No. 16-841

IN THE
Supreme Court of the United States

INTERNATIONAL PAPER COMPANY, ET AL.,
Petitioners,

v.

KLEEN PRODUCTS LLC, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PURCHASER RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

As set forth in the body of this opposition, respondents Kleen Products LLC et al. strongly disagree with the petition's characterization of the opinions below and the questions presented by this case. The questions addressed by the court of appeals, and the only questions that would be presented on review, are:

1. Whether the Seventh Circuit erred in finding that the district court did not abuse its discretion in concluding that the issue of impact (also referred to as "antitrust injury" or "fact of damage") can be determined in this case using common rather than individual proof.

2. Whether the Seventh Circuit erred in finding that the district court did not abuse its discretion in concluding that, because the issues of conspiracy, impact, and aggregate class-wide damages can be determined in this case using common proof, common issues predominate over individual issues regardless of whether individualized inquiries may be necessary to allocate that recovery to particular class members.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents Kleen Products LLC; Ferraro Foods of North Carolina, LLC; MTM Packaging Solutions of Texas, LLC; Ferraro Foods, Inc.; RHE Hatco, Inc.; R.P.R. Enterprises, Inc.; Chandler Packaging, Inc.; and Mighty Pac, Inc. state the following:

Kleen Products LLC has no parent company, and no publicly held company owns 10% or more of its stock.

Ferraro Foods of North Carolina, LLC has no parent company, and no publicly held company owns 10% or more of its stock.

MTM Packaging Solutions of Texas, LLC has no parent company, and no publicly held company owns 10% or more of its stock.

Ferraro Foods, Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

RHE Hatco, Inc. has a parent company, Pro Equine Group; no publicly held company owns 10% or more of its stock.

R.P.R. Enterprises, Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

Chandler Packaging, Inc. has a parent company, TransPak, Inc.; no publicly held company owns 10% or more of its stock.

Mighty Pac, Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

This case is about class certification of a price-fixing antitrust action in the containerboard products industry. The district court certified a class of direct purchasers of containerboard products after finding that (1) common questions regarding liability predominate over any individual issues; (2) common evidence of impact, if accepted by the jury, would establish that all or nearly all purchasers suffered injury; and (3) any individual damages questions would not overwhelm common issues at trial. The Seventh Circuit granted interlocutory review and found no abuse of discretion. The court of appeals correctly applied Rule 23 and settled antitrust principles in light of a robust evidentiary showing. Its decision does not conflict with any decision of this Court or of any court of appeals.

Petitioners, co-defendants, and one set of *amici*, in seeking to justify review, flatly mischaracterize the decision below. They assert that the court of appeals endorsed a "presumption" of class-wide injury, Pet. i; Business Roundtable Br. 4, but plaintiffs did not argue for such a presumption and the district court did not apply one. Instead, the court held that the class had "point[ed] to *common proof* that will establish antitrust injury . . . on a classwide basis," App. 14a (emphasis added) – including expert economic analysis and econometric evidence showing that the conspiracy could and did raise the prices that virtually all class members paid. As the court held, "[n]o . . . chain of assumptions taints the Purchasers' proof. They have shown actual price increases, a mechanism for those increases, the communication channels the conspirators used, and factors suggesting that cartel discipline can be maintained." App. 16a.

Nor did the court of appeals treat defendants' arguments about individualized damages as "legally irrelevant." Instead, that court held that the district court acted within its discretion in finding that any individualized questions around allocating damages were outweighed by common issues: whether petitioners conspired, whether that conspiracy moved market-wide prices, and how much the conspiracy overcharged the class as a whole.

The district court and the court of appeals set forth clearly the actual reasons for their rulings. This case is unsuitable for review, and the petition should be denied.

STATEMENT

1. "Containerboard" is used to make corrugated products – mostly boxes, but also other products, such as displays and partitions. App. 5a-6a. Containerboard consists of "sheets" fabricated from "linerboard," the smooth outsides of a containerboard sheet; and "corrugated medium," the fluted inside layer. App. 6a. Those components are made in large, expensive mills. As of 2008, no new mills had been built in the United States for 12 years. *Id.* Containerboard sheets are cut and folded into finished products at box plants and other conversion facilities. *Id.*

Containerboard is a commodity, sold with standardized characteristics such as composition and weight. *Id.* Containerboard products, as petitioners and their trade associations acknowledge outside litigation, are generally commodities as well. *See id.* (trade association statement that "boxes are essentially commodity items used in well established markets"). As of 2010, most (80%) linerboard produced in the United States was unbleached kraft linerboard, the most common grade of which weighed 42 pounds per

thousand square feet. C.A. App. 181; *see* App. 6a. Pulp & Paper Week ("PPW"), an industry periodical, publishes weekly price indices that include a price for 42-lb. unbleached kraft linerboard, based on a survey of market prices. App. 6a. That 42-lb. PPW index price is widely used as a benchmark for sales of containerboard products, with the pricing terms of most contracts and spot transactions explicitly linked to the index. *See* App. 6a, 43a (quoting expert testimony that the "vast majority of sales . . . are pegged to published price indices").[1]

A small group of vertically integrated firms produces most of the containerboard sold in North America, and the market has become more concentrated. As of 1997, the five largest firms – all defendants in the action below or their predecessors – were responsible for 41% of containerboard production. App. 6a; C.A. Supp. App. 33. By 2007, those defendants or their predecessors were responsible for 74% of production. App. 6a-7a; C.A. Supp. App. 35. The two next largest producers, representing about 10% of the market, were dismissed from this case after settlement. App. 7a; C.A. App. 570. The industry has a long history of antitrust troubles.[2]

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[1] *See also* C.A. App. 143, 191-93, 880-81; C.A. Supp. App. 232-33 (expert's contract review); *id.* at 19 (CEO statement that "[m]ost of our box prices are either directly[] or indirectly influenced by adjustments in published liner board prices"); *id.* at 178 (executive testifying that a "large percentage of our customers are on a[n] index pricing mechanism").

[2] *See*, *e.g.*, *United States v. Container Corp. of Am.*, 393 U.S. 333 (1969); *United States v. International Paper Co.*, 457 F. Supp. 571 (S.D. Tex. 1978); *In re Corrugated Container Antitrust Litig.*, 661 F.2d 1145 (7th Cir. 1981), *aff'd sub nom. Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983); *In re Folding Carton Antitrust Litig.*, 687 F. Supp. 1223 (N.D. Ill. 1988); *In re Stone*

2. During the class period (February 15, 2004, to November 8, 2010), defendants attempted 15 price increases for containerboard products. App. 7a. With one exception, every defendant joined every price increase. *Id.* Defendants usually (11 times out of 15) all said that the announced increases would be implemented in the same month. *Id.* They all increased prices by identical amounts (12 times out of 15) or with differences of less than 2% of the average price. *Id.*; *see also* C.A. App. 141-42 & n.9, 164 (detail on price increases).

Those coordinated price increases were successful more often than not. Nine of the 15 announced price increases were followed within two months by increases in the PPW index that matched the announced increases. C.A. App. 144-45, 164. Those nine successful price increases were the only times the PPW index increased during the class period. *Id.* at 761-62 & fig. 1. Successful containerboard price increases translated into price increases for boxes and other containerboard products through provisions in customer supply agreements. *Id.* at 191-93, 899; *see id.* at 923 (presentation stating that, when containerboard prices increase, a "'box price[] increase follows 100% of the time'") (emphasis omitted).

While petitioners and other defendants were increasing prices in lockstep, production capacity declined by 6% in North America but increased everywhere else in the world. App. 7a; C.A. App. 185. The North American capacity decline occurred even though demand for containerboard was generally

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Container Corp., 125 F.T.C. 853 (1998); *In re Linerboard Antitrust Litig.*, 305 F.3d 145 (3d Cir. 2002).

constant or increasing.[3] Inventory levels (relative to demand, measured in weeks of supply) generally decreased to levels not seen "since at least the early 1980s." C.A. App. 187 (emphasis omitted).

Containerboard manufacturers restricted supply by closing mills, *id.* at 897 & n.82; indefinitely idling mills, *id.* at 208-09 & n.143; temporarily idling mills, *id.* at 216-17; and reducing production rates and inventories, *id.* at 217-18. At times, they implemented supply restrictions shortly before lockstep price increases.[4] Some manufacturers experienced difficulties filling orders, to customers' dismay. *Id.* at 213, 907-08.[5]

3. Defendants had frequent opportunities to communicate about price increases and supply restrictions. Their employees often met at trade-association events, *see* App. 7a; C.A. Supp. App. 189, 211, and the district court observed a "striking" relationship between such events and price increases, *Kleen Prods., LLC v. Packaging Corp. of Am.*, 775 F. Supp. 2d 1071, 1080 (N.D. Ill. 2011) (denying motion to dismiss). Discovery also revealed several instances

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[3] *See* C.A. App. 208 & n.142 (steady increase in box shipments from 2001 to 2008); *id.* at 210 (expert report stating that "[t]he capacity cuts by Defendants in this case were undertaken during periods of strong growth in box demand"); *id.* at 903-05 (comparison of changes in containerboard supply vs. GDP in North America and elsewhere).

[4] *Compare* C.A. App. 256 (price increases in, e.g., October 2005 and January 2010) *with id.* at 254 (major mill closures in third-quarter 2005 and fourth-quarter 2009).

[5] *See also* C.A. Supp. App. 172 (internal e-mail: "We certainly understand the importance of working towards a price increase, but we may not have customers left to raise our prices to if we do not get some paper.").

in which defendants' executives spoke by telephone around the time of price increases.[6]

Defendants also revealed advance knowledge of competitor pricing behavior. Examples include a March 2004 memorandum accurately predicting "at least three $40-$50 increase over the next 18 months," C.A. Supp. App. 50; *see also* C.A. App. 256 (showing increases); and an internal communication in November 2009 that advised recipients to "begin getting their people ready for the first of what may be the next round of price increases," C.A. Supp. App. 65. Defendants' senior executives publicly announced supply restrictions while urging other industry members to follow them to keep prices up. One CEO told an industry periodical in March 2005:

> [I]f everyone would remove the same amount of capacity percentage-wise as we have, I think our business would look a lot better. You have to be ready to let go of business if you want to keep the price up.

C.A. App. 30. Other CEOs and CFOs made similar public statements.[7] Defendants' internal communications drew even more explicit links between supply restrictions and increased prices, such as a warning

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[6] *See*, *e.g.*, C.A. Supp. App. 195-96 (February 2008 call between CEOs, ostensibly about a merger, within days of a concerted price increase); *id.* at 182, 205, 206-08 (three calls in May 2008 involving at least one senior executive, all within one day of a simultaneous price increase); *see also* Dist. Ct. Dkt. Nos. 658, at 38-40, and 826, at 29-31 (more examples).

[7] *E.g.*, C.A. Supp. App. 45 (CEO "plan[ned to] continue[] . . . to cut supply enough . . . to force price increases throughout the industry"); *id.* at 69 (CFO on earnings call: "We've intentionally passed on volume in favor of balancing our capacity with customers' demand and this has enabled us to realize higher average selling prices.").

not to "spoil the containerboard party" by reopening a closed mill. C.A. Supp. App. 149.[8]

4. On September 9, 2010, the purchaser respondents filed this action, alleging that the defendant containerboard manufacturers conspired to fix prices, and so violated 15 U.S.C. § 1; and seeking to represent a class of direct purchasers of containerboard products. After consolidation with similar actions, the district court (Shadur, J.) denied a motion to dismiss because the purchasers' price-fixing allegations "more than satisfie[d] the need for plausibility." *Kleen Prods.*, 775 F. Supp. 2d at 1078-80.

The purchasers sought class certification, supporting their motion with extensive record evidence and reports from two experts: Michael J. Harris, C.A. App. 174-261; and Mark Joseph Dwyer, *id.* at 135-73. Harris analyzed the containerboard industry and defendants' conduct and found that the structure of the industry – including its concentration, *id.* at 196-98; the commoditized nature of the products, *id.* at 200-03; and the widespread use of contracts with prices tied to the index prices for linerboard, *id.* at 203-04[9] – made it likely that a conspiracy among defendants could succeed in increasing prices for all or nearly all purchasers. *Id.* at 206-07.

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[8] *See also*, *e.g.*, C.A. Supp. App. 58 (CEO describing "market related downtime . . . to keep operating rates where they need to be to maintain pricing"); *id.* at 63 (internal e-mail expressing desire to "keep the tons" from two closed mills "out of the market and get the money back through price increases").

[9] Harris ultimately reviewed 738 contracts that defendants had produced in discovery and determined that 705 (96%) of them contained such terms. C.A. App. 880; C.A. Supp. App. 232-33 (details of contract review).

Dwyer performed several statistical and econometric analyses. He examined movements in the PPW index to show that it usually moved up in response to defendants' lockstep price increases; and, when it did move up, matched defendants' increases exactly. *Id.* at 141-46. He compared the actual prices paid by a sample of class members before and after defendants' price increases and found that in almost all cases (92%) those prices increased. *Id.* at 149. He also constructed a regression model to estimate aggregate damages to the class, estimating that the class paid "statistically significant overcharges" of approximately 3.08% for containerboard products – in the aggregate, "approximately $3.8 billion" in damages. *Id.* at 140, 158-59.

Defendants opposed class certification, submitting their own record evidence and expert reports from Dennis Carlton and Janusz Ordover. Both defense experts contested Harris's analysis and claimed that Dwyer had failed to distinguish the price impact of the conspiracy from other factors affecting price. *Id.* at 495-99, 619-21. Both also criticized Dwyer's damages methodology. *Id.* at 503-09, 604-14. Harris and Dwyer submitted reply reports responding to those criticisms. *Id.* at 751-929.

Defendants did not move to exclude either expert under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), instead "'expressly reserv[ing]'" the right to do so later. App. 26a.

5. The district court (Leinenweber, J.) certified the class. App. 23a-74a. The court explained its obligation to consider whether the purchasers had "'satisf[ied] through evidentiary proof' each of Rule 23's elements" and to conduct a "'rigorous analysis'" for that purpose. App. 25a-26a (quoting *Comcast Corp.*

v. Behrend, 133 S. Ct. 1426, 1432 (2013)). Because defendants did not file *Daubert* motions, the court declined to rule on the "admissibility" of Harris's or Dwyer's reports, but it noted that defendants had "vigorously challenge[d] Plaintiffs' experts' methodology and conclusions," App. 26a-27a, and addressed those challenges in detail, App. 27a-28a.

The court focused primarily on predominance under Rule 23(b).[10] It found that the purchasers' case depended on their ability to establish a conspiracy using "documents, emails, phone records, and other indirect evidence" that would be the same for "virtually all class members." App. 36a. The court then found that the impact of the conspiracy on class members would likewise be proved or disproved by common evidence, including much of the same evidence that went to the existence of the conspiracy. App. 38a-53a.

The court examined Dwyer's analysis of correlations between defendants' lockstep price increases and the "corresponding movement of the PPW index." App. 48a. It found that record evidence supported Dwyer's premise that "Defendants . . . rely upon the PPW index in setting their prices for Containerboard Products[] [and] negotiating prices in individual contracts." App. 49a. It found, despite defendants' contrary arguments, that Dwyer's analysis demonstrated a causal relationship between price-increase announcements and increases in the PPW index, which in turn "constitutes strong evidence that all or nearly all class members were impacted by the increased price, given Plaintiffs' evidence regarding

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[10] The court observed that defendants had "[e]ssentially . . . conceded" the Rule 23(a) requirements. App. 33a.

the paramount importance of the PPW index in setting prices." App. 50a-51a.

The court observed that, to show predominance concerning damages, the purchasers would need to "produce a reliable method of measuring classwide damages based on common proof," but that "the presence of individualized questions regarding damages does not prevent certification." App. 53a. The court further considered this Court's decision in *Comcast*, on which defendants relied heavily, and concluded that *Comcast* required it to "rigorously screen [the] expert evidence" and to ensure that Dwyer's model "seeks to prove damages that flow from the harm alleged." App. 56a (citing 133 S. Ct. at 1435). The court made a painstaking analysis, examining the variables that Dwyer included in his regression model, the method used to select controls, and the results of his analysis. App. 56a-59a. It carefully considered each of defendants' challenges to Dwyer's model. App. 60a-64a. Ultimately, it found that Dwyer had produced a "reasonable approximation" of the class's damages. App. 64a.

Finally, the court concluded that any individual damages issues did not defeat class certification because of the "key, overwhelming common questions" it had already found. App. 65a. It left open the door for defendants to "seek to decertify the class or modify the class" if further discovery should show that "individual damages issues indeed threaten to overwhelm the common issues." App. 64a-65a.[11]

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[11] The court also found that a class action was superior to individual proceedings. App. 65a. It rejected arguments that superiority was defeated by purported individualized affirmative defenses – whether based on releases signed by some class members as part of settlements in earlier *Linerboard* litigation,

6. The Seventh Circuit granted leave to appeal under Rule 23(f). The court, in an opinion authored by Chief Judge Wood, unanimously affirmed. App. 1a-22a. After summarizing the facts, App. 5a-9a, and the district court's ruling, App. 9a-12a, the court observed that the purchasers had "tendered extensive evidence that, if believed, would be enough to prove the existence of the alleged conspiracy," and that the manufacturers "d[id] not contest that the existence of the conspiracy could be (perhaps had to be) proven by evidence common to the class." App. 13a. It thus turned to the question whether the impact of the conspiracy on individual purchasers could likewise be shown through common evidence, finding this question "more difficult . . . (though not too difficult in the end)." *Id.*

The court noted that, "ultimately to recover," "every class member" would have to show "at least some impact from the alleged violation." App. 13a-14a. But it rejected the contention that the purchasers had to do so "at the class certification stage." App. 14a. Instead, it focused on the "essential" question "whether the class can point to common proof that will establish antitrust injury (in the form of cartel pricing here) on a classwide basis." *Id.* Reviewing the evidence, the court of appeals pronounced itself, "[l]ike the district court, . . . satisfied" that the purchasers had met their burden of pointing to common proof. App. 14a-15a.

The court of appeals upheld the district court's reliance on Harris's and Dwyer's opinions, noting the

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App. 66a-67a, or on provisions such as mediation or arbitration in some contracts, App. 67a-69a. And it rejected arguments by respondent RockTenn that it was differently situated because of its bankruptcy. App. 69a-74a.

manufacturers' decision not to seek exclusion under *Daubert* meant that the court would "accept their reports for what they are worth at this stage." App. 21a; *see* App. 3a (citing *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1049 (2016), for the proposition that, "where there is no *Daubert* challenge, [a] district court may rely on expert evidence for class certification"). Harris's opinion showed that the "structure of the containerboard market was conducive to successful collusion" because of

> the concentration of manufacturers; the vertical integration of the market; the capital-intensive manufacturing process (which affected the pace and likelihood of new entry); weak competition from imported containerboard; no good substitutes for the product; a low elasticity of demand; and a standardized, commodity product.

App. 15a; *see id.* (observing that these factors are "all well accepted characteristics of a market that is subject to cartelization," and collecting cases). It considered and rejected criticisms of Harris's theoretical framework. App. 15a-16a.

Similarly, the court of appeals concluded that the district court had properly relied on Dwyer's opinion to find that the impact of the conspiracy on all class members could be established by common evidence. App. 16a-17a. It discussed Dwyer's quantitative findings that actual prices paid by class members were affected by the lockstep price increases and his use of a regression to show "that 'more than 97% of variation in aggregate [containerboard] prices is explained by changes in the [PPW] index.'" App. 16a.

The court of appeals considered and rejected the manufacturers' reliance on *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), and *Comcast*. As for

Wal-Mart, the defect barring certification in that case was the attempt to "extrapolate" from a "sample" of class members to determine how many had experienced discrimination, as distinct from the purchasers' efforts here to show that "every person or entity in North America" who purchased container-board products "paid the overcharges that resulted from Defendants' collusive practices." App. 17a. Those efforts would succeed or fail on a class-wide basis because

> [e]ven for transactions where prices were negotiated individually or a longer term contract existed, the district court found, reasonably, that the "starting point for those negotiations would be higher if the market price for the product was artificially inflated."

Id. (quoting App. 51a-52a).

As for *Comcast*, the court acknowledged that a class's "damages theory must correspond to the theory of liability," but rejected defendants' argument that *Comcast* supported their challenge to certification. *Id.* It reviewed Dwyer's damages model and determined that he had successfully shown "the feasibility of estimating damages on a classwide basis." App. 18a. Finally, it rejected the argument that the purchasers could not "calculate aggregate rather than individual damages for the class," explaining that in an antitrust case "plaintiffs are permitted to use estimates and analysis to calculate a reasonable approximation of their damages," and further that,

> at the class certification stage, plaintiffs are not obliged to drill down and estimate each individual class member's damages. The determination of the aggregate classwide damages is something that can be handled most efficiently as a class

> action, and the allocation of that total sum among the class members can be managed individually, should the case ever reach that point.

App. 18a-19a.[12]

REASONS FOR DENYING THE PETITION

Certiorari should be denied because this case does not present the questions stated in the petition; there is no split of authority or conflict with any decision of this Court.

Neither the district court nor the court of appeals applied any "presumption," Pet. i, that antitrust impact from price-fixing is always class-wide. Instead, the district court weighed the evidence and found that the purchasers had shown that impact could be established with common record and expert evidence, including empirical, econometric evidence of impact. The court of appeals concluded after a careful review that the district court had not abused its discretion. Neither court lightened the purchasers' burden.

The same is true for damages. Neither the district court nor the court of appeals held that the need to allocate damages to individual class members,

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[12] Like the district court, *see supra* note 11, the court of appeals concluded by rejecting additional arguments not presented here: a challenge to the superiority of a class proceeding, App. 19a-20a; and separate arguments by respondent RockTenn arising from its 2010 bankruptcy discharge, App. 20a-21a. Despite RockTenn's argument (at 7) that this final aspect of the court of appeals' decision supports review, that holding involves a straightforward application of an uncontroversial proposition of law. As defendants' own *amicus* explains, because "antitrust conspiracies sound in tort, liability is joint and several, meaning that every defendant" – including RockTenn, if it unlawfully conspired after its bankruptcy discharge – "is fully liable for the entire amount of damages caused by the alleged conspiracy." Business Roundtable Br. 21.

after liability and aggregate damages have been determined on a class-wide basis, is "legally irrelevant to the predominance inquiry," Pet. i. Instead, the courts below properly considered whether any individualized damages inquiries would "overwhelm the common questions on liability and impact," App. 18a; *see* App. 64a-65a, and concluded that common issues predominate. That decision was discretionary, fact-bound, and correct.

Once petitioners' mischaracterizations are corrected, this case is clearly unsuitable for review. There is no conflict with decisions of other circuits applying the same Rule 23 standards in holding, based on different facts, that other classes fell short. Nor is there any conflict with this Court's holding in *Comcast*, which the court of appeals considered, discussed, and found satisfied. Further, this Court's decision last Term in *Tyson Foods* supports the court of appeals' decision by reconfirming that what evidence a class can use in its case depends on the underlying substantive law, *see* 136 S. Ct. at 1046 – here, antitrust law, which the court below applied with nuance and expertise.

Tyson Foods also underscores the risk of granting review where the petition trumpets broad issues of law that turn out to be unnecessary or even irrelevant to the merits. The *Tyson Foods* petitioners sought relief from a class verdict based on a broad theory that Article III barred class certification if there was even one uninjured plaintiff in the class – a theory abandoned at the merits stage. *See id.* at 1049. Given the inconsistency between petitioners' characterization of the decisions below and their substance, petitioners would have to execute a similar switch. The Court should not take the bait. *See also Visa Inc. v. Osborn*, 137 S. Ct. 289 (2016).

I. REVIEW IS NOT WARRANTED AS TO PREDOMINANCE ON LIABILITY ISSUES

A. The Seventh Circuit's Holding Was Based on Evidence of Class-Wide Impact, Not on a "Presumption"

1. The district court found, and the court of appeals agreed, that plaintiffs had shown that the impact of defendants' price-fixing conspiracy on purchasers of containerboard products would be proven (or not) at trial with common evidence on a class-wide basis. That common evidence included defendants' price increases and communications about them, App. 7a, 41a-42a; Harris's economic analysis showing that containerboard products are commodities sold in a concentrated market whose structural characteristics made collusion with market-wide impact feasible, App. 8a, 15a, 42a-48a; and Dwyer's econometric analyses showing that defendants' lockstep price increases affected the prices class members paid, App. 8a-9a, 16a-17a, 48a-52a.

Defendants presented evidence that, because prices for containerboard products were sometimes individually negotiated, lockstep price increases did not affect the prices that many purchasers paid. The district court resolved that dispute:

> Defendants argue that a large number of class members individually negotiated a price rather than simply paying the index price. These arguments miss the mark because Plaintiffs have *produced evidence* showing that (1) Defendants largely rely on the PPW index in setting prices, and (2) in most individually negotiated contracts, the PPW index factored into the negotiated price. At the least, Plaintiffs have *presented sufficient evidence* that would allow a fact-finder to infer

> that, even for negotiated prices, the starting point for those negotiations would be higher if the market price for the product was artificially inflated.

App. 51a-52a (emphases added). Likewise, the court of appeals understood that it was reviewing a discretionary ruling based on case-specific evidence rather than on an across-the-board legal rule:

> No . . . chain of assumptions taints the Purchasers' proof. They have shown actual price increases, a mechanism for those increases, the communication channels the conspirators used, and factors suggesting that cartel discipline can be maintained. . . . [T]his evidence is enough to support class treatment of the merits.

App. 16a.

2. The district court's citation of *In re Urethane Antitrust Litigation*, 768 F.3d 1245 (10th Cir. 2014) ("*Urethanes*"), *cert. dismissed*, 137 S. Ct. 291 (2016), does not support petitioners' argument that it relied on a legal presumption. Of course, the Tenth Circuit decision is not before this Court, and what that case held is therefore largely beside the point. In any event, in *Urethanes*, the plaintiffs submitted "evidence of an artificially inflated baseline" price, including manufacturers' "parallel issuance of similar product price lists and price-increase announcements," as well as witness testimony "that price-increase announcements had affected the starting point for price negotiations." *Id.* at 1255. The Tenth Circuit held that "[t]he district judge could reasonably weigh th[at] evidence and conclude that price-fixing would have affected the entire market, raising the baseline prices for all buyers." *Id.* There, as

here, what mattered was evidence about how the market worked.

The Tenth Circuit's statement that, "[u]nder the prevailing view, price-fixing affects all market participants" and supports an "inference of class-wide impact," 768 F.3d at 1254, does nothing to support review. The "prevailing view" to which the Tenth Circuit referred does not relieve an antitrust plaintiff of its burden of proof. As the Tenth Circuit's opinion and the cases it cited make clear, it was referring to a commonly recognized method of meeting that burden: expert evidence showing that the structure and characteristics of a particular industry are such that a successful price-fixing conspiracy can move the market price and affect everyone who buys in that market.[13] Where a district court makes such a "reasonable[]" finding, it then has "discretion to treat [antitrust] impact as a common question that [is] capable of class-wide proof." *Id.* at 1255. The Tenth Circuit's affirmation of the discretionary ruling before it was just as fact-specific as the Seventh Circuit's similar ruling here.

B. There Is No Conflict with Decisions of Any Other Circuit

Because the Seventh Circuit's decision upheld the district court's reliance on factual inferences drawn

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[13] *See Urethanes*, 768 F.3d at 1254 (citing *Linerboard*, which asked whether "the facts do, in fact, support plaintiffs' theory that an individual plaintiff could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that he made some purchases at the higher price," 305 F.3d at 153; and *In re Foundry Resins Antitrust Litigation*, 242 F.R.D. 393 (S.D. Ohio 2007), where plaintiffs had "proffer[ed] . . . [an] antitrust economist" who "performed a standard economic investigation and analysis of the structural characteristics of the foundry resins industry," *id.* at 409).

from the evidence in this case, rather than on any categorical presumption, that decision is easily squared with decisions from the First, Fifth, and Eighth Circuits on which petitioners and supporting respondents rely.

1. *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 522 F.3d 6 (1st Cir. 2008), involved an alleged conspiracy to block the import of relatively inexpensive cars from Canada. The district court had certified a damages class, *id.* at 8, relying on expert testimony that statistical models could show that all members of the class were injured, *id.* at 20-21. But the First Circuit held that, although "[i]njury in price-fixing cases is sometimes not difficult to establish," the plaintiffs' "theory of impact on indirect purchasers is both novel and complex." *Id.* at 27. "[A] more thorough explanation of *how* the pivotal evidence behind plaintiff's theory can be established" was thus required. *Id.* at 29. The court of appeals therefore vacated and remanded for the district court to "reconsider [its] class certification orders in light of this opinion and the more fully developed record." *Id.* at 29-30; *see also id.* at 9.

Petitioners argue that the First Circuit "rejected plaintiffs' reliance 'on an inference that any upward pressure'" on national pricing "'would necessarily raise the prices actually paid by individual consumers.'" Pet. 14 (quoting *Motor Vehicles*, 522 F.3d at 29). But the court explained that it would not accept this inference because the plaintiffs had supported it only by pointing to its "intuitive appeal" – not, as here, with evidence – which was "not enough." *Motor Vehicles*, 522 F.3d at 29. That fact-specific holding does not conflict with the Seventh Circuit's different conclusion here.

2. *Robinson v. Texas Automobile Dealers Association*, 387 F.3d 416 (5th Cir. 2004), involved another putative class of car buyers who alleged that an association of Texas car dealerships had unlawfully conspired to itemize a state tax on vehicles on sales contracts. *Id.* at 419-20. Because the conspiracy did not involve any alleged fixing of actual prices, the theory of class-wide impact depended on a hypothesis about how buyers would react to itemized prices. But the plaintiffs had no evidence to support their claim that the itemized tax would lead to higher sale prices; they simply "assume[d]" it would happen. *Id.* at 423. The dealers, by contrast, had evidence that some buyers negotiated in such a way that the tax would not affect the overall amount they paid for a car. *Id.* at 423 & n.23. The district court excluded the dealers' evidence based on a misreading of Texas's parol evidence rule. *Id.* at 424-25. The Fifth Circuit held that the district court abused its discretion by certifying the class based on the "mere payment" of the extra tax charge while "applying the parol evidence rule to exclude evidence regarding the negotiating styles of the individual purchasers." *Id.* at 425. Here, Harris's analysis (which defendants made no effort to exclude) showed market-wide impact from defendants' agreement to restrict output and raise price; Dwyer's econometric analysis provided further evidence that nearly every purchaser in fact paid more as a result of the conspiracy; and the district court considered and rejected defendants' argument as to price negotiations. *See* App. 51a-52a. The cases are not comparable.

3. *Blades v. Monsanto Co.*, 400 F.3d 562 (8th Cir. 2005), involved two putative nationwide classes of farmers who purchased genetically modified ("GM")

seeds and alleged they had been harmed by seed producers' agreement not to undercut prices. *Id.* at 565-66. After weighing the evidence, the district court found that the farmers had asked it to "'*presume* class-wide impact without any consideration of whether the markets or the alleged conspiracy at issue here actually operated in such a manner so as to justify that presumption.'" *Id.* at 570 (quoting *Sample v. Monsanto Co.*, 218 F.R.D. 644, 650 (E.D. Mo. 2003)).[14]

The Eighth Circuit affirmed. It observed that predominance in the case before it was a "close" question, *id.* at 575, and repeatedly framed the question as whether the district court had abused its discretion, *id.* at 566, 574, 575. The court noted evidence (apparently unrebutted) that it was impossible to generalize about the impact of the alleged conspiracy on particular purchasers because of the "wide variation in list prices" with some farmers paying "negligible premiums or no premiums at all" for GM seeds as compared to unmodified seeds. *Id.* at 572. In light of that evidence, proof that the conspiracy "raised the average price of GM seeds does not make the case" that the defendants had raised the price of all varieties of GM seeds in every locality. *Id.* at 573. Here, by contrast, plaintiffs

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[14] The Eighth Circuit's opinion in *Blades* includes a lengthy block quotation of the district court's opinion. *See* 400 F.3d at 568-71. The petition erroneously quotes (at 24) from the district court's opinion as though it were the holding of the Eighth Circuit. But the Eighth Circuit did not adopt everything it quoted; it rejected some parts of that opinion as erroneous, *see* 400 F.3d at 572, and suggested that other parts were "overbroad," *id.* at 575. The language petitioners describe (at 24) as being in "stark conflict" with the Seventh Circuit's decision is from the district court's opinion.

presented evidence – before-and-after prices, analysis of contractual pricing terms, and evidence of market structure – that price increases reflected in the PPW index (*i.e.*, average prices) were likewise reflected in the prices that all class members actually paid.

Defendant Georgia Pacific relies on *Blades* for the proposition that a class cannot be certified without a "but-for analysis involving an expert construction of a hypothetical market free of any anticompetitive restraint, to which the actual market can be compared," and faults the court of appeals for rejecting that formulation as "too narrow." GP Br. 10-11; *see* App. 15a. But *Blades* makes clear that evidence tending to prove that a price-fixing conspiracy inflated market prices and that all or nearly all purchases were affected by that increase is all the proof required to establish common impact. *See* 400 F.3d at 572 ("Performance of a price-fixing conspiracy necessarily implies injury."). In *Blades*, however, the evidence was that the price-fixing conspiracy did not hold with regard to certain seed varieties in certain locations – for example, in markets where GM seeds were priced the same as non-GM seeds. Because the class had not "identified any type of common evidence . . . which could show injury to purchasers of GM seeds with negligible or zero list premiums" over non-GM seeds, the district court "did not abuse its discretion in concluding that some proposed class members *would be forced to fall back on* a comparison of actual list prices to hypothetical competitive prices." *Id.* at 574 (emphasis added). Plaintiffs here met their burden of showing that defendants' conspiracy caused virtually every class member to pay more for containerboard products in a manner that is entirely consistent with the analysis in *Blades*.

C. The Decision of the Court of Appeals Was Correct

Petitioners contend (at 21) that, aside from the presumption they erroneously attribute to the Seventh Circuit, "none of [the purchasers'] . . . common evidence could establish class-wide impact." But the purchasers showed that their liability case at trial – including both the conspiracy and impact elements of an antitrust violation – would rise or fall on a class-wide basis. The decision of the court of appeals accepting that showing was fully consistent with this Court's class-action precedents. A class representative need not "establish that it will win the fray," *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013), to obtain certification; the question whether evidence can be used by a class turns in significant part on whether the same type of evidence could be used by an individual plaintiff to "prov[e] or disprov[e] the elements of the relevant cause of action," *Tyson Foods*, 136 S. Ct. at 1046. The court of appeals' decision gave effect to those principles.

1. The court of appeals' decision is supported by "voluminous written materials of various types, which in the aggregate pointed to the existence of both agreement and actions to violate the antitrust laws." App. 13a. As the district court correctly reasoned, plaintiffs' evidence was relevant to show not only that a conspiracy existed, but also that it had the intended effect on prices. App. 41a-42a. All that evidence – along with defendants' attempts to rebut it – was common to the entire class.

2. The court of appeals' decision is supported by Harris's expert opinion that "the structure of the containerboard market was conducive to successful

collusion" for reasons including concentration, capital-intensive manufacturing, weak or absent competition from imports or substitutes, and low elasticity of demand, App. 15a. The Seventh Circuit also cited its own developed body of antitrust precedent. *See* App. 15a-16a. The Seventh Circuit persuasively rejected defendants' claim (which GP reiterates in its brief at 14) that Harris had relied on outdated assumptions about market behavior. App. 16a. Moreover, Harris's extensive review of the manufacturers' written contracts found that 96% had explicit links to the PPW index. C.A. App. 880; C.A. Supp. App. 232-33.

3. Dwyer's quantitative and statistical analyses provide further support. Three parts of his work are most relevant here. *First*, Dwyer examined the behavior of the PPW index – a measure of average prices actually paid – and compared it to the manufacturers' price-increase announcements, finding that (1) the announcements were more often than not followed by an increase in the index; (2) when such movements occurred they matched exactly the announced increase; (3) there were no increases in that index that did not follow one of the announcements; and (4) the PPW index for 42-lb. unbleached kraft linerboard and the PPW indices for other containerboard products correlated nearly perfectly. *See* App. 7a, 48a-50a; C.A. App. 143-46, 165, 761. This provided evidence that the manufacturers' agreed price increases caused average market prices to increase.

Second, Dwyer looked at actual prices paid by class members before and after successful price increases. He concluded that actual prices paid by class members increased in 92% of such cases. *See* App. 16a. Defendants argue (at 21) that Dwyer's analysis, by

itself, could not tell unlawful price increases from lawful ones. But plaintiffs can properly rely on other common evidence to show that the lockstep price increases were the work of an unlawful conspiracy and use Dwyer's evidence to strengthen the link between those conspiratorial price increases and class-wide harm. *See* App. 16a-17a ("taking into account the rest of the evidence," plaintiffs did "not fall[] into th[e] trap" of "show[ing] only correlation, not causation").

Third, Dwyer performed a regression analysis through which he determined that "'more than 97% of variation in aggregate prices [paid by members of the class] is explained by changes in the index.'" App. 16a (quoting C.A. App. 153-54). Petitioners attack this regression (at 22) because it did not distinguish between aggregate prices and individual prices, which they assert would have shown more variation. But Dwyer's aggregate-price regression showed the link between the PPW index and actual transaction prices. Plaintiffs do not need to show that movements in the index explained all movements in individual prices – only that the effect of the conspiracy (reflected in the index) moved all prices at least somewhat.[15]

4. Taking "all the evidence" into account, App. 10a, 41a, the courts below correctly concluded that at trial plaintiffs would succeed or fail on a class-wide basis at proving with common evidence (not presuming) that every direct purchaser of containerboard

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[15] *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969) (explaining that an antitrust plaintiff establishes liability by showing "*some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage").

products "paid the overcharges that resulted from Defendants' collusive practices," either through direct contract terms or through negotiations where the "'starting point . . . would be higher [because] the market price for the product was artificially inflated.'" App. 17a (quoting App. 51a-52a).

The opinions below are further reinforced by *Tyson Foods*, which emphasized that evidence on which "each class member could have relied . . . to establish liability if he or she had brought an individual action" is necessarily "a permissible method of proving classwide liability." 136 S. Ct. at 1046 (citing *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011)). Here, the district court found that

> [e]ach class member, if forced to proceed on an individual basis, would be relying on the same evidence of the structure, conduct, and performance of Defendants' industry and their uniform price-increase announcements in order to show an elevated baseline price for the Containerboard Products they purchased during the class period.

App. 52a; *see also* App. 15a. After *Tyson Foods*, that approach is no longer subject to legitimate challenge.

5. *Tyson Foods*, as the court of appeals noted, also forecloses petitioners' argument (at 24-25) that the courts below should have overlooked their decision not to raise a *Daubert* challenge to Harris's or Dwyer's testimony. *See* App. 3a; 136 S. Ct. at 1048-49. The district court noted that, if petitioners had raised a *Daubert* challenge, the court would have resolved it. *See* App. 26a (citing *American Honda Motor Co. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010)). Petitioners' passing assertion that the Third

and Seventh Circuits are split is thus without merit.[16]

Petitioners further assert (at 25) that, *Daubert* aside, the courts below failed to address "all of the objections and criticisms raised in the opposition to th[eir] motion for class certification" and that this conflicted with this Court's decision in *Comcast*. *See also* GP Br. 12-23 (elaborating on the argument). But they point to no issue that the courts below failed to resolve. As the court of appeals confirmed, the district court acknowledged and carried out its duty under *Comcast* to "rigorously screen expert evidence when certifying a class." App. 56a; *see* App. 11a (district court "assessed Dwyer's report, concluded that both the methodology and the data were reliable, and concluded that it could be used to demonstrate class-wide damages"). This Court has no reason to reconsider that question.

II. REVIEW IS NOT WARRANTED AS TO PREDOMINANCE ON DAMAGES ISSUES

A. The Seventh Circuit Did Not Hold That Individualized Damages Issues Are "Legally Irrelevant"

The district court found, and the court of appeals agreed, that the class's aggregate damages could be proved with common evidence – Dwyer's regression model. *See* App. 64a (finding that Dwyer's "methodology . . . appears to be firmly rooted in sound economic and econometric principles"); App. 11a, 18a-19a (reviewing Dwyer's methodology; concluding

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[16] The Third Circuit decision petitioners cite, *In re Blood Reagents Antitrust Litigation*, 783 F.3d 183 (3d Cir. 2015), follows *Allen* and other Seventh Circuit precedent. *See id.* at 187-88. GP's reliance (at 19-21) on *Blood Reagents* fails for the same reasons.

that "[t]he determination of . . . aggregate classwide damages is something that can be handled most efficiently as a class action"). The petition does not question that ruling.

The district court further found, and the court of appeals again agreed, that, even if allocating aggregate damages to individual class members might require some individualized inquiries, the need for allocation would "not defeat class certification, especially where, as here, common issues predominate [on] the liability and impact elements of Plaintiffs' claim." App. 64a; *see* App. 18a-19a (explaining that "the allocation of th[e] total sum among the class members can be managed individually, should the case ever reach that point"); *see also* App. 65a (district court leaving open the possibility of modifying the class).

Neither court held, despite what defendants say, that the potential for individualized damages inquiries was "legally irrelevant," Pet. i, or "immaterial," GP Br. 26-27. Petitioners mischaracterize the Seventh Circuit's opinion, quoting out of context its statement that their damages argument failed "as a matter of law." App. 18a. What the Seventh Circuit rejected as a matter of law was petitioners' argument (based on a misreading of *Comcast*) that a Rule 23(b) action can never be certified unless the class representatives present at the time of certification a "common method to prove damages." Pet'rs C.A. Br. 35-41; *see* Pet. 26 (arguing that plaintiffs were required to come forward with "common evidence" or a "[common] formula to determine the amount of damages due"). That is a very different question from the one that petitioners claim is presented.

The court of appeals correctly rejected the argument – pressed below and asserted in passing here – that individualized damages inquiries *always* bar certification. There is no split on that issue (notwithstanding GP's attempt (at 25) to suggest the contrary), nor is petitioners' position supported by *Comcast*. No case holds or could hold that *Comcast* categorically bars (or, for that matter, authorizes) class certification when there are individualized damages issues. The question whether such individualized issues defeat predominance is case-specific and committed to the district court's discretion. Whether the district court abused its discretion in concluding that the predominance of common issues on conspiracy and impact outweighed the possibility of individualized damages inquiries in *this* case does not warrant review.

B. There Is No Conflict with Decisions of Any Other Circuit or of This Court

The Seventh Circuit properly upheld the district court's discretionary determination that, on the record of this case, any individualized damages issues would not defeat predominance. That decision is easily reconciled with the decisions from the Second, Fourth, and Fifth Circuits on which petitioners rely, as well as with *Comcast*.

1. *McLaughlin v. American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), *recognized as abrogated on other grounds by, e.g., Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015), reversed a district court's certification of a class of cigarette buyers seeking to recover under the Racketeer Influenced and Corrupt Organizations Act for advertising suggesting that "light" cigarettes were healthier than others. The Second Circuit concluded that individualized

questions would predominate on issues of reliance, loss causation, injury, damages, and statute of limitations. It explained that a finding "that damages may have to be ascertained on an individual basis is not, standing alone, sufficient to defeat class certification," and that individualized damages issues were one "factor that [a court] must consider" among others. 522 F.3d at 231. That is consistent with the Seventh Circuit's approach here.

2. *Windham v. American Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977) (en banc), affirmed a district court's refusal to certify a class of tobacco growers allegedly injured by collusive tobacco bidding practices in South Carolina. The growers alleged a broad "variety of claims" based on different individual bidding practices, and the district court found that certification would result in an "overwhelming deluge of mini-trials." *Id.* at 67. The court of appeals found that the district court had properly "look[ed] at the case as a whole" and "consider[ed] proof of damages as well as other issues in the case" in determining that individualized issues had predominated. *Id.* at 71. Subsequent cases have confirmed that *Windham* was based on the particular complexity of the damages inquiries in that case and that the Fourth Circuit agrees with the Second and Seventh Circuits "that the need for individualized proof of damages alone will *not* defeat class certification." *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 429 (4th Cir. 2003) (collecting cases; distinguishing *Windham*). Again, that is consistent with the Seventh Circuit's approach here.

3. *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294 (5th Cir. 2003), affirmed a district court's refusal to certify a class of businesses claiming they were

injured when AT&T blocked the passage of caller-ID data over its network as part of an alleged scheme to monopolize caller-ID services. The district court found that individual issues as to injury and damages would predominate. The Fifth Circuit affirmed, focusing on damages. *Id.* at 303.[17] In doing so, it noted that "relatively few motions to certify a class fail because of disparities in the damages suffered by the class members" and that "[e]ven wide disparity among class members as to the amount of damages suffered does not necessarily mean that class certification is inappropriate." *Id.* at 306 & n.17 (collecting authorities).

4. Nor is there merit to petitioners' contention that the decisions below conflict with *Comcast*. The court of appeals correctly rejected the argument that defendants made below – that *Comcast* requires a common methodology for proving individual class-member damages to be presented and evaluated at the certification stage in every case. It read *Comcast* as holding instead that, where a class-certification decision does rely on a damages methodology as part of its predominance showing, it may not use a "methodology that identifies damages that are not the result of the wrong." *Comcast*, 133 S. Ct. at 1434; *see* App. 17a ("*Comcast* insists that the damages theory must correspond to the theory of liability"). The Second and Fifth Circuits – which petitioners

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[17] The damages asserted in *Bell Atlantic* were unusually fact-specific, requiring calculation of matters such as wages (for time spent answering calls) that might have been saved and long-distance charges that might have been avoided if caller-ID had been available. *See* 339 F.3d at 304.

claim are on their side of the purported split – have agreed with this reading of *Comcast*.[18]

Further, this Court confirmed in *Tyson Foods* (as petitioners concede) that "common questions can predominate over individual questions even though 'damages or some affirmative defenses peculiar to some individual class members' will have to be tried separately." Pet. 27 (quoting 136 S. Ct. at 1045). After that authoritative declaration, all that remains of petitioners' position is an assertion that the courts below "failed to undertake the analysis required by *Comcast*" as to whether "'[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class.'" Pet. 27-28 (quoting *Comcast*, 133 S. Ct. at 1433). But the court of appeals and the district court performed just that analysis.[19] Petitioners' disagreement with the result does not warrant review.

C. The Decision Below Was Correct

The court of appeals correctly applied the predominance standard. The "predominance inquiry tests

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[18] *See*, *e.g.*, *Roach*, 778 F.3d at 409 ("we do not read *Comcast* as precluding class certification where damages are not capable of measurement on a classwide basis"); *In re Deepwater Horizon*, 739 F.3d 790, 815 (5th Cir. 2014) (rejecting as a "misreading of *Comcast*" the argument that it "precludes certification . . . where the class members' damages are not susceptible to a formula for classwide measurement"); *accord*, *e.g.*, *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1239 (11th Cir. 2016) (collecting more cases).

[19] *See* App. 17a-18a ("We must see if there is a classwide method for proving damages, and if not, whether individual damage determinations will overwhelm the common questions on liability and impact."); App. 65a (rejecting argument "that individual damages issues threaten to overwhelm the litigation").

whether proposed classes are sufficiently cohesive to warrant adjudication by representation," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997), to determine whether class adjudication is the "'metho[d]' best suited to adjudication of the controversy 'fairly and efficiently,'" *Amgen*, 133 S. Ct. at 1191. If the class will likely "prevail or fail in unison," *id.*, certification is warranted. The court of appeals properly identified that standard. App. 9a; *see also* App. 19a ("If in the end the Defendants win on the merits, this entire matter will be over in 'one fell swoop.'").

The district court reasonably found predominance. That court correctly identified the predominant questions as whether containerboard manufacturers conspired to fix prices; whether that conspiracy had its intended impact on the prices class members paid; and the aggregate amount of the resulting overcharge. As the court of appeals observed, if the class proves those three things at trial, the allocation of its recovery to individual class members "can be managed individually." App. 19a. That result is firmly supported by the substantive law of antitrust, under which the amount of a plaintiff's damages need only be shown through a "reasonable approximation." App. 18a; *see Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927) ("It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate.").

Nor did the district court err in inviting defendants to move to modify or decertify the class "should discovery demonstrate that individual damages issues indeed threaten to overwhelm the common issues." App. 65a. Petitioners err (at 28) in disparaging that ruling as a "certify-first-and-ask-questions-later

approach to predominance." The district court's analysis of predominance was admirably thorough – consuming 32 pages of the appendix, *see* App. 33a-65a, and addressing in detail such technical matters as whether Dwyer properly corrected for collinearity problems in his regression (which he did), *e.g.*, App. 60a. The court then found that plaintiffs had met their burden to establish predominance based on that well-developed certification-stage record. App. 65a. Petitioners can hardly complain that the court left the door open for them to try again later to show otherwise.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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