrust Litig.*, No. 5:17-md-02773-LHK (N.D. Cal. July 11, 2017), ECF No. 94 (hereinafter "Pls.' Consol. Compl."). This is precisely the kind of situation where California law can and should be applied to injured parties across the country.[1]

[1] *See In re Yahoo Mail Litig.*, 308 F.R.D. 577, 602 (N.D. Cal. 2015) (concluding application of California law was constitutionally permissible where defendant's corporate headquarters was in California, defendant's decision makers were largely in California, and the processes at issue were developed and directed in California); *Rutledge v. Hewlett-Packard Co.*, 238 Cal. App. 4th 1164, 1187-88 (Ct.

Mazza is readily distinguishable. There, Honda misrepresented characteristics of a braking system in marketing materials provided to dealerships across the United States. *Mazza*, 666 F.3d at 586. In analyzing the "place of the wrong," the Court held that the last event necessary to make Honda *liable* took place in the states where the actual marketing occurred, i.e., where plaintiffs were subjected to marketing and subsequently purchased/leased cars. *Id.* at 593-94. Unlike in *Mazza*, Qualcomm did not advertise its products across the United States or otherwise conduct business in other states. Rather, Qualcomm's illegal "no license-no chips" policy and its unreasonable licensing terms were established and enforced *in California*, making California the place of the wrong.

Mazza also turned on crucial differences between California law and consumer laws in other states—differences that went directly to core issues of liability and damages. *See id.* at 591 (explaining that "[i]n its briefing, Honda exhaustively detailed the ways in which California law differs from the laws of the 43 other jurisdictions in which class members reside").

Particularly important was the fact that "the California laws at issue here have no scienter requirement, whereas many other states' consumer protection laws do require scienter." *Id.* California "also requires named plaintiffs to demonstrate

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App. 2015) (reversing denial of certification of nationwide class of consumers who bought computers from a California company, because the defendant's wrongful conduct took place *in* California).

reliance, while some other states' consumer protection statutes do not." *Id.* (citations omitted). *Mazza* emphasized that "these are not trivial or wholly immaterial differences." *Id.* To the contrary, they spell the difference "between the success and failure of the claim." *Id.* None of these issues are present here—a fact that Qualcomm and its amici conveniently ignore.

DOJ nonetheless insists that California's interests "cannot reasonably extend to compensating consumers who both resided and suffered harm elsewhere." DOJ Br. at 19, June 10, 2019, ECF No. 18. Not so. California courts have repeatedly held that California law would apply to both in-state and out-of-state consumers where harm was done by a California company engaged in wrongful conduct *in California*. *E.g.*, *Clothesrigger, Inc. v. GTE Corp.*, 191 Cal. App. 3d 605, 613 (Ct. App. 1987).[2]

This understanding of California law makes particular sense in light of the Cartwright Act's main goal: to deter anticompetitive behavior. *Clayworth v. Pfizer*, 233 P.3d 1066, 1083 (Cal. 2010). The California Supreme Court has held that the purpose of the Cartwright Act is the deterrence of anticompetitive behavior and "private treble damages are designed to serve [this] high purpose." *Id.* Applying California law to the anticompetitive conduct in this case advances the Cartwright

[2] *See also Nw. Mortg., Inc. v. Super. Ct. of San Diego Cty.*, 72 Cal. App. 4th 214, 224-25 (Ct. App. 1999) (holding that California's "statutory remedies may be invoked by out-of-state parties when they are harmed by wrongful conduct occurring in California.").

Act's "overarching goals of maximizing effective deterrence of antitrust violations, enforcing the state's antitrust laws against those violations that do occur, and ensuring disgorgement of any ill-gotten proceeds." *Id.* at 1070.[3]

At its core, DOJ's insistence that California has no legitimate interest in applying its laws to this class reflects a fundamental hostility to how California has chosen to regulate its resident businesses. DOJ's references to federalism fail to appreciate the hypocrisy inherent in the federal government attempting to weigh in on whether one state's laws should apply over another—that determination appropriately relies on *state* choice-of-law rules, not the DOJ's preferences. Moreover, DOJ's purported deference to other states' ability "to calibrate liability to foster commerce," DOJ Br. at 23 (citing *Mazza*, 666 F.3d at 593), fails to account for the fact that imposing liability on Qualcomm for its activities *in California* would have no impact on other states' ability to "foster commerce" within *their* borders. No weight should be accorded to DOJ's arguments in favor of federalism where, as here, those arguments undermine one of the core principles of federalism: states' rights to regulate their own residents.

[3] *See also Diamond Multimedia Sys., Inc. v. Super. Ct. of Santa Clara Cty.*, 968 P.2d 539, 557 (Cal. 1999) ("California also has a legitimate and compelling interest in preserving a business climate free of fraud and deceptive practices.").

B. "Non-Repealer" States Do Not Have a Cognizable Interest in Depriving Their Citizens of Relief Under California Law.

Unlike California, "non-repealer" states do not have *any* valid interest in applying their laws to the conduct at issue in this case. When deciding whether a foreign jurisdiction's stricter damages recovery rules should apply over California's more expansive rule, California law provides that the only valid interests a foreign jurisdiction may have for applying its damages limitations are (1) to protect its *resident defendants* from excessive financial burdens or exaggerated claims; or (2) to protect defendants who have a connection to the foreign state. *Munguia v. Bekins Van Lines, LLC*, No. 11-CV-01134-LJO-SKO, 2012 WL 5198480, at *10 (E.D. Cal. Oct. 19, 2012). Where, as here, the foreign state "has no defendant residents to protect," the state "has *no* interest in denying full recovery to its residents injured by [out-of-state] defendants." *Hurtado v. Super. Ct. of Sacramento Cty.*, 522 P.2d 666, 670 (Cal. 1974) (emphasis added).[4]

Typically, states would "rather have the injuries of [their] citizens litigated

[4] *See also Marsh v. Burrell*, 805 F. Supp. 1493, 1498 (N.D. Cal. 1992) (holding "[d]amages limitations are 'intended to protect defendants from large verdicts,' not to 'limit the compensation of plaintiffs'" and that foreign state had had "absolutely no interest in applying its more liberal recovery rules . . . ." (citation omitted)); *cf. In re Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-2420 YGR, 2017 WL 1391491, at *14 (N.D. Cal. Apr. 12, 2017) (holding that where defendants resided in non-repealer states, those states had an interest in limiting their residents' exposure to antitrust liability).

and compensated under another state's law than not litigated or compensated at all." *In re Pizza Time Theatre Sec. Litig.*, 112 F.R.D. 15, 20-21 (N.D. Ca1. 1986) (finding that other states had no interest in denying recovery to their residents injured by unfair business practices emanating from California). But this case is atypical in that certain non-repealer states have joined DOJ's amicus brief in asserting an interest in applying their own laws to preclude their residents' recovery against an out-of-state defendant. These assertions ring hollow.

First, Washington Legal Fund ("WLF") argues that non-repealer states have an interest in applying their own consumer protection laws to product sales occurring within those states. WLF Br. at 14, June 10, 2019, ECF No. 17. This misses the mark because state antitrust laws are dissimilar to the state consumer protection laws at issue in cases such as *Mazza*. As discussed above, key elements of consumer laws—such as scienter—do not exist under the antitrust laws. And whereas consumer protection laws may be focused exclusively on protecting resident consumers, antitrust laws seek primarily to deter the conduct of resident businesses that the state has deemed detrimental.

Second, DOJ and WLF incorrectly focus on the point-of-purchase transactions between consumers and third-party cell phone vendors to justify another state's interest. These third-party cellphone vendors are not resident claimants—they face no potential liability, nor could they recover damages in this matter. As a result,

their interests are not implicated by this suit.

Finally, DOJ and WLF argue that non-repealer states have an interest in applying their antitrust laws to ensure a "favorable business climate" for out-of-state businesses. *Id*. at 16. This argument does not hold up under scrutiny. This case concerns anticompetitive conduct committed by a *California* business *in California*. As a result, applying California law to Qualcomm will not have any impact on the "business climates" of non-repealer states.[5] There is no suggestion that Qualcomm conducted extensive business—or, indeed, *any* business—in non-repealer states. Rather, Qualcomm chose to incorporate itself in California and then violated California law. Qualcomm cannot now seek refuge under the laws of other states.[6]

[5] This fact readily distinguishes the only case cited by WLF on this point: *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 529 (Cal. 2010). *See* WLF Br. at 17. In *McCann*, the defendant was headquartered in New York but had contracted with, shipped to, and provided advice regarding the installation of its boiler to an Oklahoma business. Because the defendant had "conduct[ed] business in the state" that, it asserted, had an interest in applying its laws (Oklahoma), the forum court held that Oklahoma had a valid interest in its laws applying to the case. *McCann*, 225 P.3d at 529-30.

[6] Because neither Qualcomm nor its supporting amici established a valid interest in non-repealer states applying their laws, the district court was correct to end its analysis after step two and apply California law. *See Abogados v. AT&T, Inc.*, 223 F.3d 932, 934 (9th Cir. 2000) ("If only one jurisdiction has a legitimate interest in the application of its rule of decision, there is a false conflict and the law of the interested jurisdiction is applied." (citation and internal quotation marks omitted)); *Hurtado*, 522 P.2d at 669-71.

II. The District Court Did Not Abuse Its Discretion in Finding That Individualized Damages Issues Do Not Defeat Predominance.

Nor did the district court abuse its discretion in finding that common issues predominate over individual issues of fact and law. As the district court found, Qualcomm's arguments on this issue are wrong as a matter of fact, because Plaintiffs "have provided a damages model that fits Plaintiffs' theory of liability and can measure damages across the entire class." *In re Qualcomm Antitrust Litig.*, 328 F.R.D. at 314; *see also* Resp'ts Answering Br. at 20-44, Aug. 2, 2019, ECF No. 81. But even if there were individualized damages questions in this case, that fact would not preclude class certification, because satisfying "predominance" does not require that all issues of fact and law be determined *exclusively* on a class-wide basis. To the contrary, Rule 23 expressly assumes the presence of some individual issues.

Rule 23(b)(3) does not even require a plaintiff seeking class certification to prove that each "elemen[t] of her claim [is] susceptible to classwide proof." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 468-69 (2013). Rather, as the Supreme Court recently explained, Rule 23 requires the court to engage in a balancing test to assess the relative import of issues that can be determined on a class-wide basis versus those that must be determined individually. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) ("[t]he predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'"

(quoting W. Rubenstein, *Newberg on Class Actions* § 4:49 (5th ed. 2012))).

As this Circuit recently explained, even if "just one common question predominates, 'the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately.'" *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 557 (9th Cir. 2019) (quoting *Tyson Foods*, 136 S. Ct. at 1045). In this way, predominance merely "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation[;]" it does *not* limit class adjudication to classes presenting no individual variation. *Amchem*, 521 U.S. at 594, 623.

Thus, the need for individualized damages determinations does not defeat predominance. *Hyundai*, 926 F.3d at 550; *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013). Nearly every circuit to have considered the question agrees. *See, e.g.*, *Comcast Corp. v. Behrend*, 569 U.S. 27, 42 (2013) (Ginsburg, J. & Breyer, J., dissenting) ("[r]ecognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal").[7]

[7] *See also Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 988-89 (11th Cir. 2016); *Day v. Celadon Trucking Servs., Inc.*, 827 F.3d 817, 834 (8th Cir. 2016); *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 374-75 (3d Cir. 2015); *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 408 (2d Cir. 2015); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 21 (1st Cir. 2015); *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1255 (10th Cir. 2014); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013); *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564 (6th Cir. 2007); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 428 (4th Cir. 2003).

Nor does the potential existence of individual damages issues deprive Qualcomm of its ability to raise defenses. The U.S. Chamber of Commerce's (the hereinafter "Chamber") and WLF's reliance on *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 366-67 (2011), is misplaced. Unlike in *Wal-Mart*, where plaintiffs intended to demonstrate *liability* by sampling class members to determine whether adverse employment decisions were on account of gender, *see id.*, the legality of the conduct challenged here—Qualcomm's royalty charges and related policies—is indisputably common to all class members.

Finally, the implication from Qualcomm and its amici that assessing class members' damages in this case would be impossible should be rejected. To determine class members' individual damages here—as in any indirect purchaser suit—Plaintiffs will need to show that, as a result of Qualcomm's anticompetitive conduct, Qualcomm was able to charge more for its chips than it otherwise would have. This overcharge would represent direct purchasers' damages. Plaintiffs would then be required to demonstrate whether, and how much, of that overcharge was "passed on" to consumers. Edward K. Cheng et al., *Modern Scientific Evidence: The Law & Science of Expert Testimony* § 43:37 (2018). This analysis is conducted in each and every indirect purchaser suit. As demonstrated in Qualcomm's vigorous attack of Professor Flamm's analysis here, defendants can, and often do, challenge various aspects of this economic analysis. But procedures exist for determining

whether Plaintiffs have satisfactorily proved these damages: Qualcomm may challenge the appropriateness of Plaintiffs' expert testimony, the Court will have an opportunity to determine whether triable issues of material fact exist as to damages, and ultimately a jury will decide whether Plaintiffs' analysis is credible. Qualcomm's amici's implication that the calculation of damages in these cases is, by definition, impossible and thus certification inappropriate, should be rejected.

III. The District Court Did Not Abuse Its Discretion in Finding the Superiority Requirement Was Met.

A. Qualcomm and Its Amici Fail to Understand That Rule 23(b)(3)'s Superiority Requirement Is a Balancing Test.

Qualcomm and its supporting amici argue that size alone renders this class "unmanageable" and, as a consequence, that the district court abused its discretion in finding that the superiority requirement is met. Setting aside the policy implications of this argument for a moment, it fails as a matter of law.

First, this argument ignores that superiority is a balancing test. *See Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1128 (9th Cir. 2017) (affirming the "well-settled presumption that courts should not refuse to certify a class merely on the basis of manageability concerns." (citation omitted)).

As the leading treatise on class actions explains, courts must compare the manageability of a class suit to the alternative:

> the manageability inquiry is, importantly, part of the superiority inquiry. What that means is that the question

> that courts consider when they analyze manageability is not whether a class action is manageable in the abstract but how the problems that might occur in managing a class suit compare to the problems that would occur in managing litigation without a class suit. In other words, the manageability inquiry is a comparative one.

Rubenstein, *supra*, § 4:172.

In conducting that comparative analysis, the district court found (among other things) that absent a class action, the plaintiffs would have no remedy at all, because "the amount at stake for each individual class member is too small to bear the risks and costs of litigating a separate action." Pls.' Consol. Compl. at 60. That alone is a powerful basis for finding that the superiority requirement is met.

Qualcomm and its amici do not argue that the district court applied an incorrect legal rule in its superiority analysis. Nor do they identify any illogical or implausible factual findings in the district court's superiority analysis, as is required to establish an abuse of discretion. *See Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1164 (9th Cir. 2014); *Leyva*, 716 F.3d at 513.

Instead, Qualcomm and its amici focus exclusively on "manageability" concerns, with no regard to other possible means of adjudication. This blindered approach to manageability is *exactly* what this Court has forbidden. *See Leyva*, 716 F.3d at 515 (finding abuse of discretion where district court denied class certification on manageability concerns without "suggest[ing] any other means for putative class members to adjudicate their claims"); *Local Joint Exec. Bd. of Culinary/Bartender*

Tr. Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1163 (9th Cir. 2001) (finding class action superior method of adjudication because "[i]f plaintiffs cannot proceed as a class, some—perhaps most—will be unable to proceed as individuals because of the disparity between their litigation costs and what they hope to recover").[8]

Second, considering manageability in a vacuum undermines the purpose of class actions. The Supreme Court has explained, "[t]he 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." *Amchem*, 521 U.S. at 617 (citation omitted). Class action litigation "solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Id.* (citation omitted).[9]

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[8] *See also Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1358 (11th Cir. 2009) ("[W]e are not assessing whether this class action will create significant management problems, but instead determining whether it will create relatively more management problems than any of the alternatives." (quoting *Klay v. Humana, Inc.*, 382 F.3d 1241, 1273 (11th Cir. 2004))).

[9] *See also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available."); *Deposit Guar. Nat'l Bank. v. Roper*, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603, 608 (N.D. Cal. 2009) ("Class actions play an important role in the

Here, as the district court found, no viable alternative exists for class members to adjudicate their claims. Decertification would leave class members unremedied and Qualcomm undeterred. This result would make no sense, which is exactly why the plain language of Rule 23—along with decades of legal precedent at every level including the Supreme Court—prohibits considering manageability in a vacuum.

B. This Class Is Not "Too Big to Certify."

Qualcomm's amici repeatedly argue that this "unmanageably vast" class is essentially too big to certify. Chamber Br. at 5, June 10, 2019, ECF No. 16.[10] They offer no support for this assertion. That is no surprise, because it is directly contradicted by the plain language of Rule 23, which sets a numerical *floor*—not a ceiling—for class size. *See* Fed. R. Civ. P. 23(a)(1) (providing that, for a class to be certified, it must be "so numerous that joinder of all members is impracticable").

Judge Posner soundly rejected a nearly identical "too big to certify" argument regarding class size and manageability, explaining:

> That is no argument at all. The more claimants there are, the more likely a class action is to yield substantial economies in litigation. It would hardly be an

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private enforcement of antitrust actions. For this reason courts resolve doubts in these actions in favor of certifying the class." (citing *In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 350 (N.D. Cal. 2005))).

[10] WLF describe the case as a "gargantuan proceeding," of "massive scope," with "unprecedented size and complexity." WLF Br. at 28, 30. The Chamber deems the class to be "hopelessly unmanageable" and that "[i]f this class is not too large, then no class ever could be too large." Chamber Br. at 19, 22.

> improvement to have in lieu of this single class action 17 million suits each seeking damages of $15 to $30 . . . . 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.

Carnegie v. Household Intern., Inc., 376 F.3d 656, 660-61 (7th Cir. 2004) (certifying a class of approximately 17 million loan recipients in a RICO suit against banks and tax preparers).

The argument that a class of millions is inherently unmanageable fails for many additional reasons. Common legal and factual issues are just as easily determined for a class of 100 as for a class of 250 million. Moreover, as the district court found, damages are susceptible to common proof, rendering class size a non-issue. (And, as discussed above, should damages calculations require individualized analysis, this fact alone is insufficient to defeat class certification.)

There is nothing novel about a class consisting of millions of members. Courts across the country have certified litigation classes consisting of all purchasers of televisions, e-books, and foam products including mattresses, pillows, and other items found in nearly every American household.[11] Just weeks before the filing of

[11] *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 3:07-cv-05944-JST (N.D. Cal. Sept. 24, 2013), ECF No. 1950; *In re Elec. Books Antitrust Litig.*, No. 1:11-md-02293-DLC (S.D.N.Y. Mar. 28, 2014), ECF No. 585; *In re Polyurethane Foam Antitrust Litig.*, No. 1:10-md-02196-JZ (W.D. Ohio Nov. 17, 2014), ECF No. 1408; *see also In re Optical Disc Drive Prods. Antitrust Litig.*, No. 3:10-md-02143-RS (N.D. Cal. Feb. 8, 2016), ECF No. 1783 (end purchasers of optical disc drives); *In re Disposable Contact Lens Antitrust Litig.*, No. 3:15-md-02626-HES-JRK (M.D.

this brief, the Southern District of California certified a litigation class representing all end-purchasers of packaged seafood products. *See* Order Granting Class Certification at 47, *In re Packaged Seafood Products Antitrust Litig.*, No. 15-MD-2670 JLS (MDD) (S.D. Cal. July 30, 2019), ECF No. 1931 ("[c]ommon sense indicates that the Class will be large and geographically widespread based on the 'sale of **billions of units**' throughout the states in the Class definition" (emphasis added) (citation omitted)). Like here, these products were sold to tens, even hundreds of millions of consumers nationwide. But what is shocking about these cases is not the "massive" size of the class but rather the massive scope of defendants' wrongdoing.

Likewise, there are numerous instances in which very large settlement classes have been certified.[12] While a settlement class need not demonstrate its

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Fla. Dec. 4, 2018), ECF No. 940 ("tens of millions" of contact lens purchasers); *Edwards v. Nat'l Milk Producers Fed'n*, No. 4:11-cv-04766-JSW (N.D. Cal. Sept. 16, 2014), ECF No. 266 (46 million milk purchasers); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. 4:07-md-01819-CW (N.D. Cal. Nov. 25, 2009), ECF No. 903 (certifying a litigation class of 60-80 million indirect purchasers).

[12] *See, e.g.*, Order Granting Prelim. Settlement Approval at 5, *Berry v. LexisNexis Risk & Info. Analytics Grp., Inc.*, No. 3:11-cv-00754-JRS (E.D. Va. Sept. 5, 2014), ECF No. 127 (certifying a settlement class of **200 million consumers**); Order Granting Final Settlement Approval at 7, *In re Domestic Airline Travel Antitrust Litig.*, No. 15-mc-01404-CKK (D.D.C. May 13, 2019), ECF No. 374 (settlement class of **100 million** members); Pls.' Mot. for Final Settlement Approval at 23, *Clark v. Experian Info. Sols., Inc.*, No. 3:16-cv-00032-MHL (E.D. Va. Jan. 5, 2019), ECF No. 140 (**20 million consumers**).

"manageability" for a potential *trial*, the other criteria for class certification must all be met. *See Amchem*, 521 U.S. at 60 (explaining that to satisfy a Rule 23 "request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial," however, the "other specifications of the Rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context").

And to the extent technological advances have allowed persons and entities to reach an extremely large number of people very quickly, many of these same advances can cause harm to an extremely large number of people in a short amount of time. The recent emergence of data breach consumer cases provides a perfect example. The value of most class members' claims for a data breach are likely small. But the number of individuals affected by a data breach is quite large.[13]

[13] *See, e.g.*, Order Granting Prelim. Settlement Approval at 4, *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 5:16-md-02752-LHK (N.D. Cal. July 20, 2019), ECF No. 390 (**194 million**); Order Granting Prelim. Settlement Approval at 2, *In re Equifax, Inc. Customer Data Sec. Breach Litig.*, No. 1:17-md-02800-TWT (N.D. Ga. July 22, 2019), ECF No. 742 (**147 million**); Order Granting Final Settlement Approval at 4, *In re Target Corp. Customer Data Sec. Breach Litig.*, No. 0:14-md-02522-PAM (D. Minn. Nov. 17, 2015), ECF No. 645 (certifying a settlement class of millions and stating that "[c]lass notice reached more than **80 million** people"); Order Granting Prelim. Settlement Approval at 3, *In re Anthem, Inc. Data Breach Litig.*, No. 5:15-md-02617-LHK (N.D. Cal. Aug. 25, 2017), ECF No. 903 (class "comprised of approximately **79 million** individuals"); Order

Incentivizing companies to safely maintain sensitive data is critically important and yet, absent a class action, many of these companies would not face liability and affected class members would be left with no realistic recourse. For these important reasons, class size alone is not determinative of Rule 23's superiority analysis.

C. Rule 23's Requirements Do Not Include an Analysis of the Impact of Class Certification on Settlement.

Qualcomm and its amici also argue that the size of its class creates undue pressure to settle, rendering class certification improper even if the class meets the requirements of Rule 23. *See, e.g.*, Chamber Br. at 4 (arguing that "with a class this large, Qualcomm would almost certainly have to settle to avoid ruinous liability, regardless of the merits of its individual defenses or plaintiffs' theories"). This argument ignores that current federal practice strikes a careful and appropriate balance between facilitating meritorious class actions and discouraging dubious ones. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (upholding grant of motion to dismiss implausible antitrust class action conspiracy claims); *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d. 383 (3d Cir. 2015) (affirming grant of summary judgment in price-fixing class action lacking sufficient evidence of conspiracy). The various procedural mechanisms available to defendants to

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Granting Final Settlement Approval at 4, *In re The Home Depot, Inc., Customer Data Sec. Breach Litig.*, No. 1:14-md-02583-TWT (N.D. Ga. Aug. 23, 2016), ECF No. 260 ("**tens of millions**").

challenge unmeritorious class actions explain why "blackmail" settlements are a myth not supported by empirical evidence.[14] And where, as in the case of *In re Chocolate Confectionary*, defendants prevail subsequent to an order certifying a class, class certification works to defendants' benefit, as the order has preclusive effect against all class members.

Moreover, adopting unnecessary and sweeping rules to make it difficult or impossible to certify a class out of concern that certification could pressure defendants to settle would leave class members without an effective means of redress even in cases where there has been wrongful conduct. Indeed, "while affirming certification may induce some defendants to settle, overturning certification may create similar 'hydraulic' pressures on the plaintiffs, causing them to either settle or - more likely - abandon their claims altogether." *Klay*, 382 F.3d at 1275 (citation omitted); *see also* Fed. R. Civ. P. 23(f) note (Advisory Comm. 1998). This is precisely why it is vital that class certification decisions be made on the facts and

[14] *See* Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 SEATTLE U. L. REV. 1269, 1316 (2013) ("We know of no study providing evidence that any significant number of cases lacked merit and yet recovered substantial settlements."); Allan Kanner & Tibor Nagy, *Exploding the Blackmail Myth: A New Perspective on Class Action Settlements*, 57 BAYLOR L. REV. 681, 698 (2005) ("In sum, the empirical evidence quite simply does not prove up the assertion that class certification applies hydraulic pressure on defendants to settle."); Charles Silver, *''We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1359 (2003) (citing empirical research dispelling the notion that class certification coerces settlement of meritless claims).

the law, not based on speculation about how they might influence settlement.

D. This Class Is Manageable.

In a last-gasp effort to escape class certification—and thus liability—Qualcomm and its supporting amici contend that the district court abused its discretion in finding that Rule 23(b)(3)'s superiority requirement was satisfied because Plaintiffs had not submitted a trial plan or claims administration process alongside their motion for class certification, and because the notice procedure was insufficient.

But nothing in Rule 23, this Court's precedent, or the precedent of any other federal court requires that these documents be submitted at the time of class certification.[15] For good reason. It would be highly inefficient to create a trial plan or claims administration process at the class certification stage because the parties are unlikely to know the scope of the trial (or what claims would need to be administered) until after the district court has ruled on summary judgment or a settlement has been reached. In fact, it is not uncommon in complex actions such as this for a year or more to elapse between the time of class certification and trial. A

[15] Here are but a few of the many examples of litigation classes certified without the submission of a "trial plan." *See, e.g.*, Order Granting Class Certification, *In Re Optical Disc Drive Products Antitrust Litig.*, No. 3:10-md-02143-RS (N.D. Cal. Feb. 8, 2016), ECF No. 1873 (litigation class of indirect purchasers certified with no trial plan or allocation plan submitted); Order Granting Class Certification, *Edwards v. Nat'l Milk Producers Fed'n*, No. 4:11-cv-04766-JSW (N.D. Cal. Sept. 16, 2014), ECF No. 266 (same).

grant of summary judgment in defendants' favor on fraudulent concealment could alter the relevant class period; a judgment in defendants' favor could narrow the scope of the class; or a settlement could seek to compensate (and release) a broader swath of claims than originally encompassed in a certification order—these are but a few of the events that could be relevant to creating a claims administration process.

Qualcomm and its amici should not be permitted to create from whole cloth new, nonsensical legal requirements for class certification. As this Court recently recognized, "[t]he lesson of *Amchem Products* is plain: 'Federal courts . . . lack authority to substitute for Rule 23's certification criteria a standard never adopted.'" *Briseno*, 844 F.3d at 1126 (quoting *Amchem*, 521 U.S. at 622).

Finally, with regard to notice, Respondents have ably described the legal and factual effectiveness of the notice provided in this case. Those points need not be reiterated. It does bear mentioning, however, that Qualcomm and its amici inappropriately seek to conflate Rule 23(b)(3)'s superiority requirement with Rule 23(c)(2)'s notice procedures. These subsections present independent requirements for an action to proceed as a class and serve different purposes.

As discussed herein, Rule 23(b)(3)'s superiority analysis is *comparative*—seeking to determine the best *possible* mechanism for adjudicating multiple claims. Only after making that determination and the others required to certify a class does a Court review the proposed notice under Rule 23(c)(2)(B) to ensure it is the "best

"practicable." Fed. R. Civ. P. 23(c)(2)(B) (describing the notice requirements for a case already certified under subsection (b)(3)). In trying to conflate these two provisions, Qualcomm and its amici are really trying to re-litigate an issue that has been soundly rejected by this Circuit—whether class certification requires that there must be an "administratively feasible" method for identifying class members. *See Briseno*, 844 F.3d at 1127.

But Rule 23 appropriately does not mandate that the perfect be the enemy of the good in providing notice—where, as here, common issues of law and fact predominate over individual issues and no feasible alternative exists for adjudicating victims' claims, those claims may proceed as a class so long as the best "practicable" notice is provided. Qualcomm and its amici have raised myriad arguments against the propriety of certifying this class, none of which establish that the district court committed a legal error or made a clearly erroneous factual finding and accordingly, the district court's grant of certification should be affirmed.

CONCLUSION

For the foregoing reasons, amici respectfully request that the Court affirm the district court's certification decision.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am counsel for amici curiae, Public Justice, P.C., the American Association for Justice, and the Open Markets Institute, in Ninth Circuit Case No. 17-19-15159.

I certify that the attached Brief of Amici Curiae, Public Justice, P.C., the American Association for Justice, and the Open Markets Institute, in Support of Respondents' Answering Brief was prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6), contains 6915 words, and is therefore in compliance with 9th Cir. R. 29-2(c)(2).

/s/ Emmy L. Levens
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