No. 19-8014

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

AHOLD U.S.A., INC.,

Plaintiff-Respondent,

CITY OF PROVIDENCE, individually and on behalf of itself and all others similarly situated; AMERICAN SALES COMPANY, LLC, on behalf of itself and all others similarly situated; UNITED FOOD AND COMMERCIAL WORKERS LOCAL 1776 & PARTICIPATING EMPLOYERS HEALTH AND WELFARE FUND, individually and on behalf of all others similarly situated; NEW YORK HOTEL TRADES COUNCIL AND HOTEL ASSOCIATION OF NEW YORK CITY, INC. HEALTH BENEFITS FUND, individually and on behalf of all others similarly situated; FRATERNAL ORDER OF POLICE, FORT LAUDERDALE LODGE 31, INSURANCE TRUST FUND, individually and on behalf of all others similarly situated; ELECTRICAL WORKERS 242 & 294 HEALTH & WELFARE FUND, individually and on behalf of all others similarly situated; DENISE LOY, a resident citizen of the State of Florida, individually and on behalf of all others similarly situated; MELISA CHRESTMAN, a resident citizen of the State of Tennessee, individually and on behalf of all others similarly situated; MARY ALEXANDER, a resident citizen of the State of North Carolina, individually and on behalf of all others similarly situated; PAINTERS DISTRICT COUNCIL NO. 30 HEALTH & WELFARE FUND, individually and on behalf of all others similarly situated; ROCHESTER DRUG CO-OPERATIVE, INC., on behalf of itself and all others similarly situated; TEAMSTERS LOCAL 237 WELFARE BENEFITS FUND, individually and on behalf of all others similarly situated; LABORERS INTERNATIONAL UNION OF NORTH AMERICA LOCAL 35 HEALTH CARE FUND, on behalf of itself and all others similarly situated; ALLIED SERVICES DIVISION WELFARE FUND, on behalf of itself and all others similarly situated; WALGREEN CO.; THE KROGER CO.; SAFEWAY, INC.; ALBERTSON'S, LLC; HEB GROCERY COMPANY L.P.; CVS PHARMACY, INC.; RITE AID CORPORATION; RITE AID HEADQUARTERS CORPORATION,

Plaintiffs,

v.

WARNER CHILCOTT PUBLIC LIMITED COMPANY; WARNER CHILCOTT COMPANY, LLC; WARNER CHILCOTT (US), LLC; WARNER CHILCOTT SALES (US), LLC; WATSON PHARMACEUTICALS, INC.; WATSON LABORATORIES, INC.,

Defendants-Petitioners,

WARNER CHILCOTT HOLDINGS COMPANY III, LTD.; WARNER CHILCOTT CORPORATION; WARNER CHILCOTT LABORATORIES IRELAND LIMITED; WARNER CHILCOTT COMPANY, INC.; ACTAVIS INC.; LUPIN LTD.; LUPIN PHARMACEUTICALS, INC.; ALLERGAN, PLC,

Defendants.

On Petition for Permission to Appeal from the United States District Court for the District of Rhode Island Civil Action No. 1:13-md-02472-WES-PAS (Hon. William E. Smith)

BRIEF OF WASHINGTON LEGAL FOUNDATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS' PETITION FOR PERMISSION TO APPEAL FROM ORDER GRANTING CLASS CERTIFICATION

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Dated: July 23, 2019

CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1, the Washington Legal Foundation (WLF) states that it is a non-profit corporation organized under § 501(c)(3) of the Internal Revenue Code. The National Association of Manufacturers (NAM) and the Pharmaceutical Research and Manufacturers of America (PhRMA) state that they are trade associations organized under § 501(c)(6) of the Internal Revenue Code. Neither WLF, the NAM, nor PhRMA has a parent corporation, nor have they issued any stock owned by a publicly held company.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Rules:

Miscellaneous:

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public-interest law firm and policy center with supporters in all 50 States.[1] WLF promotes and defends free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF appears frequently in this and other federal courts to oppose the certification of classes in putative class actions when Rule 23's prerequisites have not been satisfied. *See, e.g.*, *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 States. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global

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[1] Under Fed.R.App.P. 29(a)(4)(E), *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

economy and create jobs across the United States.

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a voluntary, nonprofit association of the country's leading research-based pharmaceutical and biotechnology companies. PhRMA's mission is to advocate public policies encouraging the discovery of life-saving and life-enhancing new medicines. PhRMA's member companies are devoted to inventing medicines that allow patients to live longer, healthier, and more productive lives, and have led the way in the search for new cures. Since 2000, PhRMA member companies have invested more than $600 billion in the search for new treatments and cures, including an estimated $71.4 billion in 2017 alone.

Amici are particularly concerned by the district court's decision to certify a class in which roughly one-half of the class members never purchased any products from Petitioners. The Supreme Court has repeatedly cautioned that the antitrust laws do not provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. Courts generally have denied antitrust standing to individuals who did not purchase products directly from alleged antitrust conspirators—both because, under those circumstances, any causal relationship between wrongdoing and injury is likely to be highly attenuated and because massive judicial resources are often required to determine the extent of any

relationship.

Whether antitrust liability should be extended in the manner urged by Respondent is a recurring issue but one this Court has never addressed. *Amici* urge the Court to grant the Petition and provide much needed guidance to district courts and litigants alike, particularly because extending liability in this manner poses serious risks of curbing the very sorts of pro-competitive behavior that the antitrust laws were meant to encourage.

STATEMENT OF THE CASE

The facts of this case are set out in detail in the Petition for Permission to Appeal. *Amici* wish to highlight several facts of particular relevance to the issues on which this brief focuses.

Respondent-Plaintiff Ahold USA, Inc. alleges Petitioners-Defendants (collectively, "Warner Chilcott" and "Watson") violated federal antitrust law through a series of actions intended to delay and suppress generic competition for the oral contraceptive Loestrin 24 Fe. Ahold seeks to represent a putative class of wholesalers who purchased Loestrin 24 and Minastrin (a follow-on product) directly from Warner Chilcott (the manufacturer of those products) or purchased a generic version of Loestrin 24 directly from Amneal.

Ahold alleges Petitioners' actions injured wholesalers because they paid

more to purchase their products than they would have paid in the absence of antitrust violations. Ahold contends that had generic competition begun sooner, wholesalers would have purchased a different product—less-expensive, generic Loestrin 24—in place of the brand Loestrin 24 product they did purchase; and Amneal (a non-party) would have charged less for its generic Loestrin product, known as Lomedia. Ahold's effort to recover damages from Petitioners based on sales of a distinct product manufactured by a non-party raises an important antitrust issue that has never been decided by this Court.

That issue is outcome-determinative of whether the class is properly certified. Certification of a class under Rule 23 is permissible only if "the class is so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). If the 21 wholesalers who purchased no products from Warner Chilcott are eliminated from the class, the total number of class members would be reduced from 47 to 26, thereby preventing the class from satisfying the numerosity requirement.[2]

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[2] Petitioners argue that an additional 10 wholesalers must be excluded from the class—thereby further reducing the size of the potential class to 16 members—because: (1) five class members never switched from purchasing Loestrin to purchasing lower-priced Lomedia after the latter hit the market and thus were not injured when they purchased Loestrin at a time that Lomedia was unavailable; and (2) an additional five class members are corporate affiliates of wholesalers already included in the class and thus should not be counted separately

In its Opinion and Order issued July 2, 2019 ("Op."), the district court certified Ahold's requested class. ECF 1050, Exhibit 1 to the Petition. The court concluded that the 21 "generic-only" purchasers have antitrust standing and thus are properly included in the class. Op. 24. In arriving at that conclusion, the court embraced what is often termed the "umbrella" theory of injury. Op. 25 (referring to "umbrella plaintiffs"). Antitrust violators who limit output and thereby bring about higher market prices are said to spread out a "price umbrella"—creating market conditions that might result in innocent third-party sellers choosing to charge prices higher than they would have charged in a competitive market. The district court held that the 21 generic-only purchasers have antitrust standing to recover from Petitioners the supra-competitive prices they supposedly paid to an innocent third party, Amneal. Although recognizing the existence of an additional step in the causal chain (Amneal acted independently and could set its prices at whatever level it saw fit), the court credited the testimony of Ahold's expert that Amneal charged more for Lomedia than it would have charged had Petitioners not delayed and suppressed generic competition. Op. 23-26.

The district court embraced a "general presumption" that Rule 23(a)(1)'s

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for purposes of determining numerosity. *Amici* agree with those two arguments but do not address them separately.

numerosity requirement has been satisfied if the proposed class exceeds 40 members. Op. 20. Concluding that "all forty-seven members are properly included in this class," the court rejected Petitioners' numerosity challenge to class certification. Op. 28.

SUMMARY OF ARGUMENT

The Court should grant the petition for permission to appeal the district court's class certification order. The district court premised certification on an "umbrella" theory of injury, a controversial theory of antitrust standing that has been largely rejected by four federal appeals courts and has never been addressed by this Court. Given the frequency with which the issue has arisen in antitrust litigation, district courts and litigants are in urgent need of guidance on this foundational issue of antitrust law.

The Supreme Court's decision in *FTC v. Actavis*, 570 U.S. 136 (2013), by finding that settlements of patent-infringement lawsuits involving pharmaceutical patents can be anticompetitive and thus can give rise to antitrust liability, has spawned a large number of private antitrust lawsuits. In many such suits, the parties dispute whether the settling drug companies can be held liable (under an umbrella theory) for damages incurred by plaintiff wholesalers who allegedly paid excessive prices for generic drugs purchased from an innocent third party. No

federal appeals court has ruled on that issue. As the district court recognized, district courts are split on whether such generic-only purchasers have antitrust standing to seek damages. Op. 26 n.15. Under these circumstances, Rule 23(f) review is warranted.

Amici agree with Petitioners that antitrust standing should not be recognized under these facts. The Supreme Court has repeatedly declined to recognize antitrust standing for litigants who cannot demonstrate a *direct* causal link between anticompetitive activity and their injuries. No direct causal link exists here; any antitrust injury suffered by those who purchased from Amneal is wholly dependent on Amneal's independent pricing decisions.

Ahold argues that it has overcome those difficulties by introducing expert testimony showing that, at least in this instance, Amneal charged more for Lomedia than it would have in a fully competitive market (as opposed, for example, to charging a lower price to capture a larger share of the relevant market). But the Supreme Court has warned against adopting fact-specific exceptions to limitations on antitrust standing. *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 216 (1990). A principal reason for insisting on a direct causal link between violation and injury is to avoid unduly complicating antitrust litigation. *Ibid.* Granting antitrust standing to generic-only purchasers who insist that they can

demonstrate a causal link between the defendants' conduct and the prices they paid—despite the undeniable presence of an independent price setter—would impose significant litigation-related burdens on courts and litigants alike.

If the 21 generic-only purchasers are eliminated from the proposed class, Ahold cannot show that "the class is so numerous that joinder of all members is impractical." Fed.R.Civ.P. 23(a)(1). Indeed, many of the wholesalers who purchased Loestrin from Warner Chilcott are very large nationwide firms for whom joinder is eminently practicable. The Third Circuit denied class certification under similar circumstances, finding joinder of large drug wholesalers was practicable and thus that a proposed class of wholesalers failed to satisfy the numerosity requirement. *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 250 (3d Cir. 2016).

Petitioners should be granted appellate review of class certification now, rather than being required to wait for years until after the district court issues a final judgment on the merits. As the Court has recognized, Rule 23(f) review is particularly warranted when, as here, "the certification decision turns on a novel or unsettled question of law." *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000).

ARGUMENT

I. RULE 23(f) REVIEW IS WARRANTED TO DETERMINE WHETHER CLASS MEMBERS WHO ARE GENERIC-ONLY PURCHASERS HAVE ANTITRUST STANDING

Ahold alleges that Petitioners violated federal antitrust law by taking actions to delay and suppress generic competition for Loestrin 24. Included within Ahold's certified class are 21 wholesalers who never purchased Loestrin 24 or Minastrin from Warner Chilcott and thus never paid inflated prices for those products. Instead, they purchased Lomedia (a generic version of Loestrin 24) from Amneal, a non-party not accused of antitrust violations. These generic-only purchasers contend that Amneal charged them more for Lomedia than it would have charged but for Petitioners' anti-competitive activities. But there is serious question whether the generic-only purchasers possess antitrust standing to sue Petitioners for those damages, given the indirect nature of the causal relationship between Petitioners' activities and their injuries. That is, Lomedia's price was wholly dependent on choices made by a third party (Amneal) acting independently of Petitioners.

This antitrust-standing issue arises with increasing frequency but has never been addressed by the Court. Because the district court's class-certification decision was premised on its conclusion that generic-only purchasers do, indeed,

have antitrust standing, Rule 23(f) review is warranted.

The Supreme Court recently affirmed that while federal antitrust law grants a cause of action to those who buy goods and services at higher-than-competitive prices directly from alleged antitrust violators, *indirect* purchasers in the supply chain lack antitrust standing and may not sue. *Apple, Inc. v. Pepper,* 139 S. Ct. 1514, 1520 (2019) (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745-46 (1977)). The Court determined, in light of the indirect nature of any causal relationship, that indirect purchasers cannot demonstrate that the antitrust violations are the "proximate cause" of their injuries. *Ibid.*

Among the reasons for denying antitrust standing to indirect purchasers: avoiding the need for "complicated damage calculations." *Id.* at 1524. *Illinois Brick* reasoned that calculating the damages incurred by a direct purchaser (the amount by which the defendant's conduct increased the prices paid by the direct purchaser) is a relatively straightforward exercise. In contrast, attempting to calculate damages incurred by indirect purchasers "would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness." *Illinois Brick*, 431 U.S. at 737. The Court expressed unwillingness to accept "the burdens that such [litigation] would impose on the effective enforcement of antitrust laws." *Id*. at 740-41.

The district court held that *Illinois Brick* "is inapposite" because the generic-only purchasers "did not purchase indirectly—or otherwise—from Defendants." Op. 20. But *Illinois Brick* cannot be so easily distinguished. Although *Illinois Brick* was decided in the context of direct-vs.-indirect purchasers, the Court has repeatedly cited it in support of the more general proposition that "there is a point beyond which [an antitrust violator] should not be held liable. ... It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." *Assoc. Gen'l Contractors of California, Inc. v. California State Council of Carpenters* ["*AGC*"], 459 U.S. 519, 534-35 (1983) (quoting *Illinois Brick* and *Blue Shield of Virginia, Inc. v. McCready*, 457 U.S. 465, 476 (1982)).

AGC established several factors for determining whether the relationship between the antitrust violations and the plaintiff's alleged harm is sufficiently close to confer antitrust standing. *Id.* at 536-45. In the decades following *AGC*, most federal courts applying the *AGC* factors have rejected antitrust standing for plaintiffs asserting injury based on the "umbrella" theory being asserted by the generic-only purchasers. One federal court has observed that "[t]he overwhelming majority of recent court decisions that have addressed the viability of the

'umbrella' theory after [*AGC*] have rejected 'umbrella' claims." *In re Skelaxin* (*Metaxalone*) *Antitrust Litig.*, 2014 WL 2002887 at *7 n.3 (E.D. Tenn. May 15, 2014) (quoting *In re Vitamins Antitrust Litig.*, 2001 WL 855463 at *4 (D.D.C. June 2, 2001)). As Petitioners note, the Third, Sixth, Seventh, and Ninth Circuits all reject umbrella liability. Pet. at 17.

Among the reasons cited by *AGC* for finding that the plaintiffs in that case lacked antitrust standing was the existence of a class of claimants more directly injured by the alleged antitrust violations and sufficiently motivated to sue to vindicate violation of their rights. 459 U.S. at 542. The Court explained:

> The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as the Union to perform the office of a private attorney general. Denying the Union a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied.

Ibid.

That factor weighs strongly against expanding antitrust standing by crediting Ahold's umbrella theory. This lawsuit demonstrates that wholesalers who purchased Loestrin 24 from Warner Chilcott—and who then began purchasing lower-priced generic versions once they became available—are willing to step forward to vindicate their rights. There is no need to resort to overly complex

antitrust litigation to ensure additional private enforcement of the antitrust laws in the context of pharmaceutical sales. In support of its decision to expand antitrust standing, the district court argued that generic-only purchasers "are the only purchasers in a position to prove injury and recover damages for the alleged overcharges on their purchases of generic Loestrin 24 from Amneal." Op. 26-27. But *AGC* explicitly *rejected* that argument as a basis for expanding antitrust standing. 459 U.S. at 542. The Court stated: "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Id.* at 534.

To bolster its antitrust-standing finding, the district court cited the testimony of Ahold's expert that, under the facts of this case, the alleged antitrust violations led generic-only purchasers to pay more than they otherwise would have. Op. 24. But the Supreme Court has declined to permit case-by-case analyses of whether remote actors were or were not injured by antitrust violations. Rather, the Court has insisted on bright line rules (such as *Illinois Brick*'s "direct purchaser rule") that assist in holding down the costs of antitrust litigation. *Utilicorp United*, 497 U.S. at 216-17. The Court reasoned that the "possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule" and that it is "an unwarranted and counterproductive exercise to litigate a series of exceptions."

Ibid. Whether "umbrella" liability is permitted in pharmaceutical cases should be determined on an across-the-board basis, not based on the perceived strength of causation evidence in a particular case.

As the district court noted, district courts are split on whether generic-only purchasers have antitrust standing to seek damages in pharmaceutical antitrust cases. Op. 26 n.15 (citing but "respectfully disagree[ing] with" *Skelaxin*, 2014 WL 2002887 at *11). In *Skelaxin*, the U.S. District Court for the Eastern District of Tennessee explained:

> Plaintiffs are seeking the same sort of damages sought in all ["umbrella" damages] cases: overcharges due to anticompetitive conduct, that is *higher prices*. ... Plaintiffs' theory requires consideration of the reasons underlying the pricing decisions of non-conspirators. ... Regardless of the "well-established correlation," as Plaintiffs phrase it, between fewer generic manufacturers and higher generic prices, the Court concludes the damages sought here are too speculative.

Id. at *9. In light of the disagreement among the federal district courts, Rule 23(f) review is warranted.

If the 21 generic-only purchasers are eliminated from the proposed class, certification is improper because Ahold cannot demonstrate that "the class is so numerous that joinder of all members is impractical." Fed.R.Civ.P. 23(a)(1). Indeed, many of the wholesalers who purchased Loestrin from Warner Chilcott are very large nationwide firms for whom joinder is eminently practicable. The Third

Circuit denied class certification to a proposed class of direct purchasers under similar circumstances, finding that joinder of large drug wholesalers was practicable and thus that a proposed class of wholesalers failed to satisfy the numerosity requirement. *In re Modafinil Antitrust Litig.*, 837 F.3d at 250. Even if it were possible that the numerosity requirement could be satisfied with a class of only 26 wholesalers (or, as Petitioners argue, as small as 16 wholesalers), the district court abused its discretion in certifying the class because its order was based on an erroneous view of the law. *See Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 555 (2014) ("A court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.").

Rule 23(f) review is particularly warranted because the class-certification issue turns on resolution of an important but unsettled question of antitrust law. In explaining when it is appropriate to grant permission to appeal class-certification orders, this Court stated, "[p]ermission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation." *Waste Management*, 208 F.3d at 293 (quoting advisory committee notes accompanying Rule 23(f)). Both of those considerations confirm that permission to appeal is appropriately granted in this case. Indeed, given that the certification

order creates the potential for a multi-billion-dollar judgment against Petitioners, they would effectively be forced to settle "rather than incur the costs of defending a class action and run the risk of potentially ruinous liability," *ibid*, if that order stands.

II. EXPANDING ANTITRUST STANDING CREATES A THREAT OF EXCESSIVE ANTITRUST LIABILITY THAT CAN INAPPROPRIATELY DETER COMPETITION

Review is particularly warranted because the overly expansive antitrust-standing doctrine adopted by the district court is likely to deter pro-competitive activity. The Supreme Court recognized in *FTC v. Actavis* that settlement of costly patent-infringement litigation can have pro-competitive effects; but broad expansion of antitrust standing carries with it a threat of ruinous judgments that can deter even the most pro-competitive patent litigation settlements.

Ahold's principal claim of anticompetitive behavior arises from a patent infringement lawsuit filed by Warner Chilcott against Watson. Warner Chilcott alleged that Watson, a generic-drug manufacturer, infringed its patent on Loestrin 24, which was not scheduled to expire until July 2014. Watson answered that the patent was invalid and/or not infringed. The parties eventually agreed to settle their suit in 2009. Watson agreed to drop its invalidity claim. In return, Warner Chilcott agreed to grant Watson an exclusive license to market a generic form of

Loestrin 24 starting in January 2014, six months before Warner Chilcott's patent on Loestrin 24 was set to expire. Ahold contends that the settlement agreement was anticompetitive because Warner Chilcott supposedly paid Watson not to compete for several years. Petitioners contend, on the other hand, that there was no such payment; and that even if there had been a payment, the settlement had pro-competitive effects, including: (1) it ensured the onset of generic competition six months before Warner Chilcott's presumptively valid patent was set to expire; and (2) it brought expensive litigation to an end, thereby allowing the parties to devote their time and resources to more productive endeavors.

There has not yet been a trial to determine whose view of the patent settlement agreement is correct. But unless the Court adopts reasonable limits on antitrust standing that restrict damage awards for remote injuries that might be traced to an antitrust violation but were not "proximately caused" by the violation, the danger exists that the threat of liability will deter pro-competitive activities. As two leading commentators have explained, "One problem haunting most antitrust litigation ... is that vigorous competition may look very similar to acts that *undermine* competition. The resulting danger is that courts will prohibit ... acts that *appear* to be anticompetitive but really are the opposite." William J. Baumol and Alan S. Blinder, *Economics: Principles and Policy* 425-26 (8th ed. 2000)

(emphasis in original).

Moreover, when evaluating whether challenged conduct enhances or restricts competition, courts must keep in mind the substantial benefits to competition derived from enforcement of the patent laws, benefits that Congress sought to nurture when it adopted them. The patent laws promote the development of life-saving, money-saving drugs by providing substantial financial benefits (in the form of a temporary exclusion of competitors) to companies that risk the huge sums necessary to obtain marketing approval for their medical products. One study determined that if patent protection were immediately eliminated for all current and future prescription drugs, consumers would benefit in the short term from reduced prices. But for every dollar that current consumers may save in the short term, future consumers would lose three dollars (in present value terms) because of decreases in future pharmaceutical innovation. James M. Hughes, Michael J. Moore, Edward A. Snyder, *"Napsterizing" Pharmaceuticals: Access, Innovation, and Consumer Welfare* (Nat'l Bureau of Economic Research 2002).

The district court's order, by certifying a class based on a very broad understanding of antitrust standing, decreases the value of pharmaceutical patents by increasing patent owners' exposure to antitrust liability for conduct that arguably is both pro-competitive and protected by the terms of their patents. *Amici*

urge the Court to grant the Rule 23(f) petition to determine whether antitrust law authorizes recovery, under an "umbrella" theory, for injuries allegedly incurred by wholesalers who purchased nothing from Warner Chilcott.

CONCLUSION

Amici curiae respectfully request that the Court grant the petition for permission to appeal the class certification order.

Respectfully submitted,

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Dated: July 23, 2019

CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* Washington Legal Foundation (WLF). Under Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF: (1) complies with the type-volume limitations of Rule 32(a)(7)(B), because, according to the word processing system used to prepare this brief (WordPerfect X5), it contains 3,971 words, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance; and (2) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6), because it has been prepared in 14-point, proportionately spaced Times New Roman type.

/s/ Richard A. Samp
Richard A. Samp

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July, 2019, I electronically filed the brief of *amici curiae* Washington Legal Foundation, *et al.*, with the Clerk of the Court of the U.S. Court of Appeals for the First Circuit by using the appellate CM/ECF system. I certify that service is being accomplished by the appellate CM/ECF system on the following registered CM/ECF users:

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