ANTITRUST CLASS ACTIONS AND RULE 23: THE BARRIERS TO CLAIMS IN ZERO-PRICE PLATFORM MARKETS

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TABLE OF CONTENTS

I. Introduction 256
II. Zero-Price Markets and Their Impacts 258
A. The Costs Consumers Face 258
1. Information Costs 259
2. Attention Costs 260
B. The Role of Antitrust Law in Addressing Zero-Price Markets 261
III. Antitrust Class Actions and the Requirements of Rule 23 262
A. Antitrust Class Actions 262
B. Rule 23 Requirements 264
1. Commonality 264
2. Predominance 267
3. *Daubert* 269
4. Ascertainability 271
IV. The Barriers and Solutions 274
A. Using Established Antitrust Theories 275
B. Common Impact in Zero-Price and Representative Samples 277
C. *Daubert* Barriers 281
D. Uninjured Parties and Exceptions 284
E. Ascertainability and Reliable Data 285
F. Ascertainability and Analogizing the "Fraud on the Market" Theory 288
G. Severing Damages 290
H. Injunctive Relief 291
V. Broad Critiques, Defenses, and Conclusions 292
A. Critiquing the Solutions as a Whole 292
B. Defending the Solutions 294
C. Conclusion 295

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I.
INTRODUCTION

Both policymakers and consumers are concerned about the impact of social media and Big Tech on personal privacy. However, there is significant debate about how best to protect individual privacy rights. One possibility is for consumers to pursue antitrust class actions. They can argue that the platforms they use have taken anticompetitive actions, which enabled these platforms to collect more user data than would otherwise be possible in a competitive marketplace.

To serve as an effective tool for holding technology companies accountable, this type of antitrust claim must first meet the legal requirements of a class action. Rule 23 of the Federal Rules of Civil Procedure erects many barriers that a proposed class action must overcome. For instance, some legal precedents and preeminent antitrust scholars have argued that antitrust laws cannot apply in markets without prices.[1] This would mean that antitrust law cannot be used to vindicate user privacy rights because technology platforms are zero-price markets.[2]

Zero-price markets are "markets" in which the product is offered at a price of zero dollars.[3] Traditionally, plaintiffs have struggled to bring successful antitrust claims against zero-price market participants.[4] Without a price, a clear transaction, or an obvious point of sale, zero-price markets may not seem like markets at all.[5] Logging into social media is not intuitively viewed as entering into a business transaction in a market. However, with the ever-growing power and nature of social media, courts are taking a second look at the applicability of antitrust law to zero-price markets. For example, recent cases, such as *FTC v. Facebook, Inc.* and *Klein v. Facebook, Inc.*, have brought zero-price platform markets, including social media, to the forefront of antitrust law.[6]

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1. *See* John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149, 160–63 (2015).

2. *See id.*

3. *Id.* at 151.

4. *See, e.g.*, KinderStart.com, LLC v. Google, Inc., No. 06-cv-02057, 2007 U.S. Dist. LEXIS 22637, at *15 (N.D. Cal. Mar. 16, 2007) ("KinderStart has failed to allege that the Search Market is a 'grouping of sales.' It does not claim that Google sells its search services, or that any other search provider does so.").

5. *See id.*

6. FTC v. Facebook, Inc., 581 F. Supp. 3d 34 (D.D.C. 2022); Klein v. Facebook, Inc., 580 F. Supp. 3d 743 (N.D. Cal. 2022).

In *FTC v. Facebook, Inc.*, the Federal Trade Commission successfully argued that a zero-price market exists.[7] The court defined the market as personal social networks that act as a platform, enabling users to map their connections, to interact with those connections in shared virtual spaces, and to make it easier to find and connect with other users.[8] In addition, the court determined that Facebook had the requisite market power for a violation of Section 2 of the Sherman Act.[9] The court measured market power based on time spent on the platform and the number of monthly average users and daily average users.[10] This court decision affirmed that zero-price platforms are cognizable markets for antitrust actions.

In *Klein v. Facebook, Inc.*, the District Court for the Northern District of California applied the same market definition of personal social networks and measurements of market power in its order addressing Facebook's motion to dismiss a consumer and advertiser class action.[11] This class action is still ongoing and is currently in pre-certification discovery.[12] However, it raises questions about how a market where each consumer's harm is unique and where there are no prices—which would normally be used to determine common costs across consumers—could meet the barriers set forth by Rule 23.

In particular, Federal Rule of Civil Procedure 23(b)(3) requires "predominance," which means that questions of law or fact unique to individual class members cannot overwhelm questions common to all class members. Rule 23(b)(3) is a high barrier for two elements central to proving an antitrust class action: common impact causally related to the anticompetitive conduct, and measurable damages. Solutions to these predominance concerns include accepting statistical samples of injuries representative of the class as proof of common impact, allowing a de minimis exception for the number of uninjured class members, and permitting separate individual damage calculations or certification solely on liability.

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7. FTC v. Facebook, Inc., 581 F. Supp. 3d at 44–45.
8. *Id.* at 45.
9. *Id.* at 46–50.
10. *Id.*
11. *Klein*, 580 F. Supp. 3d at 765–85.
12. *See* Hailey Konnath, *Quinn Emanuel, Hagens Berman Keep Meta Leadership Roles*, Law360 (Feb. 21, 2023, 11:23 PM), https://www.law360.com/articles/1578540 [https://perma.cc/4HPH-DGNA] ("The court is left in the position of assigning interim lead counsel roles to attorneys and law firms who have had a rocky relationship . . . ." (quoting Order re Interim Consumer Class Counsel at 2, Klein v. Meta Platforms, Inc., No. 20-cv-08570 (N.D. Cal. Feb. 21, 2023), ECF. No. 456)).

Daubert challenges pose another barrier to zero-price antitrust class actions due to the heavy reliance on expert testimony required for impact and damages proof. Heightened ascertainability poses yet another barrier to the certification of these classes. Using detailed data collected from defendants during their course of business, combined with the use of basic and long-standing economic principles, these additional barriers are not insurmountable.

This Note analyzes each of these barriers, examining how they interact with traditional antitrust law in the context of zero-price platform markets. Ultimately, this Note argues that a zero-price platform class action can be successfully certified, but not without difficulty. Rule 23 presents significant barriers to zero-price platform class actions. However, by returning to long-standing antitrust theories, accepting representative statistical modeling, and permitting individual damage calculation, plaintiffs can overcome these barriers.

Part II provides a detailed analysis of the costs that exist in a zero-price market and how they impact consumers. It also discusses how antitrust law has typically dealt with anticompetitive harms in these markets. Part III discusses antitrust class actions and the requirements of Rule 23. Part IV brings the preceding two parts together, presenting the unique barriers that Rule 23 poses for zero-price antitrust class actions and offering solutions to overcome these barriers. Finally, Part V concludes by offering a broad critique and defense of the solutions.

II.
ZERO-PRICE MARKETS AND THEIR IMPACTS

A. The Costs Consumers Face

Finding an appropriate market definition is complicated within the zero-price context because the products have no price and money is not exchanged. As a result, there may not seem to be a market or an injury to consumers for antitrust laws to redress.[13] However, calling zero-price products, like social media, "free" is misleading. In order to maintain a sustainable business, these companies must have some way to generate profit. Three common methods for creating revenue in zero-price markets are tying paid products to the free product, offering premium upgrades, and using multisided platform models.[14] This paper will focus on the last method.

13. Newman, *supra* note 1, at 151.
14. *Id.* at 154.

Bruce Schneier, an adjunct lecturer at the Harvard Kennedy School and a security technologist, said at a 2010 conference: "We always like to think of ourselves as Google's customers . . . we are not. We're Google's product that Google sells to its customers. We're Facebook's product, our attention, that they sell to their customers, their advertisers."[15] Schneier is referring to multisided platform markets that involve a zero-price side. The platform, as an intermediary, brings together different consumer and business groups. In the case of Facebook, the users receive the "free" services of the platform, while the advertisers and data-seekers pay the platform for user information and attention.[16]

Thus, in zero-price platform markets, consumers face nonmonetary costs in information and attention. These costs provide an antitrust framework for defining a market and showing potential injuries from anticompetitive behavior.[17] This is essential for the success of any antitrust class action. Information and attention costs are payments for a service, just like price. As with any antitrust claim, pointing to high prices or nonmonetary costs is not enough. Instead, actionable harm to plaintiffs occurs only when claims of supracompetitive costs are paired with anticompetitive conduct, such as the creation of or contribution to monopoly power.[18]

1. Information Costs

In order to obtain revenue, platforms with "free" products offer compilations of information about their users to third-party companies, including the amount of time users spend on their websites and other pieces of personalized data about their users' interactions.[19]

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15. RSA Conference, *RSA Conference 2010 - Security and the Generation Gap - Bruce Schneier*, YouTube (Nov. 30, 2011), https://youtu.be/zADFelZYqzw [https://perma.cc/TSV7-MYLQ].

16. *See* Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 Berkeley Bus. L.J. 39, 42–44 (2019); Thomas B. Nachbar, *Platform Effects*, 62 Jurimetrics J. 1, 8–9 (2021).

17. Newman, *supra* note 1, at 165; Klein v. Facebook, Inc., 580 F. Supp. 3d 743, 773 (N.D. Cal. 2022) ("Additionally, instead of 'charg[ing] users a monetary price for access,' social media services 'subject the users to ads . . . or require the users to give up some form of limited data.'" (quoting Consolidated Consumer Class Action Complaint at 23, *Klein*, 580 F. Supp. 3d 743 (No. 20-cv-08570))).

18. *See* James C. Cooper & John M. Yun, *Antitrust & Privacy: It's Complicated*, 2022 U. Ill. J.L. Tech. & Pol'y 343, 394 ("Instead, a plaintiff must be able to point to conduct . . . that harms consumers via a reduction in privacy that was *caused by* a reduction in competition.").

19. Chris Jay Hoofnagle & Jan Whittington, *Free: Accounting for the Costs of the Internet's Most Popular Price*, 61 UCLA L. Rev. 606, 628 (2014).

For example, each time a website or application requires an email address to sign up, the email address is collected and stored along with the Internet Protocol (IP) address.[20] This collection is often accompanied by the installation of longer-term trackers, "cookies," on the users' devices.[21] Companies like Facebook can profit by allowing third-party companies to advertise to consumers directly, developing apps that contain advertisements, selling information about user habits and views, and selling users' personal information.[22] Websites like Google track users' interests and collect information to create a profile that accurately identifies a user.[23] Companies even use location data to optimize geographical advertisements.[24]

Aside from this clear invasion of privacy and any directly resulting harms,[25] there are numerous transaction costs for consumers as well. Typical transaction costs include difficulty switching systems, limited access to information about what data is tracked and how it is sold, and monetary valuation difficulties regarding the sale of consumer data.[26]

2. Attention Costs

A related but distinct nonmonetary cost is the attention cost incurred by consumers. Users "pay" with their time spent on a website by being exposed to passive advertisements, such as side banners,

20. *Id.* at 626–27.

21. *Id.*

22. *Id.* at 630–31.

23. *Id.* at 645.

24. Gregory Day, *Antitrust, Attention, and the Mental Health Crisis*, 106 Minn. L. Rev. 1901, 1916 (2022) ("Companies can even use location data to place physical advertising on the backseats of taxicabs, video screens in elevators, or elsewhere.").

25. *See id.* at 1917 ("Facebook stated that the platform can detect when an adolescent is feeling 'worthless' or 'insecure' in a memo sent to advertisers. Yet Facebook is not alone. Uber monitored users after their ride had ended and their app closed. It also developed a means of predicting whether a user is drunk based on the angle at which one is holding their smartphone, manner of walking, and time of night. Along the same lines, Spotify disclosed technology in a patent that scrutinizes a user's voice and ambiance noise in one's room to choose music based on the user's mood, setting, and personality traits such as 'agreeableness, extroversion, neuroticism, and conscientiousness.'" (footnotes omitted) (first quoting Sam Levin, *Facebook Told Advertisers it Can Identify Teens Feeling 'Insecure' and 'Worthless'*, Guardian (May 1, 2017), https://www.theguardian.com/technology/2017/may/01/facebook-advertising-data-insecure-teens [https://perma.cc/J7KN-6H37]; and then quoting Jasmin Jose, *Spotify May Soon Recommend Music Based on Your Emotional State, Surroundings, Patent Tips*, Gadgets 360 (Jan. 29, 2021, 6:06 PM), https://gadgets.ndtv.com/entertainment/news/spotify-new-patent-voice-recognition-to-determine-mood-suggest-music-2360101 [https://perma.cc/MT8M-L72R])).

26. Hoofnagle & Whittington, *supra* note 19, at 640–43.

or to active advertisements, such as watching a commercial.[27] In order to maximize their ability to capture user attention, firms employ different strategies to exploit users' brain function.[28] One of the strategies is to incorporate different features that offer instant gratification, such as the like button on Facebook or a loot box in a video game.[29] These rewards trigger dopamine releases designed to rewire habits and increase the amount of time users spend on the platform.[30] Companies can experiment with different interfaces and functions to see what will be the most addictive and the most attention-capturing.[31] When these habit-forming features are combined with information and data tracking about the attention "paid," a powerful industry is created.[32] This "industry" centers around finding ways to maximize user time by tracking their habits and optimally monetizing user attention to gain eye-popping amounts of money.[33]

B. The Role of Antitrust Law in Addressing Zero-Price Markets

Attention and information costs alone are just like prices—companies do not violate the antitrust laws if consumers are simply required to pay for a good or service. However, when there is a cognizable anticompetitive harm or practice in a market, price increases due to the harmful practice can be an injury. The pricing could even be a part of the anticompetitive practices themselves. This would require framing the increases in information and attention costs as an injury resulting from anticompetitive conduct. For example, users could employ accepted theories of anticompetitive conduct, such as monopolization, and argue that the monopolization led directly to increased attention and information costs which would otherwise be reduced or for which users would be compensated monetarily.[34]

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27. *See* Newman, *supra* note 1, at 169–72.

28. Day, *supra* note 24, at 1913.

29. *Id.*

30. *Id.*

31. *Id.* at 1914.

32. *See id.* at 1919 ("According to observers, YouTube has detected that users spend more time on the platform when exposed to curated streams of politically or socially volatile videos, helping it to build a $160 billion company based on the *one billion hours* spent daily on the platform.").

33. *See id.* at 1918–19 (explaining how different platforms effectively capture user attention and then optimize it to ensure large profits regardless of ethics).

34. *See* Klein v. Facebook, Inc., 580 F. Supp. 3d 743, 801–04 (N.D. Cal. 2022) (denying a motion to dismiss and finding that Facebook had plausibly used misrepresentation and the acquisition of Instagram and WhatsApp to gain monopoly power). The court found Facebook's monopoly power plausibly resulted in antitrust injuries of increased attention and information costs beyond competitive levels. *Id.*

This was the route taken by the *Klein* plaintiffs; users argued that Facebook's acquisition of Instagram and WhatsApp created monopoly power in violation of Section 2 of the Sherman Act.[35] The resulting harms users alleged were increased attention and information costs beyond what would have been normal in a competitive market.[36] Users further alleged that Facebook gained monopoly power through misrepresentations about their privacy policies.[37] They alleged that the method of collecting user information and attention was part of the anticompetitive practice, not just the resulting harm of increased costs. In this case, the court found information and attention costs to be of material and economic value under antitrust law and sufficient to withstand at least a motion to dismiss.[38]

III.
ANTITRUST CLASS ACTIONS AND THE REQUIREMENTS OF RULE 23

A. Antitrust Class Actions

By defining a zero-price market and finding information and attention costs to be analogous to price, various courts have found that antitrust law has a role to play in zero-price platform markets.[39] While the FTC and DOJ can bring enforcement actions in zero-price markets, users can also sue under the Clayton Act. The Clayton Act allows individuals to sue for treble damages for any conduct that injured them and is forbidden by the antitrust laws.[40] This not only empowers members of the public to become "private attorneys general" to right any antitrust violations but also provides powerful deterrence.[41] A single claim brought by a member of the public may be far too difficult and expensive to litigate, only to have a minimal impact both in costs and deterrence against a platform such as Facebook;

35. *Id.* at 805, 810–12 ("Consumers and Advertisers both allege that Facebook's 'Copy, Acquire, Kill' strategy violated Section 2 of the Sherman Act.").

36. *See id.* at 802–04.

37. *See id.* at 786.

38. *Id.* at 802–05.

39. *See* Newman, *supra* note 1, at 165–72.

40. 15 U.S.C. § 15; *see also The Antitrust Laws*, Fed. Trade Comm'n, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/B665-GSJQ].

41. Am. Bar Ass'n, Antitrust Class Actions Handbook, ch. I (2d ed. 2018), LEXIS (first citing Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972); and then citing Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 635 (1985)).

by combining their claims along with treble damages, well-funded adversaries may impose higher penalties against platforms and thus greater deterrence.[42] Class actions allow similarly situated groups of individuals to come together to argue and aggregate all their claims in one trial.[43] Class action lawsuits are governed by Federal Rule of Civil Procedure 23[44] and the Class Actions Fairness Act of 2005.[45]

Rule 23(a) sets out four requirements that all classes must meet to be certified: numerosity, commonality, typicality, and adequacy of representation.[46] Additionally, at least one of the following requirements of Rule 23(b) must be met, as summarized by the ABA Antitrust Class Actions Handbook:

> (1) the prosecution of separate actions could potentially establish inconsistent standards of conduct or substantially impair other class members' ability to protect their interests;
> (2) final injunctive or declaratory relief is appropriate because the party opposing the class acted on grounds generally applicable to the class; or
> (3) common issues predominate over individual issues and a class action is a superior mechanism for resolving the claims.[47]

The Supreme Court has interpreted Rule 23's requirements over time to require greater scrutiny of and a greater emphasis on the certification stage of a class action.[48] To further complicate the certification process, the Third Circuit has read an implicit heightened ascertainability standard into the requirements, creating a split among several circuits.[49] These certification requirements not only limit class actions in general, but pose unique barriers to antitrust class actions initiated by users in zero-price platform markets.

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42. *See id.* (explaining how the combination of treble damages and aggregated claims increases the stakes and money involved).

43. *Id.*

44. Fed. R. Civ. P. 23.

45. 28 U.S.C. §§ 1332, 1453, 1711–15.

46. Fed. R. Civ. P. 23(a).

47. Am. Bar Ass'n, *supra* note 41, ch. VI.

48. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–51 (2011) ("Rule 23 does not set forth a mere pleading standard. . . . [C]ertification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied . . . .'" (quoting Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982))); Comcast Corp. v. Behrend, 569 U.S. 27, 33–34 (2013); Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 294–95 (2014) (Thomas, J., concurring in the judgment).

49. *See* Shelton v. Bledsoe, 775 F.3d 554, 559–63 (3d Cir. 2015); Emmy L. Levens & Brent W. Johnson, *When Courts Part Ways: Circuit Splits and Disharmony Impacting Antitrust Class Actions*, Antitrust, Fall 2019, at 41, 41–42.

However, by following traditional antitrust theories, accepting representative statistical modeling, and permitting individual damage calculations, these barriers can be overcome.

B. Rule 23 Requirements

1. Commonality

While the numerosity, typicality, and adequacy requirements of Rule 23(a) do not present systematic barriers to antitrust class actions, the commonality requirement warrants discussion. Commonality requires the existence of questions of law or fact that are common to the parties involved in the class.[50] Antitrust claims generally meet the commonality requirement through the basic questions of fact that must be addressed. Even though commonality is often satisfied, *Wal-Mart Stores, Inc. v. Dukes* heightens the Rule 23(a)(2) analysis and lays a foundation that strengthens the other barriers to certification in zero-price markets.

In *Wal-Mart*, Justice Scalia's majority opinion increased scrutiny of the commonality requirement. The Court held that commonality is more than a recitation of the questions the lawsuit raises; the case must be of "a nature that is capable of classwide resolution."[51] The Court also held that there must be common answers to the common questions.[52] The Court explained that any dissimilarities between class members may prevent common answers, and thus certification.[53]

Importantly, the majority also took issue with the plaintiff's use of Rule 23(b)(2) to meet one of the Rule 23(b)(3) requirements. Rule 23(b)(2) states that class actions are appropriate when the plaintiff seeks injunctive or declaratory relief that would apply to the class as a whole.[54] The Court clarified that Rule 23(b)(2) "does not authorize class certification[s] when each . . . class member would be entitled to a *different* injunction or . . . when each class member would be entitled to an individualized award of monetary damages."[55] Money

50. Fed. R. Civ. P. 23(a)(2).

51. *Wal-Mart*, 564 U.S. at 350.

52. *Id.* (citing Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

53. *Id.*

54. Fed. R. Civ. P. 23(b)(2).

55. *Wal-Mart*, 564 U.S. at 360–61.

damages can only be sought in tandem with injunctive relief if "the monetary relief is incidental and indivisible."[56]

Wal-Mart has narrowed commonality significantly by requiring a "rigorous analysis" to determine whether there would be common answers to the questions posed by the lawsuit.[57] Extending beyond commonality, this rigorous analysis applies to all other Rule 23 elements as well.[58] This analysis opens the door for courts to review the merits of a lawsuit and to hear *Daubert* challenges during the certification stage.[59] Finally, *Wal-Mart* closed the door on plaintiffs' ability to seek monetary damages when making a Rule 23(b)(2) claim.[60]

Even with a challenge to commonality, the ABA's Antitrust Class Actions Handbook explains that the very nature of antitrust claims, such as price-fixing, monopolization, or even the existence of a conspiracy, satisfy Rule 23(a).[61] One court found that "the commonality requirement is likely met because plaintiffs allege the same economic injury stemming from the same antitrust violation . . . by the same defendants."[62] A quick review of post-*Wal-Mart* monopolization claims, including complex consumer pay-to-delay claims, confirms that Rule 23(a)(2) is usually satisfied.[63] Antitrust claims tend to

56. 6 William B. Rubenstein et al., Newberg on Class Actions 658 (5th ed. 2011).

57. *See Wal-Mart*, 564 U.S. at 351 (quoting Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982)).

58. *Id.* at 349–51.

59. *See id.* at 351 ("Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim."); *id.* at 354 ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. *We doubt that is so* . . . ." (emphasis added) (citation omitted)).

60. *Id.* at 360–61.

61. Am. Bar Ass'n, *supra* note 41, ch. VI.B.1.

62. *In re* GSE Bonds Antitrust Litig., 414 F. Supp. 3d 686, 700 (S.D.N.Y. 2019).

63. *See, e.g.*, AstraZeneca AB v. UFCW Unions & Emps. Midwest Health Benefits Fund (*In re* Nexium Antitrust Litig.), 777 F.3d 9, 18 (1st Cir. 2015) ("Defendants do not dispute that the four Rule 23(a) requirements were met here."); *In re* Wellbutrin XL Antitrust Litig., No. 08-2431, 2011 U.S. Dist. LEXIS 90075, at *13–14 (E.D. Pa. Aug. 11, 2011) (analyzing the Rule 23(a)(2) requirement in only two short paragraphs for a Sherman Act Section 2 claim); *In re* Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litig., 967 F.3d 264, 270 (3d Cir. 2020) (finding commonality where defendant was alleged to "raise[] prices, withdraw[] tablets from the market, provid[e] rebates only for film, disparag[e] the safety of tablets, and delay[] the generics' entry by filing a citizen petition. . . ."); Stromberg v. Qualcomm Inc., 14 F.4th 1059, 1066 (9th Cir. 2021) ("Qualcomm does not contest that Plaintiffs met Rule 23(a)'s requirements; rather, it contests class certification under Rule 23(b)(3) and (b)(2)."); Ploss v. Kraft Foods Grp., Inc., 431 F. Supp. 3d 1003, 1011 n.4 (N.D. Ill. 2020) (explaining that in this Sherman Act Section 2 class action, Kraft did not challenge plaintiff's showing under Rule 23(a)(2)).

require the same answers to determine whether there has been a violation of the antitrust laws: what was the relevant market, was there market power, and was the injury a result of that market power?[64]

Even though the commonality requirement tends to be easily met, *Wal-Mart* is not inconsequential. The Court's holding in *Wal-Mart* lays the foundation for approaching harder certification barriers, such as *Daubert* challenges and a rigorous analysis of Rule 23(b)(3). These are the focuses of *Comcast Corp. v. Behrend* and *Tyson Foods, Inc. v. Bouaphakeo*.[65]

In *Comcast*, an antitrust class action case, the Court focused on the failure to meet the predominance requirement of Rule 23(b)(3), holding that the same rigorous analysis and principles from Rule 23(a) also apply to Rule 23(b)(3): "If anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)."[66] Furthermore, a significant number of post-*Wal-Mart* antitrust class action decisions discuss at length about how predominance is the central issue in class certification.[67]

Dicta in *Tyson* goes further to suggest that commonality is a more basic form of predominance, and that if commonality is not met then neither is predominance.[68] The Ninth Circuit read *Wal-Mart* and *Tyson* together to mean that the predominance analysis would satisfy both the requirements of Rule 23(a) and Rule 23(b)(3).[69] The Third Circuit combined the analysis of these requirements in antitrust class actions even before *Wal-Mart* and continues to do

64. *See In re* Apple iPhone Antitrust Litig., No. 11-cv-6714, 2022 U.S. Dist. LEXIS 79593, at *32–33 (N.D. Cal. Mar. 29, 2022) ("Here, Consumer Plaintiffs argue that the commonality requirement is met because at least five common questions can be resolved with common proof . . . .").

65. Comcast Corp. v. Behrend, 569 U.S. 27 (2013); Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442 (2016).

66. *Comcast*, 569 U.S. at 34 (citing *AmChem Prods., Inc. v. Windsor*, 521 U.S. 591, 623–24 (1997)).

67. *See supra* note 63.

68. *Tyson Foods, Inc.*, 577 U.S. at 457–58 (explaining that while the *Wal-Mart* Court was focused on commonality, "[t]he underlying question in *Wal-Mart*, as here, was whether the sample at issue could have been used to establish liability in an individual action.").

69. *See* Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 664 (9th Cir. 2022) (en banc) ("The requirements of Rule 23(b)(3) overlap with the requirements of Rule 23(a) . . . . Therefore, courts must consider cases examining both subsections in performing a Rule 23(b)(3) analysis."); *In re* Google Play Store Antitrust Litig., No. 21-md-02981, 2022 U.S. Dist. LEXIS 213670, at *42 (N.D. Cal. Nov. 28, 2022) ("The Court finds it appropriate to assess commonality and predominance in tandem, with a careful eye toward ensuring that the specific requirements of each are fully satisfied." (citing Just Film, Inc. v. Buono, 847 F.3d 1108, 1120–21 (9th Cir. 2017))).

so after *Wal-Mart*.[70] Thus, while commonality is not a barrier to certification for claims in zero-price markets, *Wal-Mart* established and strengthened the level of analysis for other barriers.

2. Predominance

Rule 23(b)(3) is one of three provisions that plaintiffs can use to show that class treatment is appropriate for the claims at issue.[71] The rule requires that common issues of law and fact predominate over individual issues and that a class action is "superior" to alternative methods of adjudication.[72] The predominance test requires the court to ask "whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues."[73] While the very existence of most antitrust violations themselves tends to meet the predominance inquiry,[74] the court must conduct a rigorous analysis to determine if individual inquiries could overwhelm the common ones.[75] This rigorous analysis presents unique challenges for zero-price claims.

Predominance is often analyzed in a bifurcated way. First, the court looks at all the evidence that the class will need to present for its claim and determines which issues are individual versus common.[76] Second, the court must weigh the individual and common issues to determine if the individual issues will predominate.[77] The predominance analysis for antitrust class actions typically consists of three main parts: "(1) an antitrust violation; (2) common impact, meaning class members suffered some recognized antitrust injury as a result of the anticompetitive conduct; and (3) a reasonable estimation of damages suffered by class members."[78] Courts tend to find predominance

70. *See* Sullivan v. DB Invs., Inc., 667 F.3d 273, 297 (3d Cir. 2011) ("Hence, we consider the Rule 23(a) commonality requirement to be incorporated into the more stringent Rule 23(b)(3) predominance requirement, and therefore deem it appropriate to 'analyze the two factors together, with particular focus on the predominance requirement.'" (quoting *In re* Ins. Brokerage Antitrust Litig., 579 F.3d 241, 266 (3d Cir. 2009))).

71. Am. Bar Ass'n, *supra* note 41, ch. VI.B.2.

72. Fed. R. Civ. P. 23(b)(3).

73. *Tyson Foods, Inc.*, 577 U.S. at 453 (quoting 2 Rubenstein et al., *supra* note 56, at 195–96).

74. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997); *In re* GSE Bonds Antitrust Litig., 414 F. Supp. 3d 686, 701 (S.D.N.Y. 2019).

75. Comcast Corp. v. Behrend, 569 U.S. 27, 34 (2013).

76. 6 Rubenstein et al., *supra* note 56, at 662.

77. *Id.*

78. Christine P. Bartholomew, *Death by* Daubert*: The Continued Attack on Private Antitrust*, 35 Cardozo L. Rev. 2147, 2153 (2014) (citing *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311–12 (3d Cir. 2008); Danvers Motor Co. v. Ford

if each of these parts can be proven by common evidence.[79] Using the bifurcated approach, the court must look at the individual and common issues in each part and determine which predominate.[80] By requiring a predominance inquiry into each part of the antitrust claim, there will be some overlap with the merits of the antitrust claim.[81]

The damages part can be especially difficult to satisfy in a predominance inquiry due to its frequently individualized nature. To avoid defeating predominance, damages must be causally related to the antitrust violation and evidenced by common proof.[82] In *Comcast*, the majority suggested that allowing individual damage calculations would make individual case concerns predominate over the questions common to the class.[83] With respect to the facts of *Comcast*, the Court determined that the plaintiffs could not show predominance because the expert's statistical model was insufficient to prove that "that damages are capable of measurement on a classwide basis."[84] The Court continued, stating that "any model supporting a 'plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation.'"[85] Ultimately, the Court found that the prices above a competitive level in this case could not be attributed to the anticompetitive harm the plaintiffs alleged.[86] The plaintiffs' proof was insufficient to rule out other factors through the econometric regression analysis alone.[87] If read broadly, *Comcast* suggests that plaintiffs must have an economic model that measures the damages for most or all of the class members.[88] However, if read narrowly—as most circuits do—*Comcast*

Motor Co., 543 F.3d 141, 148–49 (3d Cir. 2008); Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302–04 (5th Cir. 2003)).

79. *Id.*

80. *See* 6 Rubenstein et al., *supra* note 56, at 662.

81. Comcast Corp. v. Behrend, 569 U.S. 27, 33–34 (2013).

82. *Bell Atl. Corp.*, 339 F.3d at 302 ("Accordingly, we have repeatedly held that where fact of damage [sic] cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance.").

83. *Comcast*, 569 U.S. at 34.

84. *Id.* ("Without presenting another methodology, respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class.").

85. *Id.* at 35 (quoting Am. Bar Ass'n, Proving Antitrust Damages: Legal and Economic Issues 57, 62 (2d ed. 2010)).

86. *Id.* at 38.

87. *Id.* at 37.

88. Steven B. Pet, Note, *Preserving Antitrust Class Actions: Rule 23(B)(3) Predominance and the Goals of Private Antitrust Enforcement*, 12 Va. L. & Bus. Rev. 149, 165 (2017).

simply requires plaintiffs' damage models to be related to the theory of anticompetitive harm.[89]

The Court in *Tyson* clarified the remaining questions about predominance created by *Wal-Mart* and *Comcast*. The Court explained that *Wal-Mart* did not hold that representative statistical samples were insufficient to prove classwide liability.[90] Recognizing that samples and representative models are sometimes the only practical means to collect data, the Court found a representative study of employee work hours to be sufficient for a reasonable jury to find classwide liability.[91] The use of this type of data is limited, but it can be permitted if each class member could have used the data to establish the hours they worked in hypothetical, separately tried, individual cases.[92] In clarifying the open predominance questions from *Comcast*, the Court explained that "other important matters will have to be tried separately, such as damages . . . peculiar to some individual class members."[93] This suggests that the Court found the narrower reading of *Comcast* appropriate: a plaintiff's damage model only needs to be related to the theory of anticompetitive harm presented. This narrower reading along with the use of statistical samples and representative studies are key components of overcoming the predominance barrier to certification in zero-price markets.

3. *Daubert*

Whether an antitrust class satisfies Rule 23(b)(3) requires a detailed analysis of the relevant markets, their definitions, the existence of and calculation of anticompetitive impacts, and damage calculations.[94] To prove these analyses, "the plaintiffs' economist must propose an econometric method to establish that anticompetitive impact and damages can be evaluated on a class-wide basis."[95] As *Tyson* explained, in limited situations, even statistically representative samples and regressions can be used to show classwide injury.[96] Antitrust class actions commonly use econometric models

89. *Id.* at 165–66.

90. Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 457 (2016).

91. *Id.* at 455–57.

92. *Id.* at 455.

93. Pet, *supra* note 88, at 166 (quoting *Tyson Foods, Inc.*, 577 U.S. at 453).

94. Amit Bindra, *Antitrust Class Action Litigation Post* Wal-Mart v. Dukes*: More of the Same*, 13 J. Bus. & Sec. L. 201, 227 (2013).

95. Bartholomew, *supra* note 78, at 2153.

96. *See Tyson Foods, Inc.*, 577 U.S. at 455–56 (A representative or statistical sample's "permissibility turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action.").

and extensive expert testimony to prove predominance requirements. Therefore, one of the largest impacts of *Wal-Mart* on zero-price antitrust class actions was to allow *Daubert* challenges during the certification stage.[97] This barrier is difficult for plaintiffs to overcome and while not impossible, it will limit the number of successful certifications in zero-price antitrust claims.

In a *Daubert* challenge, parties can question the admissibility of an expert witness's testimony based on unreliable methodology.[98] *Daubert* challenges differ slightly in the Rule 23 context. Instead of asking whether an expert's opinion is admissible due to the method's reliability and relevancy, the court considers the sufficiency of the expert's opinion, models, and testimony.[99] *Daubert v. Merrell Dow Pharmaceuticals, Inc.* established flexible factors that judges can use to assess a challenge: whether the opinion, model, or testimony can be tested; whether it has been subject to peer review and publication; the potential rate of error; and the "general acceptance" of the method within the relevant scientific field.[100]

In antitrust class actions, the expert's economic model depends on data and information publicly available or provided during pre-certification discovery.[101] Sufficient economic models rely on clear industry and product information, with the goal of establishing a common pricing structure that affected the entire class.[102] When a market is particularly complex and does not possess a uniform method of determining price, economists turn to regression analyses comprised of fact-specific variables on which they do not often agree.[103] The role of defense experts is to point out the flaws in the plaintiffs' expert's pricing model or to use their own methodology to advance a theory that there are too many individualized issues for Rule 23(b)(3) to be met.[104]

Eight circuits require a full or almost full *Daubert* analysis at certification.[105] In evaluating *Daubert* challenges, courts are faced

97. Bartholomew, *supra* note 78, at 2149, 2160–61; *see, e.g.*, *In re* Rail Freight Fuel Surcharge Antitrust Litig., 292 F. Supp. 3d 14, 41–43 (D.D.C. 2017) (analyzing expert testimony in great depth).

98. 6 Rubenstein et al., *supra* note 56, at 737–44.

99. Bartholomew, *supra* note 78, at 2155–56.

100. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593–94 (1993).

101. Bartholomew, *supra* note 78, at 2153–54.

102. *Id.*

103. *Id.* at 2154.

104. *Id.* at 2154–55.

105. *Id.* at 2161 ("The Seventh Circuit was the first circuit court to mandate this new hurdle. Soon after, other circuits followed suit. The First, Second, Third, Fourth, Fifth, Eleventh, and portions of the Ninth Circuit adopt a similar requirement."); *see*

with opposing experts. Some courts will even weigh their conflicting testimonies and exclude the "loser" of the battle of the experts; the Eleventh Circuit explicitly makes this a requirement.[106] This is a particularly difficult barrier for private antitrust enforcement because there will often be two skilled economists using different data or coming to different reliable conclusions based on different methods of interpreting the same data.[107] Another large barrier is the flexibility judges have in applying the *Daubert* factors.[108] Certain factors, such as peer review, are difficult to meet, as expert economic models that are specific enough to provide sufficient proof of injury tend to be made purely for litigation.[109] General acceptance requirements may eliminate newer schools of economic thought that would incorporate ideas such as zero-price markets.[110] *Daubert* is one of the largest barriers to antitrust class actions as a whole, and it provides a powerful gatekeeping mechanism.[111] This gatekeeping is especially difficult for plaintiffs in zero-price markets to overcome, but as discussed later, not impossible.

4. Ascertainability

The plain language of Rule 23 prohibits a class from being defined too narrowly or too broadly, since this would "impede the dissemination of notice or render the preclusive effects of a judgment uncertain."[112] However, in *Marcus v. BMW of North America, LLC*, and *Carrera v. Bayer Corp.*, the Third Circuit read a heightened ascertainability requirement into Rule 23.[113] In order to meet the heightened ascertainability requirement, "[f]irst, the class must be defined with reference to objective criteria. . . . Second, there must be a reliable and administratively feasible mechanism for determining whether

also Am. Bar Ass'n, *supra* note 41, ch. VI.C ("Although not required, most district courts will hold evidentiary hearings on contested class certification motions.").

106. Bartholomew, *supra* note 78, at 2166 (citing Sher v. Raytheon Co., 419 F. App'x 887, 890–91 (11th Cir. 2011)).

107. *Id.* at 2166–70.

108. *See* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141–42 (1999).

109. Bartholomew, *supra* note 78, at 2170–72.

110. *See id.*

111. *Id.*

112. Levens & Johnson, *supra* note 49, at 41 (citing Fed. R. Civ. P. 23(c)(1)(B)).

113. *See id.* at 41–42 (first citing Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593 (3d Cir. 2012); and then citing Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013)) (discussing how the holdings in *Marcus* laid the foundation for *Carrera* which held against certifying a class because the plaintiffs had not met the heightened ascertainability requirement).

putative class members fall within the class definition."[114] This increased requirement imposes a higher barrier on all class certifications, but especially on claims in zero-price markets.

The *Carerra* court held that, just as with the other Rule 23 requirements, courts must undertake a rigorous analysis of heightened ascertainability, as established by *Wal-Mart*.[115] Importantly, *Marcus* and *Carerra* suggested that the ascertainability inquiry overlaps with the predominance inquiry; they held that the feasibility and reliability prongs were not satisfied if there must be "individualized factfinding or mini-trials" to prove one is a member of the class.[116] The methods or mechanisms offered to identify class members must also be supported by evidence that they can reliably identify members.[117] However, this does not mean that all of the class members must be identified at the time of certification.[118] Relatively recently, the Third Circuit loosened its application of heightened ascertainability by clarifying that "gaps in the record do not undermine the conclusion that all the evidence taken together could at the merits stage be used to determine" the identity of the injured members.[119] The Third Circuit has also clarified that the heightened ascertainability requirement does not apply to Rule 23(b)(2) cases for injunctive relief; instead, it limited the requirement to Rule 23(b)(3).[120]

The circuits are split with respect to the heightened ascertainability standard; the First and Eleventh have also adopted it, while

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114. Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 355 (3d Cir. 2013) (citation omitted) (citing *Marcus*, 687 F.3d at 593–94).

115. *Carrera*, 727 F.3d at 306 (discussing Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011)).

116. *Id.* at 307 (quoting *Marcus*, 687 F.3d at 593) (implying that the predominance inquiry, which requires that individualized factfinding not overwhelm the common issues at law, is a concern when the ascertainability inquiry would require extensive individualized factfinding).

117. Stephanie Haas, Note, *Class is in Session: The Third Circuit Heightens Ascertainability with Rigor in* Carrera v. Bayer Corp., 59 Vill. L. Rev. 793, 810–11 (2014).

118. *See* Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015) ("And it does not mean that a plaintiff must be able to identify all class members at class certification—instead, a plaintiff need only show that 'class members *can* be identified.'" (quoting *Carrera*, 727 F.3d at 308 n.2)).

119. Hargrove v. Sleepy's LLC, 974 F.3d 467, 480 (3d Cir. 2020). *See also* Am. Antitrust Inst., Class Action Issues Update Spring/Summer 2022, at 4–5 (2022), https://www.antitrustinstitute.org/wp-content/uploads/2022/07/Class-Action-Issues-Update-July-2022.pdf [https://perma.cc/9ZS5-PBYC] (providing a helpful overview of the Third Circuit's recent changes to the heightened ascertainability requirement).

120. *See* Shelton v. Bledsoe, 775 F.3d 554, 563 (3d Cir. 2015) ("[A]scertainability is not a requirement for certification of a (b)(2) class seeking only injunctive and declaratory relief, such as the putative class here.").

the Second, Sixth, Seventh, and Ninth have rejected it.[121] The First Circuit adopted heightened ascertainability in an antitrust class action,[122] but suggested that a rebuttable presumption, like the "fraud on the market" theory in securities class actions, could apply to establish an antitrust injury.[123] The "fraud on the market" theory creates a rebuttable presumption of shareholder reliance based on the idea that the stock price is an accurate reflection of all public information.[124] This theory presumes that individual purchasers relied on the statements made, and it does not require proof of reliance once plaintiffs have proven a material misstatement.[125] If a similar theory applied in antitrust, it could look like a presumption that "economically rational consumers faced with two identical products would purchase the less expensive alternative."[126] This presumption would create a "mechanism for exclusion of the brand-loyalist consumers," and thus distinguish the uninjured "brand-loyalists" consumers from the injured ones.[127] While the First Circuit discussed this novel theory based on a version of the "fraud on the market" theory, it determined that it was ultimately unnecessary to decide whether it was applicable because in the specific case at hand, the plaintiff's unrebutted affidavits or declarations could independently meet the "administratively feasible" prong of the heightened ascertainability standard.[128]

In sharp contrast, the Seventh Circuit rejected a heightened version of ascertainability in favor of keeping the base requirement that a class must be clearly defined,[129] and applied only the first prong that "the class must be defined with reference to objective criteria."[130] The Seventh Circuit held that Rule 23(b)(3)'s superiority requirement

121. Levens & Johnson, *supra* note 49, at 42.

122. Christian Osorno Cortes, Comment, *Who, What, Where, and When? Why Courts Should at Least Consider the Third Circuit's Heightened Ascertainability Requirement as a Prerequisite to Class Certification*, 15 FIU L. Rev. 487, 499–500 (2021) (citing AstraZeneca AB v. UFCW Unions & Emps. Midwest Health Benefits Fund (*In re* Nexium Antitrust Litig.), 777 F.3d 9 (1st Cir. 2015)).

123. *Id.* at 500 (citing *In re Nexium Antitrust Litig.*, 777 F.3d 9).

124. *See* Basic Inc. v. Levinson, 485 U.S. 224, 250 (1988).

125. *Id.* at 241–42 ("The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business . . . ." (quoting Peil v. Speiser, 806 F.2d 1154, 1160–61 (3d Cir. 1986))).

126. *In re Nexium Antitrust Litig.*, 777 F.3d at 20.

127. *See id.* at 19–20.

128. *Id.* at 19; Cortes, *supra* note 122, at 499–500 (citing *In re Nexium Antitrust Litig.*, 777 F.3d at 19–20).

129. Mullins v. Direct Digit., LLC, 795 F.3d 654, 657–58 (7th Cir. 2015).

130. Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 355 (3d Cir. 2013) (citing Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593 (3d Cir. 2012)).

accomplishes the goals set forth by the heightened ascertainability requirement without needing to implement this balance-upsetting requirement.[131] The court stated that heightened ascertainability tends to bar class actions where consumers pay little for the goods or services and where they do not have documentary proof, such as receipts of purchases.[132]

The question of how to certify a class when not all consumers have proof of purchase has divided lower courts. Some hold that it is an insurmountable barrier to certification under the heightened standard.[133] Other courts, if not outright rejecting the heightened ascertainability requirement, have changed their analysis to avoid eliminating consumer class actions as a whole.[134] It has even been suggested that requiring proof of purchase incentivizes defendants to delete records of purchases or to decrease their recordkeeping to avoid future liability.[135] The heightened ascertainability requirement is yet another barrier to class certification, and a difficult barrier for zero-price claims. The specific challenges these claims face will be discussed in Part IV.

IV.
THE BARRIERS AND SOLUTIONS

After discussing the barriers to certification in general created by the predominance analysis, *Daubert* challenges, and ascertainability, this Part will discuss how they are uniquely challenging for an antitrust class action that alleges anticompetitive harm in a zero-price platform market. Furthermore, this Part will discuss possible solutions, offered by traditional antitrust enforcement theories as well as innovative theories, that will show that these barriers are not impossible to overcome.

For a zero-price platform market, the complex supply and demand dynamics pose several challenges to meeting the predominance requirement.[136] Proving that the individual questions do not predominate is difficult when the anticompetitive harms themselves can be spread across multiple different sides of the platform—impacting individuals in different ways, depending on which part

131. *Mullins*, 795 F.3d at 658.

132. *Id.*

133. Christine P. Bartholomew, *The Failed Superiority Experiment*, 69 VAND. L. REV. 1295, 1308 (2016).

134. *Id.*

135. Brent W. Johnson & Emmy L. Levens, *Heightened Ascertainability Requirement Disregards Rule 23's Plain Language*, ANTITRUST, Spring 2016, at 68, 72.

136. Shili Shao, *Antitrust in the Consumer Platform Economy: How Apple Has Abused Its Mobile Platform Dominance*, 36 BERKELEY TECH. L.J. 353, 405–06 (2021).

or feature of the platform they use.[137] For example, "Apple's exclusionary conduct happens across its IAP tie," their in-app purchase payment system, and "its limits on third-party access to NFC and Siri," their contact payment chip and virtual assistant.[138] Apple's exclusionary conduct even extends to "its self-preferencing over push-notification advertising."[139] This is an example of how the anticompetitive conduct in zero-price markets can "affect[] developers and consumers in different markets" and in different ways.[140] Without available alternatives to these zero-price products, proving divergent consumer losses requires evidence that is distinct and hard to calculate.[141] Individualized conduct, differing impacts, and differing levels of demand for each component are likely to overwhelm the common evidence used in a model of injury and damages.[142] This is why predominance is a uniquely high barrier for zero-price markets.

To add to the complexity of these platform markets that threaten the predominance analysis, anticompetitive impacts in zero-price markets are largely qualitative and difficult to measure.[143] Attention and information costs are highly differentiated between individual consumers and their individual circumstances, without clear uniform data.[144] The information collected and overall experiences on these platforms are typically based on personal use and interaction with the platform.[145] Accurate and sufficient estimations of common damages or impacts in zero-price markets can therefore be difficult.[146] Such individualization raises concerns about how to satisfy a rigorous analysis of the predominance requirement.

A. Using Established Antitrust Theories

Taking a step back and returning to basics is the first step to overcoming these barriers in these "new" markets. One of the first

137. *Id.* at 406.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *See* Newman, *supra* note 1, at 179.
144. *See id.* at 180–81 (discussing how consumers not only experience different advertisements but also the information collected can be dependent on individual consumer interactions, and each advertiser values that personal information differently).
145. *Id.*
146. *See id.*

barriers to a successful antitrust class action in a zero-price platform market is the application of the predominance requirement to the alleged antitrust violation.[147] Establishing the existence of an antitrust violation, based on a theory of harm, is essential to building a case. Meeting the predominance requirement for this first step can be relatively easy, even for complex monopolization claims like those involving zero-price platforms.[148] While zero-price multisided platform markets are more complex, one solution to the predominance barrier is to use existing and recognized theories of harm, as these non-novel theories—such as monopolization or unlawful restraint of trade—generally rely on common evidence.[149] However, a greater problem arises when the theory of harm itself relies on information costs, such as predatory pricing claims.[150] While there are new alternatives to a "cost-based standard" for evaluating these claims, the classic approach looks towards the monopolist's pricing strategies.[151] A zero-price claim would rely on strategies based on information costs instead of price, and these costs create individual complexities, which could overwhelm the common issues.

The District Court for the Northern District of California took a unique approach to this barrier in *Klein*. In this consumer class action against Facebook, the plaintiffs alleged that Facebook obtained monopoly power through misrepresentation of its privacy policy in violation of Section 2 of the Sherman Act.[152] The court found the allegations regarding the consumers' data privacy claims to be plausible and sufficient to reject the motion to dismiss.[153] The misrepresentation involved the deception of users about Facebook's use and monetization of user data as well as Facebook's privacy policy.[154] This theory is clever: instead of claiming monopolization through predatory information collection, it focuses on the misrepresentations about such collection. The theory of harm was monopolization through misrepresentation; the misrepresentation constituted the anticompetitive conduct that allowed Facebook to better position

147. *See supra* note 78 and accompanying text.
148. *See supra* note 63 and accompanying text.
149. *See* AM. BAR ASS'N, *supra* note 41, ch. III.
150. *Id.*
151. *See* Thomas B. Leary, Former Comm'r, Fed. Trade Comm'n, The Need for Objective and Predictable Standards in the Law of Predation (May 10, 2001), https://www.ftc.gov/news-events/news/speeches/need-objective-predictable-standards-law-predation [https://perma.cc/23N2-VBR9].
152. Klein v. Facebook, Inc., 580 F. Supp. 3d 743, 785 (N.D. Cal. 2022).
153. *Id.* at 794–96.
154. *Id.*

itself and exclude rivals from the market.[155] This is an innovative way to use information costs in place of pricing, through the lens of an established anticompetitive theory, to avoid a predation claim.

While the antitrust violation itself in zero-price platform claims may easily meet the predominance requirements, proving common impact and providing a reasonable estimation of damages through classwide evidence is where many of the issues begin for zero-price markets.[156]

B. Common Impact in Zero-Price and Representative Samples

One problem in proving both common impact of injury resulting from the antitrust harm and the estimation of damages in zero-price platform markets is how privacy is valued. The common impact or harm in these cases is the increased use of personal data at a supracompetitive level. In theory, the antitrust injury would be that, because of the alleged illegal anticompetitive conduct, the defendant could impose information costs and take user data at a level higher than they would have been able to in a competitive market.[157] However, measuring the value of privacy is a complicated endeavor, especially when attempting to find the "competitive" level.[158] The competitive price is the price at which the aggregated supply of the good meets the aggregated demand for that good. In most markets, consumers value each good differently. Some will even get surplus enjoyment because they were willing to pay a much higher price. However, monetary price is a way of standardizing each person's valuation of a good that can then be aggregated and applied to the market as a whole. This aggregation results in finding an optimal

155. This appears to be a form of deceptive self-preferencing; Facebook was highlighting its own materials and privacy policy while deceiving customers about the agreements it has about their data. *See* Daniel Francis, *Making Sense of Monopolization*, 84 ANTITRUST L.J. 779, 831 (2022) (arguing that while self-preferencing does not typically raise liability, it can when deceptive self-preferencing is involved).

156. *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311–12 (3d Cir. 2008).

157. *See, e.g.*, Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1339 (11th Cir. 2010) ("By 'anticompetitive,' the law means that a given practice both harms allocative efficiency *and* could 'raise[] the prices of goods above competitive levels or diminish[] their quality,' . . . in addition to other possible anticompetitive effects such as those above. In turn, the ability to raise prices above the competitive level corresponds to a firm's market power. . . . Here, beyond the bald statement that consumers lost hundreds of millions of dollars, there is nothing establishing the competitive level above which TPX's allegedly anticompetitive conduct artificially raised prices." (citations omitted)).

158. *See* Garrett Glasgow & Chris Stomberg, *Consumer Welfare and Privacy in Antitrust Cases—An Economic Perspective*, ANTITRUST, Fall 2020, at 46–47.

price in a perfectly competitive market. Unlike monetary prices, the complex and extreme individualization of information costs challenges the ability to standardize and aggregate across consumers; thus, information costs make defining the meaning of "competitive" and the impact and damages analysis difficult.[159] However, classwide evidence of an antitrust injury and common impact can be sufficiently alleged to satisfy the predominance requirements through the use of economic models and averaging.[160]

In what is often called the "privacy paradox," consumers will state that they highly value their personal information despite studies of their actions suggesting that their actual preferences place little value on privacy.[161] For example, Pew Research found that 79% of Americans are somewhat or very concerned about how companies use their personal data and 81% believe that the risks outweigh the benefits.[162] Yet, 38% of adults say they *sometimes* read the privacy policies they agree to and 36% say they *never* read it before agreeing to the policies.[163] If individual evidence of privacy valuations are required to find an aggregated information cost in a hypothetical competitive market, this would likely overwhelm the common evidence that predominance requires.

Courts have historically struggled with the predominance analysis in markets where each consumer faces unique costs and conditions.[164] In 2005, the Eighth Circuit refused to certify an antitrust class due to an inability to prove common impact because the price of the product was "dependent on geographic location, growing conditions, institutional discounts, and consumer preferences."[165]

One solution to this problem is to take the approach suggested in *Tyson*, where the Court held that statistically representative models and samples could be used to find classwide liability. The specific solution would entail running a regression analysis on representative

159. *See* Shao, *supra* note 136, at 406 ("For example, Apple's exclusionary conduct happens across its IAP tie, its limits on third-party access to NFC and Siri, and its self-preferencing over push-notification advertising, affecting developers and consumers in different markets.").

160. *See* Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 455–57 (2016).

161. *See* Glasgow & Stomberg, *supra* note 158, at 47.

162. Brooke Auxier et al., *Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information*, Pew Rsch. Ctr. (Nov. 15, 2019), https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/ [https://perma.cc/GYT2-7L88].

163. *Id.*

164. 6 Rubenstein et al., *supra* note 56, at 668–69.

165. *Id.* at 669 (citing Blades v. Monsanto Co., 400 F.3d 562, 568–71 (8th Cir. 2005)).

statistical samples to find the common impact of the anticompetitive behavior.[166] Zero-price platforms comprise a market where classwide statistical samples would meet the requirements of *Tyson*; individuals could use a classwide statistical sample if they were suing individually and if there is not a better alternative method of achieving common evidence.[167] The Ninth Circuit, relying on *Tyson*, confirmed that highly individualized differences in the costs to each consumer do not "undermine the regression model's ability to provide evidence of common *impact*."[168] While this barrier to the predominance analysis can be overcome through regression analysis and statistical samples, this does not address the need for the court to analyze damages on an individualized basis.[169]

Assuming *Daubert* challenges against plaintiffs' experts do not succeed, proving common impact through statistical and economic regression analysis and models should be successful. *In re Google Play Store Antitrust Litigation* is an example of the successful use of a statistical and economic regression model.[170] While primarily focused on supracompetitive pricing concerns such as the impact of anticompetitive actions taken by Google, the antitrust consumer class was certified despite the individualized costs among consumers.[171] The Rule 23(b)(3) class consisted of all consumers in certain states "who paid for an app through the Google Play Store or paid for in-app digital content . . . ."[172] The expert demonstrated common classwide impact on consumers through a "pass-through formula" that was then input into the Rochet-Tirole model.[173] Put simply, this is a model centered around the concept of transaction platforms, like Google, that determines how much of the "supracomeptitive cost imposed on developers . . . is passed through to consumers."[174] The model showed that

166. *See* Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 457–58 (2016).

167. *See id.*

168. Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 679 (9th Cir. 2022) (en banc).

169. *Id.*

170. *See generally In re* Google Play Store Antitrust Litig., No. 21-md-02981, 2022 U.S. Dist. LEXIS 213670, at *56 (N.D. Cal. Nov. 28, 2022) ("Google's suggestion that Dr. Singer did not do any empirical analyses is wholly unfounded. The record, namely his report and hot tub testimony, amply establish that his opinions were solidly grounded in the transactional data and other evidence in the case. . . . He also ran multiple tests using that real-world data to confirm the accuracy of his predictions about such things as 'the relationship between an app's share within its category and its price.'" (citations omitted)).

171. *Id.* at *56–57.

172. *Id.* at *25.

173. *Id.* at *49.

174. *Id.* at *48 (quoting plaintiffs' expert for certification, Dr. Hal J. Singer).

consumers were paying thirty cents per application beyond what they would in a competitive market.[175] This economic model averages the prices consumers paid on different apps across categories to different developers.[176] Even with high individualization of the costs to consumer in this case, the costs were able to be aggregated and modeled to successfully show antitrust impact common to the class.

In re Google Play Store Antitrust Litigation is an excellent example of how to approach overcoming the barriers that individualized impacts can pose to the predominance analysis in platform markets. However, this was not an instance of a zero-price platform, as the case centered on paid apps.[177] For zero-price platforms, *Klein* once again offers a way to take into account the barriers that individualized impacts pose for determining costs in zero-price platforms. Even though *Klein* is a pre-certification case and not about predominance, the allegations show how to demonstrate aggregation and common proof using a framework similar to *In re Google Playstore Litigation*.

The Court in *Klein* found that the consumers' "'information and attention' has 'material value.'"[178] This is first a recognition that information costs are analogous to price. The court then further found the consumers adequately alleged injury related to the anticompetitive harm. Specifically, if Facebook had not had a monopoly, consumers would have benefited from higher protections, less collection of their personal information, or alternative social media platforms to choose from.[179] This connects their privacy loss with the harm of anticompetitive conduct and establishes the existence of an antitrust injury. Most importantly, in attempting to address the barrier individualized impacts might have in a zero-price market, the allegations placed an aggregated monetary value on consumers' information and attention costs.[180] This aggregation was done through both an approximation of Facebook's average revenue per user and a willingness to pay structure using samples of times when Facebook paid certain users for their data.[181] This allegation

175. *Id.* at *50.

176. *Id.* at *52–54.

177. *Id.* at *25.

178. Klein v. Facebook, Inc., 580 F. Supp. 3d 743, 803 (N.D. Cal. 2022) (citing Reiter v. Sonotone Corp., 442 U.S. 330, 338 (1979)).

179. *Id.* at 803–05.

180. *Id.* at 803.

181. *See id.* at 803 ("Consumers identify examples of companies that have been willing to pay users for information and attention. . . . Indeed, Facebook itself paid certain users 'up to $20.00 per month in return for access to those users' emails, private messages in social media apps, photos and videos, web browsing and search activity, and even location information.'" (citations omitted)).

used representative samples, statistical revenues, and was deemed adequate to survive a motion to dismiss, but it was not in a predominance context.[182] However, *Klein* should serve as an example of what future courts should accept as common evidence under Rule 23(b)(3) for a zero-price platform antitrust class action. *Klein* provides a zero-price example of how the framework accepted in *In re Google Play Store Antitrust Litigation* could be successfully used to prove common impact. Even in highly individualized markets such as zero-price platforms, classwide evidence of an antitrust injury and common impact can be sufficiently proved for predominance through the use of economic models and averaging.

C. Daubert Barriers

In order for a regression analysis and statistical samples to overcome the barrier of demonstrating common classwide impact in a zero-price platform market, the models and analyses themselves must overcome any likely *Daubert* challenges. In fact, it is clear that if the model relied on to prove common impact fails a *Daubert* challenge, then the class will not be certified: "[B]road generalizations by market participants . . . cannot, in the absence of a proper chain of expert models, serve as common proof . . . ."[183] Models demonstrating common impact may fail *Daubert* for various reasons. One important reason is that aggregations of data and information cannot be used to "mask individualized injury."[184] Overcoming a *Daubert* challenge requires a "micro-level analysis" into the expert testimony, rather than simply accepting the averages presented.[185] The Third Circuit suggests that the court must weigh "whether the market is characterized by individual negotiations" with competing factual questions to determine if the average is credible and also predict how the expert's testimony might "play out at trial."[186] This makes *Daubert* the strongest barrier to zero-price antitrust class actions. One solution to lessen the burden of *Daubert* would be to use existing and

182. *See generally id.* (deciding on a motion to dismiss before class certification was decided, and injunctive relief was requested).

183. *In re* Aluminum Warehousing Antitrust Litig., 336 F.R.D. 5, 50 (S.D.N.Y. 2020); *see also* Laumann v. Nat'l Hockey League, 105 F. Supp. 3d 384, 398–99 (S.D.N.Y. 2015) ("Here, Dr. Noll's model *was* the common evidence—and the model has been excluded. Therefore, no (b)(3) class may be certified." (footnote omitted)).

184. *In re* Lamictal Direct Purchaser Antitrust Litig., 957 F.3d 184, 194 (3d Cir. 2020).

185. *Id.*

186. *Id.*

established economic models based on classic economic theories that are associated with simpler and older platform markets, such as televisions and newspapers.

With the flexibly applied *Daubert* factors of peer review and general acceptance within the field, economic models for newer zero-price markets face an uphill battle. The factor of general acceptance was adopted from *Frye*, which requires that "the [evidence] from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[187] *Daubert* rejected general acceptance as the sole dispositive element in determining reliability.[188] Instead, the case incorporated the factor as one of many considerations and stated that the methodology must have gained more than a minimal amount of support.[189]

Applying the *Daubert* factors more directly to zero-price markets presents a barrier, as often new economic models are used. For example, relatively new behavioral economics research suggests that consumers are influenced by "free" products to a greater extent than predicted by the traditional model.[190] However, the traditional model assumes that "zero" simply serves as another number, and that rational consumers analyze "zero" under the standard cost-benefit framework.[191] Behaviorally, customers react beyond what rationality and the standard model would suggest.[192] The "zero-price effect" occurs when customers overvalue a good priced at zero to the point that it leads to inefficiencies and waste.[193] Thus, zero-price models are novel and tend to deviate from traditional assumptions in most classic economic models.[194] Furthermore, as mentioned previously, the majority of antitrust theory centers on "price-focused theory."[195] Therefore, zero-price markets are a deviation from "[t]he universe of homogenous goods and static price competition that gave birth to modern analyses . . . ."[196]

The innovative economic modeling of zero-price markets does not appear to satisfy the general acceptance factor in *Daubert* analyses. This is especially difficult in cases where one expert is using a

187. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).
188. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589 (1993).
189. *Id.* at 594.
190. Newman, *supra* note 1, at 183–85.
191. *Id.* at 184.
192. *Id.* at 185.
193. *Id.* at 185–86.
194. *Id.* at 183–86.
195. *Id.* at 190.
196. *Id.* at 196.

well-accepted and well-known price centric model and the other uses the newer models based on behavioral economics.[197] The most commonly accepted economic testimony relies on a narrow definition of harm.[198] In addition to these concerns, the testability and replicability of economic modeling is uniquely hard in real-world cases, and especially so in markets that may not behave "rationally."[199] While these considerations mean that any antitrust claim would not have sufficient modeling for a *Daubert* challenge if that standard were always applied strictly, the complexity of zero-price models further focuses the analysis on the general acceptance factor.[200] With the importance of providing expert testimony and models to prove common impact and even damages, *Daubert* challenges appear to pose a high barrier to zero-price antitrust class actions.

This is not to say that it is impossible for zero-price platform-based models to overcome a *Daubert* challenge. The Rochet-Tirole Model, discussed earlier, was published in a peer-reviewed journal and has been accepted by courts.[201] In *In re Google Play Store Antitrust Litigation*, the Northern District of California accepted the use of the Rochet-Tirole Model after holding a concurrent expert proceeding.[202] The model authors refer to the well-established low—or zero—price economics of newspapers and television as a case study supporting their theories.[203] In these contexts, viewers and readers obtain the service for free or at a loss to the company, and the profit for the newspapers and television is on the advertising side.[204] Even though zero-price markets for social media like Facebook and TikTok are relatively new, the model can fall back on these non-novel forms. The main difference, however, is that in the social media context, there are information costs in addition to attention costs: instead of simply profiting from views, social media platforms also profit from collecting, compiling, and selling personal information. However, even with these differences, the basic economic principles of the internet as a whole appear to be used in social media, just in

197. *See* Bartholomew, *supra* note 78, at 2170–72.

198. *Id.* at 2171.

199. *See id.*

200. *Id.* at 2171–72.

201. *See* Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. Eur. Econ. Ass'n 990 (2003); *In re* Google Play Store Antitrust Litig., No. 21-md-02981, 2022 U.S. Dist. LEXIS 213670 (N.D. Cal. Nov. 28, 2022).

202. *In re Google Play Store Antitrust Litig.*, 2022 U.S. Dist. LEXIS 213670, at *33, *36, *39.

203. Rochet & Tirole, *supra* note 201, at 1013–15.

204. *Id.*

a more extreme application of a platform model.[205] This would suggest that the economic models that have worked for traditional and longstanding forms of zero-priced goods can be applied in novel circumstances. Thus, using older forms of zero or unprofitably priced platform models may offer a solution to satisfying the general acceptance and peer review factors. This leaves a *Daubert* challenge to zero-price platform models as a difficult, but not insurmountable, barrier to certification.

D. Uninjured Parties and Exceptions

Courts are divided on how to handle the possibility of uninjured parties and the potential consequences for determining common impact and damages. The Third, Fifth, and D.C. Circuits require every member of the class to in fact be injured by the antitrust violation—a strict standard.[206] However, the de minimis exception adopted by the First Circuit in *In re Nexium Antitrust Litigation* may be a solution to the problem of uninjured class members.[207] This exception allows for the certification of a class if "the number of uninjured members is *de minimis*."[208]

The de minimis exception was limited by the First Circuit in *In re Asacol Antitrust Litigation*.[209] In this case, there were thousands of members, at least ten percent of the class, who were not impacted by the anticompetitive conduct.[210] The court denied the use of affidavits to prove injury for these class members as it would cause minitrials to review each contested affidavit.[211] Thus, there was no plan to review claims of injury from likely uninjured parties, and this would overwhelm the common calculations or violate superiority, as the

205. *Id.*

206. Pet, *supra* note 88, at 159 n.52 (first citing *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008); then citing Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003); and then citing *In re* Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252 (D.C. Cir. 2013)).

207. *See* Rami Abdallah Elias Rashmawi, Note, *No Injury? No Class: Proof of Injury in Federal Antitrust Class Actions Post-*Wal-Mart, 77 Wash. & Lee L. Rev. 1375, 1412 (2020) (citing AstraZeneca AB v. United Food & Com. Workers (*In re* Nexium Antitrust Litig.), 777 F.3d 9 (1st Cir. 2015)).

208. *Id.* at 1411.

209. *See In re* Asacol Antitrust Litig., 907 F.3d 42, 58 (1st Cir. 2018) (reversing the lower court's decision to grant certification that relied on *de minimis* exception because no reasonable workable plan to prevent the overwhelming of common issues was offered).

210. Rashmawi, *supra* note 207, at 1421–22 (citing *In re Asacol Antitrust Litig.*, 907 F.3d at 47).

211. *Id.* at 1422 (citing *In re Asacol Antitrust Litig.*, 907 F.3d at 53).

case would be unmanageable.[212] This case shows the limits of a de minimis exception. The D.C. Circuit has similarly suggested that if there is a de minimis exception, the number of uninjured members must not be too numerous as to render the exception pointless.[213] The Ninth Circuit adopted a similar exception, preventing the presence of non-injured class members from defeating certification as long as there were not "large numbers of class members who were never *exposed* to the challenged conduct to begin with."[214] The Ninth Circuit sitting en banc clarified that there is no per se rule that individualized damages at trial would defeat the certification of a class or that more than a de minimis number of uninjured parties would fail Rule 23(b)(3).[215] Comparing the rule to the First Circuit and D.C. Circuit exceptions, the Ninth Circuit stated that predominance analysis must be applied on a case by case basis with the presence of uninjured parties instead of applying a per se rule.[216] This requires analyzing the facts to determine if an effort to identify the uninjured class members, an individual issue, would predominate the common issues at hand.[217]

The de minimis exception would be context-specific for zero-price antitrust markets, as cases may arise in which there are too many uninjured parties. However, given the goal of class actions to aggregate claims that would likely not be brought due to costs of litigation, a de minimis approach should be adopted in zero-price antitrust cases. While these exceptions are not clearly established, nor well defined in these Circuits, they offer a clear path forward for complex zero-price antitrust markets where a large number of class members are in fact injured by the anticompetitive conduct through increased privacy and attention costs.

E. Ascertainability and Reliable Data

The barrier of uninjured parties overlaps with that of ascertainability. The definition of a class in antitrust zero-price class actions can easily become overly broad: should it include Facebook users? Or only those experiencing increased privacy and attention costs?

212. *Id.* at 1413, 1422 (citing *In re Asacol Antitrust Litig.*, 907 F.3d at 45–47, 51, 55, 58).

213. *Id.* at 1415 (citing *In re* Rail Freight Fuel Surcharge Antitrust Litig., MDL No. 1869, 934 F.3d 619, 625–26 (D.C. Cir. 2019)).

214. *Id.* (quoting Ruiz Torres v. Mercer Canyons Inc., 835 F.3d 1125, 1136 (9th Cir. 2016)).

215. Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 681–82 (9th Cir. 2022) (en banc).

216. *Id.* at 669 n.13.

217. *Id.*

Or only those whose personal information was taken? What about those who would accept the higher information and attention costs in return for services? This challenge is not unique to zero-price class actions, and a clear definition of users that were injured by an antitrust violation should suffice for the overall class definition. Part of proving the harm would be determining the increased impact of the information and attention costs due to the antitrust violation and who was affected by this impact.

This high barrier results from the heightened ascertainability standard in some circuits. The heightened ascertainability standard is a practical standard focusing on defining a class in a manageable and feasible way.[218] This is done in order for a defendant to enforce the finality of a judgment, for the plaintiffs to be able to distribute funds, and for administrative reasons.[219] If the definition of the class does not accomplish these goals, courts fear that the individual issues will overwhelm the common issues.[220] Thus, in zero-price cases, whether members of the class can be sufficiently identifiable will depend heavily on the available data from the interactions between the consumer and the platform.

The argument in the American Antitrust Institute's amicus brief for *In re Niaspan Antitrust Litigation* provides a good example of how zero-price platform cases could address the heightened ascertainability barrier. *In re Niaspan Antitrust Litigation* is an antitrust case in which insurers were the intermediaries paying for prescription drugs, and the end payors were the consumers.[221] Although prescription drugs have a clear price, unlike zero-price platforms, this example offers a framework for arguments concerning zero-price platforms. The amicus brief suggests that a dependable method of showing administrative feasibility is to show that reliable data surrounding costs and usage exist and can be paired with affidavits affirming the data.[222] This reliable data is recorded as a result of ordinary business needs; all participants in the pharmaceutical industry keep records of each product, the price, and the amount each party pays.[223] Likewise, in a zero-price platform context, companies keep

218. *See* Brief for the American Antitrust Institute as Amicus Curiae in Support of Appellants at 1–2, *In re* Niaspan Antitrust Litig., 67 F.4th 118 (3d Cir. 2023) (No. 21-8042), https://www.antitrustinstitute.org/wp-content/uploads/2022/01/TSAC-Amicus-Curiae-AAI-No.-21-2895.pdf [https://perma.cc/GG5E-JYQ8].

219. *Id.* at 4

220. *Id.*

221. *See In re Niaspan Antitrust Litig.*, 67 F.4th at 122, 124.

222. Brief for the American Antitrust Institute as Amicus Curiae in Support of Appellants, *supra* note 218, at 3.

223. *Id.* at 14–15.

records of the consumer data purchased, the purchaser, and for how much the data were sold.

In addition to regular business needs, pharmaceutical companies have financial incentives to analyze and sell the information for research or monetary purposes.[224] Similarly, it is the collection and sale of user data that has made Facebook and other zero-price platforms profitable. Therefore, like pharmaceutical companies, the high financial incentive in the zero-price platform context should result in high retention of data on the information collected and sold.[225]

Finally, the pharmaceutical industry has reliable data due to legal regulations.[226] For zero-price platforms, internal regulations and privacy laws may not offer clear data. For example, Facebook has previously allowed third-party companies to violate Facebook's stated privacy policies.[227] The lack of internal policing and proper controls suggests that reliable data regarding the extent of the class membership may not exist.[228] However, with a recent settlement order, Facebook now has a clear legal obligation to document instances where users' information has been breached, increase oversight, and establish and maintain data security programs.[229] In addition to this, oversight programs were recently implemented regarding Facebook's privacy policy.[230] Assuming reliable records now exist as a result of prior litigation and settlements and can be achieved through pre-certification discovery, these records would satisfy the Third Circuit's administrative feasibility requirement of ascertainability, even if they are incomplete.[231]

This is, however, a contentious solution, as the arguments relied on in this analogy are from an amicus brief arguing for a reversal of a district court decision.[232] The Third Circuit recently affirmed the district court's opinion that the data were not sufficient to meet the

224. *Id.* at 18–19.

225. *See id.*

226. *Id.* at 12–14.

227. *See FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook*, Fed. Trade Comm'n (July 24, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions-facebook [https://perma.cc/ME3D-Q4D2].

228. *See id.*

229. *See id.*

230. *See id.*

231. *See* Brief for the American Antitrust Institute as Amicus Curiae in Support of Appellants, *supra* note 218, at 11.

232. *Id.* at 27.

ascertainability standard.[233] The Third Circuit found that the data failed to identify the relationship between the members of the class and the intermediaries, only serving to quantify the different intermediaries involved.[234] Additionally, the court held that the plaintiffs' method of feasibly identifying class members was self-dependent, meaning that their method required the assumption that it was correct in order to operate.[235] Even more troubling for zero-price market claims was the court's confirmation of the district court's view on the role of intermediaries:

> The District Court found that the prevalence of intermediaries is a significant problem, especially since the same players in this industry may be end-payors, fully insured health plans, or merely administrators in any given transaction, and the PBM [Pharmacy Benefit Managers] data does not indicate which role they are playing. That finding is not clearly erroneous.[236]

The Court's finding suggests that there are many roles that zero-price platforms play, and if the data do not clarify these roles, ascertainability will be a difficult barrier to overcome.

This all appears quite troubling for a market in which platforms and advertisers interact with users in many different capacities. However, the Third Circuit took issue with the data and metrics used, not the theory involved.[237] This suggests that "detailed records that easily allowed identification of a [class member] on the face of each record" without ambiguity could be sufficient for meeting the ascertainability requirement.[238] The recordkeeping and inner workings of platforms are beyond the topic of this paper. An in-depth analysis is required to determine whether reliable data exist to meet the Third Circuit's ascertainability requirements.

F. Ascertainability and Analogizing the "Fraud on the Market" Theory

The First Circuit offers an intriguing but flawed theory for how zero-price claims could overcome the barrier presented by the heightened ascertainability standard. The court has suggested that a rebuttable presumption similar to that of the "fraud on the market" theory from securities class actions could be a successful

233. *In re* Niaspan Antitrust Litig., 67 F.4th 118, 136–37 (3d Cir. 2023).
234. *Id.*
235. *Id.* at 134–35.
236. *Id.* at 135.
237. *Id.* at 134–37.
238. *Id.* at 137.

method.[239] The argument in the complaint for *Klein* aligns with the First Circuit's theory. First, Facebook misrepresented and withheld vital information from consumers.[240] Second, this information about the privacy policy and its operation would have been relied on by consumers when deciding to participate in the service and trade personal information.[241] Here, the quality of the platform and its privacy protections would act as a substitute for price in the "fraud on the market" theory. Users would claim that they relied on misrepresentations about the privacy policy when trying to decide whether to use a free platform. This is similar to relying on statements in making a decision on whether to buy a stock.

However, "fraud on the market" is a highly specific rebuttable presumption and courts are unlikely to utilize similar principles outside of the securities context.[242] This is because "reliance is an element of a Rule 10b-5 cause of action."[243] This reliance requirement is necessary for the plaintiff to show a connection between the false statements and the securities injury itself.[244] In antitrust claims, however, reliance is not a requirement to show injury or impact.

While this novel rebuttable presumption theory may potentially be able to satisfy the administrative feasibility prong for normal antitrust class actions, it is not suitable for zero-price platform claims. In zero-price markets, users may feel compelled to set aside privacy concerns or do not prioritize privacy when deciding to join a platform, as the "privacy paradox" would suggest.[245] In contrast, the preeminence of the price of a stock in a decision to purchase, even over other possible considerations, is central to the theory.[246] Privacy costs, the central analog to a monetary price, plays too uncertain of a role in consumer decision making for a presumption theory to work. As an example of this uncertainty, Commissioner Carr of the Federal Communications Commissions testified to Congress on the threats of TikTok:

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239. Cortes, *supra* note 122, at 500 (citing AstraZeneca AB v. United Food & Com. Workers (*In re* Nexium Antitrust Litig.), 777 F.3d 9, 20 (1st Cir. 2015)).

240. Klein v. Facebook, Inc., 580 F. Supp. 3d 743, 785–86 (N.D. Cal. 2022).

241. *Id.* at 787–88.

242. *See* Basic Inc. v. Levinson, 485 U.S. 224, 242 (1988).

243. *Id.* at 243.

244. *Id.*

245. *See* Glasgow & Stomberg, *supra* note 158, at 47.

246. *See Basic Inc.*, 485 U.S. at 241–42 ("The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business. . . ." (quoting Peil v. Speiser, 806 F.2d 1154, 1160–61 (3d Cir. 1986))).

> They consider it to be just another app for sharing funny videos or memes. . . . At its core, TikTok functions as a sophisticated surveillance tool that harvests extensive amounts of personal and sensitive data. Indeed, TikTok's own disclosures state that it collects everything from search and browsing histories to keystroke patterns and biometric identifiers, including faceprints . . . .[247]

TikTok's security concerns and data collection have not slowed its growth, even among members of the military.[248] Perhaps this is because eighty-one percent of Americans feel they have little control over the information collected by companies.[249] Thus, privacy concerns in zero-price markets are not clearly analogous to the price considerations that are necessary in the "fraud on the market" theory. Therefore, adopting a rebuttable presumption similar to that of the "fraud on the market" theory is not a viable option for zero-price platform claims to overcome barriers of heightened ascertainability. Instead, arguments to overcome ascertainability in a zero-price market should follow the lead of the data reliability model argument offered by the amicus brief. Clear, reliable data about class members can be collected and provide a solution to defining a manageable and administratively feasible class.

G. Severing Damages

The predominance inquiry requires the plaintiff to demonstrate classwide aggregated damages that account for the total liability of the defendants.[250] When analyzing each individual's damages becomes necessary to determine the aggregate classwide damages, the predominance requirement is not met.[251] However, in many antitrust cases, courts have interpreted *Comcast*'s "classwide damages" to refer to the requirement of finding a "classwide method" that would reliably identify individual damages in later stages of the case.[252] Thus, the damages element of a zero-price platform antitrust class action is unlikely to be much of a barrier.

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247. *Protecting Military Servicemembers and Veterans from Financial Scams and Fraud: Hearing Before the Subcomm. on Nat'l Sec. of the H. Comm. on Oversight & Reform*, 117th Cong. (2022) (statement of Brendan Carr, Comm'r, Fed. Trade Comm'n).

248. *Id.*

249. Auxier et al., *supra* note 162.

250. 6 RUBENSTEIN ET AL., *supra* note 56, at 727–29.

251. *See id.* at 729.

252. *Id.* at 731–33.

Given the vast individualization and complexity of damages for plaintiffs in zero-price platform markets, expert testimony plays a large role; this raises *Daubert* concerns once again. In addition to this, the breadth of the interpretation of *Comcast* regarding what is sufficient for common evidence of individualized damages remains a relatively open question.[253] Prior to *Tyson,* lower courts tended to take three distinct paths:

> (1) courts distinguishing *Comcast*, and finding a common formula at the class certification stage, and thus, predominance, satisfied . . . ; (2) courts applying *Comcast* and rejecting class certification on the ground that no common formula exists for the determination of damages . . . ; and (3) courts embracing a middle approach whereby they employ Rule 23(c)(4) and maintain class certification as to liability only, leaving damages for a separate, individualized determination . . . .[254]

Following the Supreme Court's implicit clarification in *Tyson*, the solution to allow for certification of zero-price class actions under Rule 23(b)(3) appears to be for courts to employ Rule 23(c)(4).

Rule 23(c)(4) allows for a class action to be maintained when arguing the merits for liability concerns, while allowing the arguments for damages to be determined individually, outside of the class.[255] This solution would allow for consumers with highly individualized damages such as those resulting from increased attention and information costs to meet Rule 23(b)(3) and the narrow interpretation of *Comcast.*

Plaintiffs in zero-price platform market antitrust class actions should expect to resort to class certification solely on liability, not on damages. This is due to the complexity of a classwide method to calculate individual damages and potential *Daubert* challenges. This is not to say that individual damage calculations will always be a barrier, because as long as there is a common method available, a route to certification is possible. Thus, individualized damages do not present a large barrier, beyond *Daubert*, for zero-price platform antitrust claims.

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253. *See supra* Section III.B.

254. Jacob v. Duane Reade, Inc., 293 F.R.D. 578, 581–82 (S.D.N.Y. 2013) (first citing Leyva v. Medline Indus. Inc., 716 F.3d 510, 511 (9th Cir. 2013); then citing Roach v. T.L. Cannon Corp., No. 10-CV-591, 2013 U.S. Dist. LEXIS 45373 (N.D.N.Y. Mar. 29, 2013); and then citing *In re* Motor Fuel Temperature Sales Pracs. Litig., 292 F.R.D. 652, 674–75 (D. Kan. 2013)).

255. *See* Fed. R. Civ. P. 23(c)(4).

H. Injunctive Relief

While *Wal-Mart* foreclosed the possibility of monetary damages under Rule 23(b)(2) in most instances, plaintiffs may still use Rule 23(b)(2) to seek injunctive relief.[256] Consumers in zero-price markets may want to achieve injunctive relief in the form of stopping the collection of their data or at least auditing the proper collection of data.[257] While *Klein* has yet to reach the certification stage, the consumers requested injunctive relief as a remedy.[258] They wanted Facebook to stop its deceptive consumer data privacy practices, to require Facebook to undergo auditing of its practices, and to correct any problems detected.[259] This is a legitimate path forward in zero-price antitrust class actions, as it completely avoids the barriers of Rule 23(b)(3). However, if the plaintiff were to request treble damages, courts likely would not certify the class. It is unlikely that the exception of allowing monetary damages when they are incidental to injunctive relief would apply when treble damages are involved.[260]

V.
BROAD CRITIQUES, DEFENSES, AND CONCLUSIONS

A. Critiquing the Solutions as a Whole

One of the largest flaws in the solutions presented above is that they all rely on the assumption that in a perfectly competitive market, consumers would choose between social media platforms based on their information costs and attention costs, similar to price. In other words, the assumption is that in zero-price markets, consumers pay for services with their privacy and attention.[261] The underlying theory is that if market power leads to less privacy, a consumer

256. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360–61 (2011).

257. *See* Klein v. Facebook, Inc., 580 F. Supp. 3d 743 (N.D. Cal. 2022) (deciding on a consumer class action requesting injunctive relief).

258. *Id.* at 804–05.

259. *Id.*

260. *See* 6 RUBENSTEIN ET AL., *supra* note 56, at 654–55 ("Given the availability of treble damages, courts have questioned whether monetary relief can ever be merely incidental to injunctive relief in antitrust class actions. Accordingly, courts routinely deny 23(b)(2) certification[s] in antitrust cases in which the plaintiffs have requested treble damages but failed to demonstrate a compelling need for injunctive relief." (footnote omitted)).

261. Cooper & Yun, *supra* note 18, at 345.

antitrust class action could increase competition and remedy the problem.[262]

Equating information and attention costs to price ignores the fact that consumer data is itself "an *input* into a production process that generates revenue *only* when it is put to some productive use—one that typically increases demand . . . ."[263] The price of a good is not an input into the goods product that is received. Thus, greater collection of user data may not be an antitrust injury, but instead could reflect efficiencies in the market.[264] These systems work through network effects that rely on user data and its collection.[265] Furthermore, even if increased data collection is considered an antitrust injury, like increases in price, it remains true that this harm must result from anticompetitive conduct.[266] Otherwise, just like an increase in price, an increase in data collection could simply be a firm's response to different demand for the product.[267]

According to one study regarding privacy and market power, the data suggest that there is no statistically significant relationship between market power and lower levels of privacy for Android applications and websites.[268] This suggests that greater competition does not result in higher levels of privacy, and the data even indicate that the more consumer information is collected, the higher the quality the product.[269]

A less technical critique is that private enforcement is not appropriate for complex areas that are neither considered harmful per se—like price-fixing—nor hidden.[270] The concern is overdeterrence of procompetitive activities due to the possibility of treble

262. *See id.* ("On a superficial level this seems right: after all, if competition can lower prices, it can surely get us more privacy.").

263. *Id.* at 361.

264. *See id.* at 361–62 (arguing that the benefits of data collection are intertwined with the costs, and even then, until the data is monetized it simply sits on the servers and is only monetized in ways that would be of use to the consumers).

265. *What is the Network Effect*, Wharton Online (Jan. 17, 2023), https://online.wharton.upenn.edu/blog/what-is-the-network-effect/ [https://perma.cc/Z92H-6BUJ].

266. Cooper & Yun, *supra* note 18, at 365.

267. *See id.* (arguing that demand should fall equivalent to the increase in privacy harms if the harm is analogous to price or lower quality).

268. *Id.* at 392.

269. *See id.* at 392–93 ("That is, a highly competitive market can be completely consistent with low levels of privacy if increasing privacy results in lower quality in dimensions that are more salient to consumer choice.").

270. *See* Thomas A. Lambert, *The Limits of Antitrust in the 21st Century*, 68 U. Kan. L. Rev. 1097, 1122 (2020).

damages.[271] If suits requesting treble damages are successful, they may strongly discourage new platforms from offering zero-price products for fear that they will be sued.[272] Instead, this critique suggests that other bodies of law can successfully intervene to prevent the harms in the first place.[273] Since the harm is ultimately centered around attention and information costs, laws regulating privacy may be more appropriate here. Even if antitrust law is the proper avenue, this critique implies that government enforcement may be more appropriate;[274] the procedural barriers in place, such as predominance, are gatekeeping methods available to courts seeking to prevent harmful class actions and overdeterrence.[275]

B. Defending the Solutions

The above critiques are at the intersection of procedural and substantive law. They require asking normative questions about what should be as opposed to what the law is. Whether the collection of data is indeed an efficiency, input, or conduct that leads to increased market power is precisely the question a *Daubert* challenge or an analysis of the merits would address.[276] The critique regarding the role of data collection and quality of the product based on a study should not be extrapolated to all claims. Instead, courts should continue to decide on a case-by-case basis. The experts conducting these studies to question the impact of data collection are using imperfect information to achieve an uncertain answer through statistical analysis.[277] Furthermore, while the possibility that data collection is an input that leads to a better product calls the injury into question, it does not require additional individualized determinations to prove

271. *Id.* at 1123.

272. *See id.* (arguing that a firm would not engage in a procompetitive behavior if the likelihood of an erroneous decision imparting treble damages is higher than the benefits).

273. *Id.* at 1126.

274. *Id.* at 1122–23 (arguing that treble damages available to private plaintiffs can lead to overdeterrence).

275. Elena Kamenir, Comment, *Seeking Antitrust Class Certification: The Role of Individual Damage Calculations in Meeting Class Action Predominance Requirements*, 23 Geo. Mason L. Rev. 199, 224–26 (2015).

276. *See* Bartholomew, *supra* note 78, at 2154–55 (explaining what defense experts can do to challenge plaintiffs' evidence proving predominance in a *Daubert* challenge).

277. *See* Cooper & Yun, *supra* note 18, at 392 ("Although our proxies for market power are imperfect—we lack a natural experiment and the type of time-series variation that would allow us to identify causal impacts—our empirical results shed important light on this question.").

such injury.[278] Instead, consumers can rely on common evidence when addressing arguments such as this. Thus, this inquiry is more appropriately a question of proving the injury on the merits. Instead of reasons to prevent certification, these arguments are more appropriate as procompetitive justifications that could be offered by the defendant.

In response to the argument that other bodies of law are better suited to address privacy concerns, returning to the basic goals of an antitrust class action is appropriate. Congress had two goals in allowing private individuals to sue under the Clayton Act: "compensating victims of antitrust violations and deterring anticompetitive conduct."[279] Class actions further these goals by allowing plaintiffs who lack the time, money and risk tolerance to bring a suit against a monopolist or group of powerful companies.[280] Compared to the DOJ's recovery from cartels from 1990 to 2011, valued at most $11.8 billion, class actions during the same time period totaled nearly $20 billion.[281] Antitrust class actions work and are essential to the goals of antitrust law. Simply because a newer market requires complex solutions and has procompetitive impacts does not mean antitrust laws are no longer applicable. Furthermore, privacy laws can remedy privacy concerns, but this is a quick, temporary fix. These laws do not address the foundational harm that allowed these privacy violations to occur in the first place—the anticompetitive nature of these platforms. Letting zero-price platform cases past the procedural gates and on to the merits would allow for a proper determination as to whether antitrust law is best suited for these cases.

C. Conclusion

The complexity and individualistic nature of zero-price platform markets offer distinct challenges to the predominance requirements of Rule 23(b)(3). However, the challenges facing zero-price claims are only heightened versions of those that exist in typical antitrust class actions. Thus, barriers imposed by Rule 23 can be overcome by creative application of the standard solutions.

The first consideration of an antitrust claim, the violation itself or the anticompetive conduct, is typically established using common

278. *See id.* at 394 ("Instead, a plaintiff must be able to point to conduct . . . that harms consumers via a reduction in privacy that was *caused by* a reduction in competition.").

279. Pet, *supra* note 88, at 151–52.

280. *Id.*

281. *Id.* at 170.

evidence, with no need for individual analysis.[282] Thus, a consumer will easily be able to overcome the predominance barrier of proving a violation of the antitrust law in zero-price platform markets by following the same method as other antitrust claims.[283] With the first element easily meeting the predominance requirement, the complexity in zero-price claims results from applying the remaining two elements central to an antitrust class action: proving common impact causally related to the anticompetitive conduct and having measurable damages.[284]

The second part, proving common impact with classwide evidence, relies on the Supreme Court's acceptance in *Tyson* of representative and statistical models for specific situations.[285] When combined with regression analysis, the use of statistically representative samples and standard economic models can help provide common evidence of a classwide impact.[286] *In re Google Play Store Antitrust Litigation* offers an example of how highly individualized pricing markets can use existing economic models to create averages that illustrate common impact.[287] The only extra complication zero-price platform markets offer is that the evidence requires the reliance on privacy costs instead of traditional pricing structures created by standard models. However, *Klein* provides the framework for taking a regression and statistical approach to zero-price antitrust class actions: using measurements of time spent by users and information sold to advertisers as analogous to pricing structures.[288] Therefore, the use of statistical economic models can provide a sufficient solution to predominance concerns regarding the common impact element of zero-price antitrust class actions.

Another concern of the common impact part is the presence of uninjured parties. The possibility of uninjured parties presents an issue in antitrust class actions; while these parties are particularly concerning in a zero-price antitrust class actions, the solution remains the same. The de minimis exception from the First Circuit

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282. *See supra* note 63 and accompanying text.

283. *Id.*

284. *See* Bartholomew, *supra* note 78, at 2153 (first citing *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311–12 (3d Cir. 2008) (summarizing the elements of an antirust class action); then citing Danvers Motor Co. v. Ford Motor Co., 543 F.3d 141, 148–49 (3d Cir. 2008); and then citing Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302–04 (5th Cir. 2003)).

285. *See* Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 455–57 (2016).

286. *See id.*

287. *In re* Google Play Store Antitrust Litig., No. 21-md-02981, 2022 U.S. Dist. LEXIS 213670 (N.D. Cal. Nov. 28, 2022).

288. *See* Klein v. Facebook, Inc., 580 F. Supp. 3d 743, 776 (N.D. Cal. 2022).

should apply, allowing for there to be a small number of uninjured members, so long as the injured class is sufficiently large for common classwide injury.[289] Uninjured parties also become a concern due to the heightened ascertainability requirement of the First and Third Circuit. However, with the Third Circuit's recent loosening of its requirement, ascertainability has become slightly less stringent of a barrier to certification.[290] While applying a similar theory to "fraud on the market" theory is an intriguing solution, the zero-price platform market requires too great of a deviation from its originating principals. Thus, reliable data about consumers' uses and habits that is collected due to business needs, financial incentives, and possible legal regulations should be sufficient to allow plaintiffs to meet the heightened ascertainability standard of an administratively feasible identification mechanism.[291]

The final part of an antitrust class action, the damages portion, must also meet predominance requirements. Aggregate damages do not pose an issue for the predominance test in a zero-price platform antitrust class action—one "aggregate calculation" can be made for the class.[292] Yet aggregate damages can cause issues when trying to prove that a common calculation method exists for the widely varying individualized damages in zero-price class actions.[293] Without a price, courts cannot rely on the simple difference between the competitive price and the price paid by consumers. Instead, courts should further follow *Tyson*'s implicit lead in allowing for individual damage calculations after a determination of common liability based on Rule 23(c)(4) and continue to read *Comcast* narrowly so that damages do not block certification.[294] Plaintiffs can still attempt to provide a common method of proving individual damages depending on the variations between individuals' nonmonetary costs. Further research is needed on how the algorithms and codes that target individuals' information could be used for proving both impact and damages. Alternatively, Rule 23(b)(2) offers an intriguing path forward for those solely concerned about future privacy invasions and maintaining a free platform moving forward.

289. *See* Rashmawi, *supra* note 207, at 1412 (citing AstraZeneca AB v. United Food & Com. Workers (*In re* Nexium Antitrust Litig.), 777 F.3d 9 (1st Cir. 2015)).

290. *See* Hargrove v. Sleepy's LLC, 974 F.3d 467, 480 (3d Cir. 2020); Am. Antitrust Inst., *supra* note 119, at 4–5.

291. *See* Brief for the American Antitrust Institute as Amicus Curiae in Support of Appellants, *supra* note 218, at 11.

292. *See* 6 Rubenstein et al., *supra* note 56, at 729.

293. *See id.* at 729–32.

294. *See* Fed. R. Civ. P. 23(c)(4); Jacob v. Duane Reade, Inc., 293 F.R.D. 578, 581–82 (S.D.N.Y. 2013).

The critiques of these solutions skip over the procedural concerns of meeting predominance, and instead go right to the substance. Is this really a problem for antitrust class actions and is it really a harm? While the collection of data can be beneficial and is the reason why these platforms are free, there is a limit to the procompetitive nature of this conduct. The court's role in certification should not be to determine the merit of these cases by using procedural gatekeeping; courts should instead answer these questions after certification.

Accepting statistical modeling not based purely on price structures allowing a de minimis exception and permitting individual damage calculations are sufficient solutions that fit within existing interpretations of Rule 23. As with most antitrust class actions, this is all conditional on the expert testimony's sufficiency under a *Daubert* analysis. Privacy laws accomplish the protection of consumers and even have shown some hope in recovery. Yet, at their core, these specific privacy violations are a result of the violation of antitrust laws. Antitrust laws must adapt to better protect consumers in zero-price platform markets. While Rule 23 poses many heightened barriers to class certification in a zero-price context, they are not insurmountable for plaintiffs.