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

REPLY BRIEF FOR PETITIONERS

CARTER G. PHILLIPS*
C. FREDERICK BECKNER III
KATHLEEN MORIARTY MUELLER
PAUL J. RAY
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Petitioners

* Counsel of Record

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RULE 29.6 STATEMENT

Effective January 1, 2017, petitioner Temple-Inland Inc. changed corporate form and became Temple-Inland LLC. Temple-Inland LLC's parent company is International Paper Company, which owns 100% of its stock.

There have been no changes in the Rule 29.6 Statement in the Petition for petitioners International Paper Company and Weyerhaeuser Company.

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In their opposition, plaintiffs do not dispute the petition's central arguments for certiorari. Plaintiffs do not claim the questions presented are unimportant or that any procedural impediment to this Court's review exists.

Plaintiffs do not even defend the reasoning of the courts below. Plaintiffs nowhere claim a court may certify a class based on a presumption that a price-fixing conspiracy caused all purchasers to pay supra-competitive prices even where prices were individually negotiated. Plaintiffs do not dispute that the need for individualized damages determinations is relevant to the predominance analysis and can preclude class certification. And plaintiffs do not dispute that a contrary holding on either of these questions would conflict with decisions of this Court and other circuits.

Instead, plaintiffs seek to rewrite the lower courts' opinions. In plaintiffs' rendition, "Petitioners, co-defendants, and one set of *amici*" all "mischaracterize" the Seventh Circuit's opinion, and "this case does not present the questions stated in the petition." Opp. 1, 14. This imaginative reconstruction of the decisions below is wishful thinking. The district court *did* rely on a presumption of class-wide harm (at plaintiffs' request), and the Seventh Circuit rejected defendants' objections to this approach. *Infra* pp. 2-4. The district court *did* deem legally irrelevant the need for individualized damages inquiries, and the Seventh Circuit agreed, finding predominance met because plaintiffs' expert purportedly could determine aggregate damages. *Infra* pp. 9-10. This case therefore presents an excellent vehicle for deciding two indisputably important, recurring questions of class

action jurisprudence on which the lower courts are divided.

I. THE COURT SHOULD GRANT REVIEW TO DECIDE WHETHER CLASS CERTIFICATION MAY BE BASED ON THE PRESUMPTION THAT A CONSPIRACY TO FIX PRICES HARMS ALL MARKET PARTICIPANTS EVEN WHEN PRICES ARE INDIVIDUALLY NEGOTIATED.

1. The opinions belie plaintiffs' claim, Opp. 14, that the courts below did not rely on a "presumption" of class-wide harm.[1]

The district court held that antitrust impact was a common question because it thought Dwyer's analysis of "the lock-step increase in the PPW index that followed and tracked Defendants' collective price-increase announcements demonstrates that nearly all class members suffered antitrust impact." Pet. App. 50a. The court acknowledged defendants' objection

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[1] Plaintiffs' assertion that the lower courts used an evidentiary inference rather than a legal "presumption," Opp. 16-17, is both mistaken and irrelevant. The "inference" in the numerous decisions cited by the district court was a "presumption" because it was invoked as the basis for establishing class-wide liability even where there was evidence that many class members were not injured. *See* 21B C.A. Wright & K.W. Graham, Jr., *Federal Practice and Procedure: Evidence* §5122.1 (2d ed. Jan. 2017 update) (discussing difference between inferences and presumptions). Regardless, *Brooke Group, Ltd.* v. *Brown & Williamson Tobacco Corp*., 509 U.S. 209 (1993), rejected the very evidentiary inference plaintiffs seek to draw, and other circuits have held that a class cannot be certified based on any such "inference," *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 29 (1st Cir. 2008), "assumption," *Robinson* v. *Tex. Auto. Dealers Ass'n*, 387 F.3d 416, 423 (5th Cir. 2004), or "presumption," *Blades* v. *Monsanto Co.*, 400 F.3d 562, 570 (8th Cir. 2005).

that "reliance on the PPW index in analyzing impact is misplaced" because most prices are individually negotiated and the index does not reflect actual prices, *id.* at 51a, but said these arguments "miss the mark" because plaintiffs have 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 is artificially inflated. This comports with the "prevailing view" that "price-fixing affects all market participants, creating an inference of class-wide impact even when prices are individually negotiated."

Id. at 51a-52a (quoting *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1254 (10th Cir. 2014)).

If there were any doubt, the district court further emphasized:

> Numerous cases have found that when a plaintiff produces evidence that the alleged conspiracy increased the baseline price of a product, "there is an inference of class-wide impact." *In re Urethane Antitrust Litig.*, 768 F.3d at 1254 (collecting cases across several jurisdictions). Evidence that multiple defendants issued "parallel … price-increase announcements especially supports the inference of class-wide impact, and this is true "even when prices are individually negotiated." *Id.* at 1254-55.

Pet. App. 52a-53a.

The Seventh Circuit gave the same reason for rejecting defendants' showing that impact was not a common question due to individualized negotiations. Pet. App. 17a. Indeed, it quoted the very portion of the district court's opinion that applied the *Urethane*

presumption. *Id.* ("for transactions where prices were negotiated individually … 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'") (quoting *id.* at 52a). This was the only basis for the Seventh Circuit's rejection of defendants' argument with respect to "transactions where prices were negotiated individually or a longer term contract existed." *Id.* at 17a.

2. Plaintiffs now claim *Urethane* is "largely beside the point," Opp. 17, but they successfully took the opposite position below. Before the district court, they asserted:

> Under the prevailing view, price-fixing affects all market participants, creating an inference of class-wide impact even when prices are individually negotiated. []. The inference of class-wide impact is especially strong where, as here, there is evidence that the conspiracy artificially inflated the baseline for price negotiations.

Dkt. 829 at 36-37 (quoting *In re Urethane Antitrust Litig.*, 768 F.3d at 1253-55) (bracketed omissions in original).

Moreover, in defending the district court's reliance on *Urethane* on appeal, plaintiffs claimed the district court "drew reasonable inferences about the feasibility of a class-wide impact determination" and properly "made analogies to cases, such as *Urethane*, 768 F.3d 1245, in which other courts drew similar inferences from similar facts." Pltfs.' C.A. Br. 43.

3. Plaintiffs advocated and the lower courts embraced the presumption of injury because none of plaintiffs' common evidence could establish that the

alleged conspiracy remotely caused all class members to pay supra-competitive prices.[2]

Plaintiffs claim that 96% of a sample of contracts "had explicit links to the PPW index," Opp. 24, but that does not prove class-wide antitrust impact because (1) a number of contracts allowed the purchaser to abandon the contract or renegotiate the price if PPW increased (A.203, A.573); (2) many class members purchased only when the PPW index was flat or falling (A.392, A.478); and (3) many purchased pursuant to "handshake agreements" or spot sales not tied to PPW (A.573, PSA.85).

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[2] Even if the Seventh Circuit relied exclusively on Dwyer's analyses and not on a presumption, its decision conflicts with *Blades* v. *Monsanto*, 400 F.3d 562 (8th Cir. 2005), because Dwyer assumed that any price increase was caused by the conspiracy, and his analysis did not account for economic factors that would have caused prices to rise in a "but for" competitive market. Pet. 23-24. Plaintiffs try to distinguish *Blades* on its facts, Opp. 22, but the key point is that the Eighth Circuit rejected class certification because common evidence must allow the "jury [to] reasonably infer that the competitive price was less than the price [each] plaintiff paid." 400 F.3d at 573.

In addition, the Seventh Circuit split with *In re Blood Reagents Antitrust Litigation*, 783 F.3d 183 (3d Cir. 2015), by accepting Dwyer's analyses without addressing the opposing views of defendants' experts because defendants had not sought to exclude Dwyer's opinions. Pet. 24-25. Defendants made the same criticisms below that they advance here. *Compare* Pet'rs C.A. Br. 26-32 & Reply Br. 9-13, *with* Pet. 24-25. The Seventh Circuit ignored most of them. *E.g.,* Pet. App. 16a-17a (citing Dwyer's regression without acknowledging that it was based on averages that obscure variation in individual prices, Harris' analysis of contracts with prices tied to PPW without acknowledging the sales made without contracts, and Dwyer's "before and after" pricing analysis without acknowledging that it is prone to false positives).

Plaintiffs likewise tout Dwyer's claim that 92% of a sample of class members experienced a price increase when the PPW index rose, Opp. 24-25, but this includes price increases customers would have had absent any alleged conspiracy. Plaintiffs do not dispute that Dwyer assumed every customer's price increase, no matter how small, was due to the alleged conspiracy, even though there were increases in costs and demand during the class period that would have caused prices to rise in a competitive market. *Id*. at 24; GP Br. 12-16; A.487. A class cannot be certified on expert analysis that fails to distinguish price increases caused by lawful market conditions from increases caused by a conspiracy. *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1435 (2013).

Finally, plaintiffs admit that the regression analysis showing a correlation between changes in the PPW index and aggregate prices is based on an *average* of thousands of different products purchased at different prices. Opp. 25. It thus elides the individual variation (*e.g.*, some purchasers negotiated prices that declined even as PPW rose, A.575, and some bought only when PPW was falling, A.392, A.478) that refute plaintiffs' assertion that the "conspiracy (reflected in the index) moved all prices at least somewhat." Opp. 25.[3]

4. Plaintiffs also wrongly claim that the "inference of class-wide impact" does "not relieve an antitrust plaintiff of its burden of proof." Opp. 18. Although a

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[3] Plaintiffs also refer to Harris's opinion that "the structure of the containerboard market was conducive to successful collusion," Opp. 23-24, but they do not claim that this could prove that all class members paid supra-competitive prices. As the Seventh Circuit recognized (Pet. App. 15a-16a), and Georgia-Pacific's brief supporting certiorari further explains (at 14), structural evidence cannot prove whether collusion actually occurred or which market participants it injured.

"successful price-fixing conspiracy" that raised "the market price" would "affect everyone" who bought at the inflated market price (*id.*), that is not the "inference" applied in *Urethane* or by the courts below. The "prices" that were allegedly inflated here (PPW index) and in *Urethane* (list prices) were *not* the prices purchasers actually paid; they were prices used as a baseline in negotiations of actual prices. While a conspiratorial increase in the PPW index *might* cause a corresponding increase in the price some purchasers of other products actually paid, it also *might not*; it all depends on what the parties negotiate. See Pet. 5-6, 19-20.

In allowing plaintiffs to use an "inference" to avoid having to prove an impact on the prices actually negotiated, the lower courts departed starkly from decisions of the First, Fifth, and Eighth Circuits. See Pet. 13-15. Plaintiffs do not dispute the petition's description of the holding of those decisions. They claim instead that this case is "easily squared" with those decisions, because the district court here relied on "factual inferences drawn from the evidence in this case, rather than on any categorical presumption." Opp. 18-19. But the "inference" that the increase in the PPW index caused class-wide harm was essential to the certification of the class, and none of plaintiffs' evidence could show that all class members paid supra-competitive prices. *Supra* pp. 4-6. Indeed, if plaintiffs had common evidence of class-wide harm, they would not have urged the lower courts to adopt a presumption of harm. *Supra* p. 4.

5. Finally, plaintiffs do not even attempt to refute the petition's showing that:

(1) Class certification based on presumed harm is incompatible with this Court's precedents requiring

actual, not presumed, conformance with Rule 23, see Pet. 18-19;

(2) The "inference" applied below is foreclosed by *Brooke Group,* 509 U.S. at 236 (it is "unreasonable to draw conclusions about the existence of tacit coordination or supracompetitive pricing from data that reflect only list prices" when "list prices were not the actual prices paid by consumers"), see Pet. 18-19;

(3) Class certification based on presumed harm effectively strips defendants of their right to raise defenses to individual claims, because in a class trial defendants could not introduce the negotiations of thousands of class members to rebut the presumption (or dispel the inference), see Pet. 20; and

(4) Class certification frequently causes defendants to settle more quickly and on more unfavorable terms even if they have done nothing wrong to avoid the risk of a multi-billion dollar trebled damages award, see Pet. 33.

Plaintiffs' inability to defend the "inference" of class-wide harm they urged the lower courts to apply confirms that the petition should be granted before the litany of plaintiffs seeking to invoke it grows any longer.

II. THE COURT SHOULD GRANT REVIEW TO DECIDE WHETHER THE NEED FOR INDIVIDUAL DAMAGES INQUIRIES IS IRRELEVANT TO RULE 23(b)(3)'S PREDOMINANCE INQUIRY.

Certiorari is independently warranted to make clear that the need for individualized damages determinations is relevant to the predominance analysis. Plaintiffs do not dispute that this is what Rule 23(b)(3) requires, or that a contrary holding

would conflict with decisions of this Court and other circuits. Ironically, plaintiffs urge the Court to deny certiorari on the theory that the courts below actually *followed* the rule advocated by the petition. Opp. 28. Again, the lower courts' opinions belie plaintiffs' claim.

1. The district court held that plaintiffs established predominance because their damages model was "a reliable method of measuring classwide damages based on common proof." Pet. App. 53a. Although the model could not determine the damages of any individual class member, and thus left "individualized damages issues," the court held that "that alone will not defeat class certification, especially where, as here, common issues predominate the liability and impact elements of Plaintiffs' claims." *Id.* at 64a.

Defendants appealed, arguing that predominance is not present because class members purchased "tens of thousands" of different products, mostly on individually negotiated terms; thus, without a model or common evidence to determine individual damages, "reliably determining each claimant's damages would necessitate thousands of individualized adjudications, destroying any efficiency class litigation might otherwise achieve." Pet'rs C.A. Br. 37. The Seventh Circuit characterized that as an argument "that it is wrong to calculate aggregate rather than individual damages for the class." Pet. App. 18a. It said the "district court rejected that position as a matter of law, as do we." *Id.* The Seventh Circuit added that:

> at the class certification stage, plaintiffs are not obliged to drill down and estimate each individual 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 handled individually,

should the case ever reach that point.

Id. at 18a-19a.

2. Plaintiffs are thus wrong to say the Seventh Circuit simply "upheld the district court's discretionary determination that, on the record of this case, any individualized damages issues would not defeat predominance." Opp. 29. Nowhere in its 32-page discussion of predominance, *id.* at 34, does the district court explain how a lump-sum award could be fairly allocated among individual class members, or why that could be "handled individually" without overwhelming the common issues. See *Comcast*, 133 S. Ct. at 1433. Indeed, the court was sufficiently uncertain about whether this could be done that it expressly said the class might need to be modified or decertified at the damages stage. Pet. App. 65a. No amount of praise of the opinion's "admirably thorough" analysis of other issues, Opp. 34, can obscure the fact that in refusing to address how individual damages could be decided in this sprawling class action, the court followed the "certify-first-and-ask-questions-later" approach to predominance repeatedly condemned by this Court. See Pet. 18-19.

3. In affirming that result on the ground that the need for individual damages determinations is irrelevant and predominance is satisfied if plaintiffs have common evidence of aggregate damages, the Seventh Circuit departed from decisions of the Second, Fourth, and Fifth Circuits. Pet. 29-33.

Plaintiffs claim no conflict exists because those circuits acknowledge that the fact that damages have to be determined individually is not "alone" sufficient to defeat class certification, and that is "consistent with the Seventh Circuit's approach here." Opp. 30. That is a straw man. Defendants acknowledge that

common questions can predominate even if damages will have to be tried individually. Pet. 27 (citing *Tyson Foods, Inc.* v. *Bouaphakeo*, 126 S. Ct. 1036, 1045 (2016)).

What plaintiffs obscure is the central difference between the Seventh Circuit's approach and that of the other circuits: While other circuits agree that individualized determinations will not always preclude certification, the Seventh Circuit alone has held that they *never* will. The Seventh Circuit illogically invoked the principle that individual damages issues do not always preclude class certification as a reason not to consider *at all* whether individual damages reliably and fairly could be determined in the overly broad class plaintiffs sought to certify. Pet. App. 18a-19a. That is a fundamentally different approach than that taken in *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), *Windham* v. *American Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977) (en banc), *Bell Atlantic Corp.* v. *AT&T Corp.*, 339 F.3d 294 (5th Cir. 2003), and *Gunnells* v. *Healthplan Services, Inc.*, 348 F.3d 417 (4th Cir. 2003). In those cases, the courts discussed how individual damages would be determined consistent with due process and the underlying cause of action, and then decided whether such individualized determinations could be handled manageably in a class action. See Pet. 29-32; Opp. 29-31. If they could, class certification was proper. *E.g. Gunnells*, 348 F.3d at 429 ("a court-appointed fiduciary has already calculated most of the Plaintiffs' claims for medical bills" and the amount of premiums to be refunded "could be quickly and easily determined" from company records). If not, class certification is denied. *E.g.*, *Windham*, 565 F.3d at 67-70 (determining damages of 20,000 farmers allegedly harmed by price-fixing at tobacco auctions would be a

"complex, highly individualized task"). The Court should grant review to resolve the confusion and make clear that the latter approach is required by Rule 23.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

CARTER G. PHILLIPS*
C. FREDERICK BECKNER III
KATHLEEN MORIARTY MUELLER
PAUL J. RAY
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Petitioners

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* Counsel of Record