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 OF RESPONDENT GEORGIA-PACIFIC LLC IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an antitrust class may be certified under Fed. R. Civ. P. 23(b)(3) based on a presumption that an increase in an index price demonstrates class-wide antitrust injury, even though most sales in the industry are individually negotiated and executed at prices below the index price.

2. Whether the fact that individualized inquiries are needed to determine the amount of damages due to each class member is, as the Seventh Circuit held here, legally irrelevant to the predominance inquiry under Fed. R. Civ. P. 23(b)(3).

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, Georgia-Pacific LLC states that it is wholly owned by Georgia-Pacific Holdings, LLC and Koch Industries, Inc. No publicly held corporation owns 10% or more of the stock of Georgia-Pacific LLC or its parent companies.

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BRIEF OF RESPONDENT GEORGIA-PACIFIC LLC IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Respondent Georgia-Pacific LLC—one of the defendants-appellants in the courts below—respectfully submits this brief in support of the petition of International Paper Company et al. for a writ of certiorari.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs allege a sprawling, nationwide conspiracy by manufacturers of containerboard to restrict production capacity and thus manipulate the prices of thousands of diverse downstream products sold to more than 100,000 purchasers—including both large Fortune 500 companies and small mom-and-pop shops. Containerboard—which includes both linerboard and medium—is essentially large rolls of heavy stock paper that is used by both defendants and other manufacturers to make a variety of corrugated (*i.e.*, cardboard) products, including everything from pizza boxes, to boxes used to ship refrigerators, to retail floor displays.

To prove their case at trial, plaintiffs must show that the alleged restrictions on capacity for containerboard actually affected the prices paid by purchasers of thousands of different products at different prices—some pursuant to handshake deals, and others under long-term agreements—over a nearly seven-year pe-

[1] Pursuant to Rule 12.6, Georgia-Pacific timely notified counsel of record for all other parties on January 23, 2017, of its intention to file a brief supporting the petition.

riod that included the Great Recession. And to be entitled to litigate the claims of a putative *class* of those purchasers in a single proceeding, plaintiffs were required by Federal Rule of Civil Procedure 23 to demonstrate a common method capable of resolving this central issue—antitrust "impact"—for all purchasers in "one stroke," *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 350 (2011), *and* a common method for proving damages that would not result in thousands of individualized adjudications on the back-end, *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1433 (2013). Given the breadth of the case plaintiffs chose to bring and the heterogeneity of the many thousands of claims they seek to litigate on a class basis, this is a nearly insurmountable burden. The Seventh Circuit affirmed class certification here only by excusing plaintiffs from carrying it.

In almost all putative antitrust class actions alleging a price-fixing conspiracy, the element of an agreement will be common to the class; predominance will turn on whether plaintiffs can prove, on a classwide basis, both antitrust injury (*i.e.*, impact) and damages. But the Seventh Circuit permitted plaintiffs to bootstrap allegations of conspiracy alone into a showing of predominance by effectively discarding the elements of impact and damages for purposes of class certification: The court affirmed a class-certification ruling that allowed plaintiffs to presume classwide impact from the supposed agreement without proving causation; and it deemed sufficient a model for *aggregate* damages likewise premised on that presumption. As petitioners show, both of those holdings lie at the center of circuit conflicts that merit this Court's review.

The need for this Court's intervention is magnified, moreover, because each key step of the court of appeals' reasoning in reaching those holdings departs from this Court's and other circuits' case law on fundamental antitrust, class-action, and constitutional principles. The court absolved plaintiffs of their burden of showing that impact is capable of common proof because it fundamentally misunderstood this critical element of claims alleging violations of Section 1 of the Sherman Act. This Court has made clear that establishing antitrust impact requires proving causation—*i.e.*, that each plaintiff was injured *because of* the alleged unlawful acts. Applying that teaching, the Eighth Circuit has correctly held that plaintiffs claiming that they paid higher prices due to collusion must show that, "but for" the purported collusion, they would have paid less. Putative class plaintiffs thus cannot satisfy Rule 23(b)(3)'s predominance requirement, the Eighth Circuit held, without demonstrating a common method of conducting that but-for analysis. None of the evidence submitted by plaintiffs in this case—expert or otherwise—even purports to meet this burden. Yet the Seventh Circuit excused that failure because it held that a classwide "but for" analysis is unnecessary. The circuits thus disagree not only as to whether plaintiffs can carry their burden of showing impact using a presumption, but also as to what that burden *is*.

The Seventh Circuit's analysis of damages likewise not only contradicts other circuits' decisions, as petitioners show, but also contravenes this Court's precedent in additional respects. The Seventh Circuit appeared correctly to recognize that, if individualized damages inquiries are needed, common issues do not predominate. But it circumvented this principle by holding that defendants' liability can be assessed

based on estimated *aggregate* damages. That holding not only conflicts with the views of other circuits, but also contravenes the Rules Enabling Act, bedrock due-process principles, and the Seventh Amendment.

Indeed, the Seventh Circuit doubled down on its refusal to hold plaintiffs to their burden of proof by disclaiming any duty to examine critically whether plaintiffs' proffered expert evidence is actually capable of showing causation *or* damages. The court's sole rationale for doing so was that defendants did not move to exclude that evidence pursuant to Federal Rule of Evidence 702 or *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), before class certification. That reasoning defies this Court's decision in *Comcast*, which held that Rule 23 itself "requir[es] precisely that inquiry" regardless of whether the evidence is found to be admissible (or not) under *Daubert*. 133 S. Ct. at 1431 n.4, 1433. The Seventh Circuit's decision refusing to conduct this rigorous analysis under Rule 23 is sufficiently serious and clear to merit summary reversal. It also creates yet another circuit split—contradicting a recent decision of the Third Circuit correctly applying *Comcast* in this setting.

The court of appeals, in short, broke with this Court's and other circuits' precedent at every turn. The stakes of these conflicts are grave indeed. As this Court has repeatedly noted, class certification is often a pivotal question in large cases, given the immense pressure certification imposes on defendants to settle even meritless claims. As this case illustrates, the impact and damages issues are often pivotal and frequently determine whether a gargantuan class action will proceed. The Seventh Circuit's erroneous conclusions regarding both impact and damages resulted in

its approving certification of a suit seeking *$11 billion* in treble damages.

Given the increasing prevalence and scale of antitrust litigation, lower courts urgently need clarity concerning the correct class-certification standards and their application in these cases. Moreover, because it is increasingly difficult to secure discretionary interlocutory review under Rule 23(f), and because many large antitrust cases in which classes are certified are settled before trial, opportunities to provide definitive guidance are in limited supply. This high-stakes case—in which interlocutory review was granted, and in which these recurring issues were pressed and passed upon below and are dispositive of whether class certification was proper—provides a rare opportunity for this Court to provide urgently needed guidance.

The petition should be granted.

ARGUMENT

Certiorari is warranted because the court of appeals' rulings and reasoning concerning both antitrust impact and damages contravene this Court's teaching and create or cement circuit splits. The conflicts the petition identifies reflect further, fundamental lower-court disagreements regarding basic tenets of antitrust, class-action, and constitutional law. The Seventh Circuit's standard reduces Rule 23's "stringent requirements for certification that in practice exclude most claims," even in cases seeking to "'vindicate the policies underlying the antitrust' laws," *Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (citation omitted), to little more than a rubberstamp.

The court's misguided analysis led it to an unsettling, inexplicable result: approving a single class

trial to adjudicate the claims of tens of thousands of differently situated purchasers—which purchased a diverse array of products, ranging from bulk containerboard sheets, to specialized boxes for products from tenderloins to trailer hitches, to customized grocery-store fruit displays—all at different times, on different terms, and with different alleged damages. It would have stunned Rule 23's framers to see the Rule transformed in this fashion. This case is an ideal vehicle to resolve these conflicts on these important and recurring issues.

I. THE SEVENTH CIRCUIT'S ANALYSIS OF PLAINTIFFS' PURPORTED SHOWING OF IMPACT CONTRAVENES THIS COURT'S CASE LAW AND CREATES TWO FURTHER CIRCUIT CONFLICTS.

As petitioners explain (Pet. 12-20), the court of appeals upheld a class-certification order that is premised on *presuming* antitrust impact—rather than requiring plaintiffs to show that they can *prove* it at trial. That ruling directly implicates an existing circuit split and impermissibly dilutes the requirements of substantive antitrust law in order to enable class certification. The conflict between the decision below and this Court's and other circuits' precedent, in fact, runs even deeper. By excusing plaintiffs from showing how they will prove—on a classwide basis—that the alleged collusion was a *but-for cause* of their purported injuries, the Seventh Circuit distorted settled antitrust doctrine and also parted ways with the Eighth Circuit. And by refusing to confront defendants' challenges to the reliability and sufficiency of the evidence plaintiffs did tender, solely because of how those challenges were *styled*, the decision below defied this Court's decision in *Comcast* and created a further split with the Third Circuit. These further conflicts

between the decision below and this Court's and others' case law confirm the need for plenary review.

A. The Seventh Circuit's Holding That Plaintiffs Need Not Establish But-For Causation Contradicts Decisions Of This Court And The Eighth Circuit.

The Seventh Circuit's analysis of antitrust impact—culminating in its affirmance of a class-certification ruling premised on a presumption of impact—rests on a fundamental misconception of this central element of antitrust claims. Properly understood, establishing impact requires proving causation—*i.e.*, that plaintiffs would not have been injured but for the alleged unlawful acts. For impact to constitute a common issue, plaintiffs thus must show a common method of establishing but-for causation. The Seventh Circuit rejected this requirement, and in doing so created a further split with the Eighth Circuit.

1. The Clayton Act permits only a person "injured in his business or property *by reason of* anything forbidden in the antitrust laws [to] sue therefor." 15 U.S.C. § 15(a) (emphasis added). That statutory text requires plaintiffs to prove that the alleged unlawful conduct "'caused them an injury for which the antitrust laws provide relief.'" *Atl. Richfield Co.* v. *USA Petrol. Co.*, 495 U.S. 328, 344 (1990) (citation and emphasis omitted). As plaintiffs themselves described it below, "antitrust impact is a causation inquiry." D.C. Dkt. 658, at 3. That requirement must be met, this Court has made clear, in *every* case—"even in cases involving *per se* violations," such as "horizontal price fixing." *Atl. Richfield*, 495 U.S. at 344.

It thus is hornbook antitrust law that "[e]very plaintiff in a civil case must show that its injuries

were 'caused' by the defendant's illegal conduct." 2A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* § 338 (2015) ("Areeda & Hovenkamp"). It is not enough that alleged misconduct occurred and plaintiffs later paid higher prices; the misconduct must have *caused* the alleged higher prices. As this Court underscored in rejecting certification of another massive antitrust class, "[p]rices whose level above what an expert deems 'competitive' has been caused by factors *unrelated* to an accepted theory of antitrust harm are not 'anticompetitive' in any sense relevant" in antitrust suits. *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1435 (2013) (emphasis added).

It also is well-settled that, to satisfy Rule 23(b)(3)'s predominance requirement, plaintiffs must show that impact is capable of common proof at trial. As the courts of appeals have consistently held, this means that plaintiffs seeking class certification must tender a classwide method for showing that the purported conspiracy resulted in higher prices to every class member. *See*, *e.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013) (requiring "show[ing] that [plaintiffs] can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy" to certify a class); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311-12 (3d Cir. 2008) ("[T]he task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members."); *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008) (same); *Bell Atl. Corp.* v. *AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003) (same). Plaintiffs conceded below that "predominance … requires a

showing that the key elements of Plaintiffs' case"—including (*inter alia*) "causation (variously known as 'antitrust injury,' 'fact of damage' or 'impact')"—"can be established using common proof at trial." D.C. Dkt. 658, at 1-2.

Applying these principles, the Eighth Circuit has held that, where (as here) plaintiffs allege injury in the form of higher market prices, they necessarily must offer some comparison between the actual market prices paid and hypothetical market prices they would have paid "but for" the alleged unlawful acts, in order to show that those purported acts—as opposed to other, unrelated factors—were the reason for the higher prices. *See Blades* v. *Monsanto Co.*, 400 F.3d 562, 569, 571-75 (8th Cir. 2005). To satisfy Rule 23(b)(3)'s predominance requirement, *Blades* held, plaintiffs thus must show a common method for performing this type of but-for causation analysis at trial on a classwide basis. *See ibid*.

The plaintiffs in *Blades* alleged that defendants entered into a price-fixing conspiracy to inflate artificially the prices of hundreds of different genetically modified corn and soybean seeds. 400 F.3d at 565. They introduced expert testimony purporting to show classwide antitrust impact in the form of supra-competitive prices. *Id.* at 569. Despite declining to exclude this testimony under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the district court in *Blades* ruled that this evidence was insufficient to satisfy Rule 23. 400 F.3d at 569. "To establish antitrust impact" at trial, it explained, the plaintiffs would be "'required to construct a hypothetical market, a but-for market, free of the restraints and conduct alleged to be anticompetitive.'" *Ibid.* (citation omitted). Yet at the class-certification stage,

the plaintiffs had not offered any classwide method of performing that analysis, which defeated predominance. *Id.* at 569-70.

The Eighth Circuit affirmed. 400 F.3d at 571-75. "To prove that the members of the proposed classes were injured by paying supra-competitive prices for [genetically modified] corn and soybean seeds," *Blades* held, "*each* plaintiff must be able to present evidence from which a jury could reasonably infer that the *competitive* price," *i.e.*, the but-for price, "was less than the price the plaintiff paid." *Id.* at 573 (emphases added). For impact to constitute a common issue, "each plaintiff would need to present evidence that the list prices of the seeds he purchased, not just some or even most of the hundreds of list prices on appellees' price lists, were inflated." *Ibid*. But the plaintiffs offered no common, classwide method to determine the competitive, but-for price for each class member. *Id.* at 573-574. "[T]he presence of individualized market conditions" would instead "require individualized, not common, hypothetical markets—thus individualized, not common, evidence." *Id.* at 574; *see also* 2A Areeda & Hovenkamp § 396e ("Proof of impact using common proof is problematic when the class members are in many different product and geographic markets.").

2. The Seventh Circuit here acknowledged *Blades*'s holding, but it expressly rejected the Eighth Circuit's approach requiring antitrust plaintiffs to show a classwide method of performing such a "'but-for' analysis." Pet. App. 14a (citing *Blades*, 400 F.3d at 569). 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," the court of appeals held, "might be *one* way in which a plaintiff could satisfy its burden."

Ibid. (emphasis added). But the court thought that "formulation is too narrow," and that impact can be established in *other* ways, *without* comparing hypothesized competitive prices to actual market prices. *Id.* at 14a-15a. In the Seventh Circuit's view, in other words, but-for analysis may be *sufficient*, but it is not *necessary*. The decision below thus not only conflicts with other courts of appeals' rulings regarding the use of a presumption to establish impact, but also conflicts directly with Eighth Circuit case law on the question of what burden plaintiffs bear with respect to proving impact in the first place.

The Seventh Circuit's position eviscerates the requirement of antitrust impact. Establishing that alleged collusion "caused" plaintiffs to pay higher prices (*Atl. Richfield*, 495 U.S. at 344) inherently requires plaintiffs to show not merely that market prices increased following purported collusion, but that they increased *because of* that alleged collusion, as opposed to other causes. Showing causation in that sense is impossible if one cannot isolate the effects of the alleged unlawful acts. *See* 2A Areeda & Hovenkamp § 396e ("common proof" of "the fact of injury … requires showing that the actual price paid exceeded the 'but for' price," which "is determined by the forces of supply and demand absent conspiracy in the market"). By rejecting a requirement of but-for analysis, the decision below eliminated the element of causation itself.

The Seventh Circuit's description of its contrary view confirms as much. The court asserted that "[w]hat is essential is whether the class can point to common proof that will establish antitrust injury (in the form of *cartel pricing* here) on a classwide basis." Pet. App. 14a (emphasis added). But the court

failed to recognize that, to constitute a cognizable antitrust injury, such "cartel pricing" must by definition be prices *higher than what would have existed* without the alleged cartel activity, *i.e.*, the prices that would prevail in the "but-for" world where no cartel existed. One cannot know what prices would have been without analysis of that hypothetical market. By eliminating that comparison of the actual and but-for markets, the Seventh Circuit's approach takes causation—*i.e.*, antitrust impact—out of the analysis altogether. That approach contravenes the Clayton Act and this Court's case law, and in class actions such as this it drastically reduces the showing plaintiffs must make to secure class certification. The Seventh Circuit's departure from settled principles and disagreement with the Eighth Circuit amplifies the need for this Court's review.

B. The Seventh Circuit's Refusal To Assess The Reliability And Sufficiency Of Plaintiffs' Expert Evidence Flouts *Comcast* And Creates A Further Split.

The Seventh Circuit's dilution of the antitrust-impact element and its refusal to require plaintiffs to demonstrate a common method of proving causation were essential to its decision affirming class certification. Plaintiffs never tendered any common method capable of showing on a classwide basis that class members would have paid lower prices but for the alleged collusion. Although plaintiffs proffered several purported expert analyses, each one was, as defendants thoroughly demonstrated, inherently incapable of proving but-for causation because none could isolate the supposed effects of the alleged collusion.

The court of appeals, however, disclaimed any obligation to determine what (if anything) plaintiffs' expert evidence is capable of proving. Instead, it upheld as "reasonabl[e]" the district court's question-begging assumption "that the 'starting point for [price] negotiations would be higher if the market price for the product was artificially inflated,'" Pet. App. 17a, and otherwise did not engage with the adequacy of plaintiffs' expert evidence on the ground that defendants had not sought exclusion of that evidence for all purposes under *Daubert* and Rule 702 before certification. That holding directly contradicts this Court's decision in *Comcast* and a recent decision of the Third Circuit rejecting precisely that mistaken view of a court's duty.

1. Plaintiffs' theory of antitrust impact is that class members paid supra-competitive prices for thousands of varied intermediate and finished products. C.A. App. A.5; D.C. Dkt. 658, at 52. Plaintiffs' own experts admitted, however, that *other* factors unrelated to collusive conduct—such as supply and demand—also affected the prices paid for the thousands of containerboard and corrugated products allegedly affected by the supposed conspiracy. *See*, *e.g.*, C.A. App. A.388, 417-18, 431. Yet, as defendants and their experts demonstrated in extensive detail, none of the analyses offered by plaintiffs' experts to show impact made any effort to "contro[l] for such factors" in order to "isolate any price effects during the class period that are due to the alleged collusion"—that is, plaintiffs' experts did not even purport to address the *one thing* that their evidence needed to show in order to be even *germane* to plaintiffs' claim of antitrust impact. *Id.* at A.155; *see also id.* at A.139-40, A.156-57, A.325-26, A.388, A.417-18.

Plaintiffs relied heavily on a qualitative, impressionistic assessment of the containerboard market that applied the "structure-conduct-performance" paradigm—an *ad hoc*, multi-factor mode of analyzing markets and their potential *susceptibility* to collusion. Pet. App. 42a-46a. That rubric—once in vogue, principally in merger analysis—was "debunked" decades ago as a method of establishing whether collusive conduct actually occurs and with what effects in a market. Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 Yale L.J. 2216, 2234-35 (2012). By the mid-1980s, "it [was] hard to find an economist who believe[d] the old structure-conduct-performance paradigm." Frank H. Easterbrook, *Workable Antitrust Policy*, 84 Mich. L. Rev. 1696, 1698 (1986).

In any event, this structure-conduct-performance analysis is indisputably incapable of proving that alleged collusion *caused* classwide injury. Indeed, a study on which plaintiffs' expert relied explains that "the fact that firms *could* sustain collusion does not mean that they actually *succeed* in doing it," making it "impossible to rely on a theoretical analysis alone to determine whether collusion is *actually* taking place," let alone whether collusion is in fact *injuring* particular market participants. Marc Ivaldi et al., *The Economics of Tacit Collusion, Final Report for DG Competition, European Comm'n* 63 (Mar. 2003) (cited in C.A. App. A.877-78 & nn.23-29) (second emphasis added).

The Seventh Circuit never confronted the inability of the structure-conduct-performance paradigm to prove causation. Plaintiffs, the court asserted, "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." Pet. App. 16a. In other words, plaintiffs showed a concentrated industry, alleged an ability of defendants to form an agreement and to communicate with one another, and some higher prices (from which they sought to infer an agreement)—none of which even at face value establishes that the purported collusion *caused* higher prices. The court nevertheless held that "this evidence is enough to support class treatment of the merits," *ibid.*, without addressing this central shortcoming in plaintiffs' expert submission.

As defendants further showed, the only quantitative analyses of impact plaintiffs presented, prepared by a second proffered expert, did not even attempt to control for factors other than alleged collusion, and thus also are incapable of establishing causation. One analysis purported to show that the alleged conspiracy succeeded in raising the "PPW Index," a composite average of prices reported in a trade publication index for one specific type of containerboard in one region—"42[-pound] unbleached kraft linerboard for delivery east of the Rocky Mountains"—which in turn was correlated with the "aggregate" price paid by the putative class. C.A. App. A.143, A.153-54 & n.28. But, as the expert admitted, he could not even "speculate at" the "relationship between" the "aggregate price" he calculated and the prices individual consumers actually paid—the crux of the causation inquiry. *Id.* at A.279.

A second analysis simply compared prices paid by certain purchasers before and after price-increase announcements, without any effort to isolate the effects of purported collusion. C.A. App. A.325-26; *see also id.*

at A.148-53. Plaintiffs' only analysis that even purported to control for other, non-collusive factors—a regression analysis proffered to estimate damages—could not possibly *prove* impact because, as plaintiffs themselves admitted, that regression "*assum[ed]*" that impact had already been established. C.A. Appellee Br. 50-51 ("the purpose of the regression" was "to estimate damages *on the assumption* that Plaintiffs succeed in demonstrating liability—that is, conspiracy and impact").

2. The Seventh Circuit did not find that any of plaintiffs' expert analyses showed but-for causation for the class. Instead, it declined to grapple with this fatal deficiency in plaintiffs' purported methods of showing impact, disclaiming any obligation to scrutinize that evidence at all because of the way defendants' challenges to that evidence were styled. The court asserted that it "need say little" about the adequacy and reliability of plaintiffs' expert evidence—and need not even "discuss the opposing views expressed by Defendants' experts"—simply "because no defendant challenged the [plaintiffs'] experts under Federal Rule of Evidence 702 or the Supreme Court's decision in *Daubert*" prior to class certification. Pet. App. 3a, 21a. That ruling flouts this Court's teaching and exacerbates the conflict between the decision below and other circuits' case law.

a. This Court has made emphatically clear that courts evaluating class certification must rigorously analyze the adequacy of any evidence—including expert testimony—presented to satisfy Rule 23(b)(3)'s predominance requirement. That obligation, imposed by Rule 23, is independent of courts' assessment of whether to exclude proffered expert evidence for all purposes under *Daubert*, 509 U.S. 579.

In *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338 (2011), the Court reiterated that "certification is proper only if 'the trial court is satisfied, after a rigorous analysis,'" that Rule 23's "'prerequisites … have been satisfied.'" *Id.* at 350-51 (citation omitted). This "rigorous analysis" may require "'the court to probe behind the pleadings before coming to rest on the certification question.'" *Id.* at 350 (citation omitted). *Dukes* reserved judgment on whether the expert evidence offered to establish predominance should have been excluded entirely under *Daubert*, explaining that, "*even if*" that expert testimony was "properly considered," that evidence did "nothing to advance respondents' case" for class certification. *Id.* at 354 (emphasis added). After carefully analyzing the sufficiency of that expert evidence under Rule 23, *Dukes* held that the evidence was "worlds away" from the proof necessary to support certification. *Id.* at 353-55.

The Court applied that same understanding in *Comcast*, a case where no pertinent *Daubert* challenge was presented. Indeed, the Third Circuit in *Comcast* had declined to confront the defendants' challenges to the adequacy of plaintiffs' expert models, asserting that it needed only "evaluate [those] expert models to determine whether the theory of proof is *plausible*," because the defendant had *forfeited* any *Daubert* challenge to the admission of that evidence. *Behrend* v. *Comcast Corp.*, 655 F.3d 182, 204 n.13 (3d Cir. 2011) (emphasis added). Without disturbing that forfeiture ruling, this Court reversed. The Court specifically rejected the contention that the defendant's forfeiture of a *Daubert* argument excused the lower courts from addressing challenges to the sufficiency of that evidence under Rule 23. 133 S. Ct. at 1431-32 n.4. Rule 23, the Court held, requires the same "'rigorous analysis'" of the sufficiency of expert evidence *regardless* of

whether the party opposing certification has also moved to exclude it under *Daubert* or Rule 702. *Id.* at 1433 (citation omitted).

The question presented in *Comcast*, the Court explained, was "'[w]hether a district court may certify a class action without resolving whether the plaintiff class had introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.'" 133 S. Ct. at 1431-32 n.4 (citation omitted). The plaintiffs argued that the defendants "forfeited their ability to answer this question in the negative because they did not make an objection to the admission of [the expert's] testimony under the Federal Rules of Evidence" before the class was certified. *Ibid.* (citing *Daubert*, 509 U.S. 579). This Court disagreed. "Such a forfeit" of a *Daubert* argument "would make it impossible for [the defendants] to argue that [the expert's] testimony was not '*admissible* evidence' under the Rules; *but* it does *not* make it impossible for them to argue that the evidence failed 'to show that the case is susceptible to awarding damages on a classwide basis,'" and it did not absolve courts of their duty to confront those challenges. *Ibid.* (emphases added). Otherwise, "at the class-certification stage *any* method of measurement [would be] acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be"; but that "would reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Id.* at 1433.

What mattered, *Comcast* held, was that the defendants had "argued below, and continue[d] to argue" in this Court, "that certification was improper because [the plaintiffs] had failed to establish that damages"—the only element of the plaintiffs' claim that was at

issue in this Court—"could be measured on a class-wide basis." 133 S. Ct. at 1431-32 n.4. "*That* is the question [this Court] address[ed]." *Ibid.* (emphasis added). Whether the defendants preserved a separate *Daubert* objection before class certification was entirely irrelevant to their entitlement to challenge, and the Court's ability and obligation to adjudicate, the evidence's sufficiency under Rule 23. Neither the Seventh Circuit nor any other lower court may depart from *Comcast*'s clear holding in this respect, regardless of how closely divided this Court was in that case. *See*, *e.g.*, *Caetano* v. *Massachusetts*, 136 S. Ct. 1027 (2016) (*per curiam*).

b. Faithfully applying these teachings, the Third Circuit recently held that whether a defendant's challenge to the sufficiency and reliability of expert evidence at the class-certification stage invokes the *Daubert* label is immaterial to a court's duty under Rule 23 to analyze that evidence rigorously. *See In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187-88 (3d Cir. 2015). Like plaintiffs here, the plaintiffs in *Blood Reagents* "relied on expert testimony to produce most of their antitrust impact analyses and damages models, which they offered to demonstrate that common questions predominated over individual questions as required by Rule 23(b)(3)." *Id.* at 188. The defendants "consistently challenged" the "reliability" of that expert evidence, but they had not yet requested its exclusion for all purposes under *Daubert*. *Id.* at 185-86; *see also id.* at 188 n.9. The district court certified the class because it found that this testimony "'could evolve to become admissible evidence' at trial." *Id.* at 186 (citation omitted). On appeal, plaintiffs defended this conclusion, arguing that the defendant had "waived the opportunity to bring a *Daubert* challenge." *Id.* at 188 n.9. The Third Circuit rejected this

argument, vacating the class-certification order and remanding for the district court to analyze that evidence. *Id.* at 188.

As the Third Circuit explained, applying *Comcast*, the defendant's failure to object to the evidence as categorically inadmissible under *Daubert* was irrelevant to the district court's duty to assess its adequacy under Rule 23. 783 F.3d at 187-88 & n.9. The "'rigorous analysis'" required by Rule 23, the court held, "applies to expert testimony critical to proving class certification requirements," full stop. *Id.* at 187 (citing *Comcast*, 133 S. Ct. at 1433). The defendant's failure to level a *Daubert* challenge thus was irrelevant to the district court's obligation to assess whether that evidence satisfied Rule 23. Because the defendant had "consistently challenged the reliability of plaintiffs' expert's models and the sufficiency of his testimony to satisfy Rule 23(b)(3)," Rule 23 required the district court to address those challenges. *Id.* at 188 n.9.

The Third Circuit's holding in *Blood Reagents* accords with decisions of other circuits predating *Comcast*, which have similarly cautioned against conflating the *Daubert* and Rule 23 inquiries. *See*, *e.g.*, *Ellis* v. *Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011) (vacating certification where district court "confused the *Daubert* standard … with the 'rigorous analysis' standard" under Rule 23); *In re IPO Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006) (disavowing suggestion that "expert's testimony may establish a component of a Rule 23 requirement simply by being not fatally flawed" under *Daubert*); *see also Hydrogen Peroxide*, 552 F.3d at 323 ("opinion testimony should not be uncritically accepted as establishing a Rule 23 requirement merely because the court holds the testimony should not be excluded, under *Daubert* or for any other

reason"). As these courts have recognized, Rule 23 independently requires courts to assess whether plaintiffs have carried their burden of proving (*inter alia*) predominance, and the Rule's requirements "exten[d] to the resolution of expert disputes" bearing on the predominance inquiry. *Blades*, 400 F.3d at 575; *accord Hydrogen Peroxide*, 552 F.3d at 307.

c. The Seventh Circuit reached exactly the opposite conclusion here, refusing to confront defendants' challenges to the adequacy of plaintiffs' expert evidence to meet their Rule 23 burden, solely because defendants had not cast their challenges at the class-certification stage as wholesale attacks on the admissibility of that evidence under *Daubert*. Pet. App. 3a. The court asserted that, because the "[d]efendants did not challenge [the plaintiffs'] experts under *Daubert* and Federal Rule of Evidence 702" before certification, the court would "accept [those] reports for what they are worth at this stage"—without determining whether they can establish but-for causation, or indeed making any determination of what that evidence is capable of proving. *Id.* at 21a.

That is precisely the position the Third Circuit took but this Court rejected in *Comcast*—and which the Third Circuit has since repudiated in *Blood Reagents*. And it is irreconcilable with the basic principle articulated in *Dukes* and *Comcast* that Rule 23 of its own force requires courts to conduct a "'rigorous analysis'" of whether plaintiffs have presented "evidentiary proof" demonstrating that Rule 23's requirements, including predominance, are "'satisfied.'" *Comcast*, 133 S. Ct. at 1432 (citation omitted). Although defendants brought *Comcast* and *Blood Reagents* (among other pertinent authorities) to the Sev-

enth Circuit's attention, the court never addressed either decision's relevant holdings. Its clear departure from this Court's and another circuit's decisions is unexplained and undefended.

The closest the Seventh Circuit came to attempting to justify its laser focus on whether defendants filed a *Daubert* motion was a passing, parenthetical reference to this Court's decision in *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036 (2016). Pet. App. 3a. The court of appeals described *Tyson* as holding that, "where there is no *Daubert* challenge, [a] district court may rely on expert evidence for class certification." *Ibid.* (citing 136 S. Ct. at 1049). That description distorts *Tyson*, which did not confront this issue—and which certainly did not purport to overrule either *Dukes* or *Comcast*. *Tyson* reviewed a *final judgment* in favor of a class after a jury trial, in a case where the defendant had neither "move[d] for a hearing regarding the statistical validity of respondents' studies under *Daubert*" *nor* "attempt[ed] to discredit the evidence with testimony from a rebuttal expert." 136 S. Ct. 1044. This Court consequently held that it was not legal error to admit that evidence at trial because there was "no basis in the record to conclude" otherwise. *Id.* at 1049. That holding has nothing to do with courts' obligation at the class-certification stage to ensure that Rule 23's requirements are met, including engaging with defendants' challenges to the

sufficiency of expert proof in meeting those requirements.[2]

Unlike the defendants in *Tyson*, defendants here extensively challenged plaintiffs' expert submissions—and presented extensive expert evidence of their own rebutting plaintiffs' submissions—consistently asserting that plaintiffs' evidence was inadequate to meet the requirements of Rule 23. Before the court of appeals could affirm certification of a class, it was required to "entertain" all of defendants' "arguments against" plaintiffs' expert analyses that "bore on the propriety of class certification," including the question whether plaintiffs met their burden of demonstrating that the key elements of their claims were capable of proof on a classwide basis. *Comcast*, 133 S. Ct. at 1432-33. Neither *Tyson* nor any other decision of this Court can excuse the Seventh Circuit's outright refusal even to conduct that analysis. The resulting direct circuit conflict compounds the lower-court disagreement created by the Seventh Circuit's erroneous approach to antitrust impact itself.

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[2] Indeed, this Court *did* examine the expert evidence in *Tyson* and concluded that it could validly support class liability because the evidence would be good enough for each class member to use in an individual action. 136 S. Ct. at 1048 ("[T]he study here could have been sufficient to sustain a jury finding as to hours worked if it were introduced in each employee's individual action."). The Seventh Circuit, by contrast, disclaimed any obligation to examine rigorously the adequacy of plaintiffs' experts or to consider defendants' rebuttals.

II. THE SEVENTH CIRCUIT'S RULING UPHOLDING CLASS CERTIFICATION DESPITE THE NEED FOR MYRIAD INDIVIDUALIZED DAMAGES INQUIRIES CONTRAVENES THIS COURT'S PRECEDENT.

As petitioners further show (Pet. 26-34), the Seventh Circuit's holding that common issues predominate, even though plaintiffs offered no classwide method to determine the damages of tens of thousands of class members which purchased thousands of varying products, cements yet another circuit split concerning the meaning of *Comcast*, and creates a new one regarding the use of aggregate damages, both of which warrant this Court's attention. The need for review is heightened because the court of appeals' analysis of damages is also at war with *this* Court's teaching, as well as the Rules Enabling Act, due-process principles, and the Seventh Amendment.

A. The Circuits Are Irreconcilably Split On The Meaning of *Comcast*.

Comcast squarely held that common issues cannot predominate, and certification under Rule 23(b)(3) is improper, where plaintiffs fail to show that "damages are capable of measurement on a classwide basis," and thousands of individualized damages inquiries will therefore be necessary. 133 S. Ct. at 1433. The plaintiffs in *Comcast* had not proffered any common method of demonstrating the damages attributable to their only cognizable theory of antitrust violations. *Id.* at 1432-33. Although they tendered an expert analysis of damages, that analysis swept up damages from four different theories of antitrust liability, three of which had already been rejected by the district court. *Id.* at 1431, 1433-34. There was thus "no question" that plaintiffs' only classwide damages model

"failed to measure damages resulting from the particular antitrust injury on which petitioners' liability in th[at] action [was] premised," leaving them with no relevant classwide method of determining the relevant damages at all. *Id.* at 1433. "[I]ndividual damage calculations" accordingly would be unavoidable. *Ibid*. Because those "[q]uestions of individual damage calculations w[ould] inevitably overwhelm questions common to the class," the plaintiffs "c[ould not] show Rule 23(b)(3) predominance." *Ibid.*

Since *Comcast*, the circuits have become intractably divided about the meaning of its central holding. The D.C., Second, Eighth, and Tenth Circuits have correctly held that individualized damages issues can preclude a finding of predominance. *See Rail Freight*, 725 F.3d at 253 ("No damages model, no predominance, no class certification."); *Roach* v. *T.L. Cannon Corp.*, 778 F.3d 401, 408 (2d Cir. 2015) ("*Comcast* reiterated that damages questions should be considered at the certification stage when weighing predominance issues"); *Ebert* v. *Gen. Mills, Inc.*, 823 F.3d 472, 480 (8th Cir. 2016); *Wallace B. Roderick Revocable Living Tr.* v. *XTO Energy, Inc.*, 725 F.3d 1213, 1220 (10th Cir. 2013).

By contrast, the Sixth, Ninth, and Eleventh Circuits have held that even highly individualized damages issues generally do not bar class certification. *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 853 (6th Cir. 2013); *Pulaski & Middleman, LLC* v. *Google, Inc.*, 802 F.3d 979, 987 (9th Cir. 2015); *Carriuolo* v. *Gen. Motors Co.*, 823 F.3d 977, 988 (11th Cir. 2016). The Third and Fifth Circuits have articulated the same view, though exactly what standard each applies is unclear. *Compare Neale* v. *Volvo Cars of N. Am., LLC*, 794 F.3d 353,

375 (3d Cir. 2015) ("'individual damages calculations do not preclude class certification under Rule 23(b)(3)'" (citation omitted)), *with In re Modafinil Antitrust Litig.*, 837 F.3d 238, 260 (3d Cir. 2016) ("[t]he predominance requirement applies to damages as well," but "[t]his does not mean … that damages must be 'susceptible of measurement across the entire class'" (citation omitted)); *compare In re Deepwater Horizon*, 739 F.3d 790, 815 (5th Cir. 2014) ("nothing in *Comcast* mandates a formula for classwide measurement of damages in all cases"), *with Ludlow* v. *BP, PLC*, 800 F.3d 674, 683 (5th Cir. 2015) ("to certify a class, the damages methodology must be 'sound' and must 'produce commonality of damages'" (citation and brackets omitted)).

The Seventh Circuit here attempted to split the difference, purporting to heed *Comcast*'s teaching but in fact defying it. The Seventh Circuit acknowledged that courts ruling on class certification 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." Pet. App. 17a-18a. But it went on to "confir[m] that at the class certification stage, plaintiffs are not obliged to drill down and estimate each individual class member's damages." *Id.* at 18a. Instead, the court held that, under *Comcast*, plaintiffs carried their Rule 23 burden by offering a model for determining "aggregate classwide damages," and that "the allocation of that total sum among the class members c[ould] be managed individually" at some later point in time pursuant to some unspecified methodology "should the case ever reach that point." *Id.* at 18a-19a. In practical effect, the Seventh Circuit's approach boils down to the position taken by the circuits

that have held individualized damages inquiries immaterial to predominance.

The Seventh Circuit's attempt to square this approach with *Comcast* rests on an implausibly crabbed reading of this Court's decision. Pet. App. 17a. The court construed *Comcast* as requiring only that "the damages theory … correspond to the theory of liability"—but read *Comcast* as silent on whether antitrust plaintiffs must tender a common method of determining each class member's individual damages in the first place. *Ibid.* ("that is all *Comcast* said that is pertinent to our case"). That illogical reading of *Comcast* turns this Court's core holding upside-down.

Comcast squarely held that plaintiffs' failure to present a common method of determining damages that corresponds to their liability theory was fatal to predominance, because without such a common method, "[q]uestions of individual damages calculations w[ould] inevitably overwhelm questions common to the class." 133 S. Ct. at 1433. It follows *a fortiori* from that holding that, if plaintiffs present *no* method of determining class members' individual damages—thereby requiring post-trial individualized inquiries that will dwarf any common issues—predominance likewise will be lacking. If the Seventh Circuit were correct that Rule 23 and *Comcast* do not affirmatively require a common method of determining individual damages (or an affirmative showing that individualized inquiries will not overwhelm genuinely common issues), then the mismatch in *Comcast* itself between the plaintiffs' liability theory and their damages model would have made no difference. If *no* damages model were necessary under Rule 23, it could not have mattered in *Comcast* whether a damages model the

plaintiffs voluntarily proffered corresponded to the unlawful acts they alleged. The court of appeals' attempt to square its conclusion with *Comcast* cannot be reconciled with the reasoning or the result of this Court's precedent.

In fact, the Seventh Circuit's reading of *Comcast* "reduce[s] Rule 23(b)(3)'s predominance requirement to a nullity." 133 S. Ct. at 1433. If plaintiffs' damages model cannot lead to an accurate and straightforward determination of damages under the law governing the cause of action—*i.e.*, the *individual* damages to which each member of the class is entitled—then the model adds nothing to the predominance inquiry. The trial court would still be required to conduct thousands of mini-trials to award the only damages available under the antitrust laws here: individual awards based on the injuries actually sustained by each member of the putative class.

The decision below thus compounds the already-deep division among the circuits about the meaning of one of this Court's precedents. With nearly every circuit weighing in on this important and recurring question of class-action law, and reaching an impasse in published decisions, this issue is ripe for this Court's review.

B. Imposing Liability Based On Estimated Aggregate Damages Is Unlawful.

The procedure the Seventh Circuit approved for determining damages not only contravenes this Court's construction of Rule 23 itself, but also brings that Rule into conflict with a federal statute and the Constitution. The court of appeals acknowledged that plaintiffs' only damages analysis cannot calculate the damages of any individual class member; even taken

at face value, their model can estimate only the *aggregate* damages for all class members combined. Pet. App. 18a. The Seventh Circuit held that this aggregate-damages calculation was good enough for class certification, because the "aggregate classwide damages" could be litigated in a class trial and the "allocation of that total sum among the class members can be managed individually, should the case ever reach that point." *Id.* at 18a-19a. That ersatz solution is independently unlawful; it violates Rule 23, the Rules Enabling Act, and the Constitution.

As this Court has long held, Rule 23 "must be interpreted in keeping … with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'" *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997) (quoting 28 U.S.C. § 2072(b)). Allowing defendants' total liability to be adjudicated based on an estimate of aggregate damages, without any inquiry into the amount of or defenses against individual plaintiffs' claims, violates that prohibition. "Roughly estimating the gross damages to the class as a whole and only subsequently allowing for the processing of individual claims would inevitably alter defendants' substantive right to pay damages reflective of their actual liability." *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008), *abrogated on other grounds by Bridge* v. *Phx. Bond & Indem. Co.*, 553 U.S. 639 (2008); *see also In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974) ("allowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights under the antitrust statutes"); *Windham* v. *Am. Brands, Inc.*, 565 F.2d 59, 66 (4th Cir. 1977) (en banc) ("Generalized or class-wide proof of damages in a private anti-trust action would … contravene the mandate of the Rules

Enabling Act.…" (footnote omitted)). "[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011).

The danger that reliance on aggregate estimates of damages will lead to errors is particularly acute in massive antitrust class actions such as this. Unlike cases where the total harm caused by a defendant's conduct can readily be calculated and allocation of the total damages is a zero-sum game—*e.g.*, where a defendant's conduct injures or destroys particular property, the total value of which is known, and the only question is how to divide the recovery among plaintiffs—in antitrust class actions like this a defendant's total liability to the class cannot be determined without knowing the damages owed to each plaintiff. The damages (if any) owed to each class member depend in turn on whether and to what extent that class member purchased products whose prices were higher due to alleged unlawful conduct (and to what extent). The amount of injury suffered by each class member is independent of the injury suffered by any other.

In this setting, imposing classwide damages based only on an aggregate estimate, and addressing the value of each class member's claim only in allocating that total judgment among the class, impermissibly deprives defendants of any opportunity to show that the estimate is incorrect as to a particular plaintiff. Not until after the total damages defendants supposedly owe are determined will the validity and amount of each plaintiff's claim be aired, in follow-on proceedings to determine the "allocation of that total sum among the class members." Pet. App. 19a. For every plaintiff whose damages are less than the purported

average, defendants' substantive rights—*i.e.*, the extent of their liability—are unlawfully altered. *Cf. Tyson*, 136 S. Ct. at 1048-49 (permitting putative "representative proof" to determine claims of class members who are "not similarly situated" would "violat[e] the Rules Enabling Act by giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action"). Because damages under the Clayton Act are trebled, moreover, the effect of each alteration of defendants' rights is magnified threefold.

The Seventh Circuit's judgment-first, trial-later approach also contravenes the Constitution. "'Due process requires that there be an opportunity to present every available defense'" to every claim. *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (citation omitted). Thus, as this Court has held, a class cannot be "certified on the premise that [the defendant] will not be entitled to litigate its … defenses to individual claims." *Dukes*, 564 U.S. at 367. The decision below, however, will deprive defendants of that opportunity. Pet. App. 18a-19a. As it explained, "[i]f [plaintiffs] prevail on the common issues, both liability and aggregate damages will be resolved." *Id.* at 19a. That procedure leaves no avenue to litigate plaintiff-specific defenses that (if successful) would alter the amount of defendants' liability—which *Dukes* held is impermissible. It also violates the Seventh Amendment, which entitles defendants to have a jury determine the amount of damages owed to *each* claimant. *See Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 352-53 (1998). Indeed, the damages trial the district court apparently envisioned is precisely the type of "Trial by Formula" *Dukes* emphatically "disapprove[d]." 564 U.S. at 367.

"[T]he Rules Enabling Act forbids interpreting Rule 23" in a way that violates these deeply rooted rights. *Dukes*, 564 U.S. at 367. At a minimum, the avoidance canon bars construing Rule 23 in a manner that raises substantial questions of the Rule's constitutionality. *See Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The Seventh Circuit's departure from these foundational principles confirms the need for this Court's intervention.

III. This Case Is An Excellent Vehicle To Resolve Important, Recurring Questions That Often Evade Review.

Both questions presented in the petition—and the court of appeals' multiple errors in answering them incorrectly—are exceptionally important for class litigation, in the antitrust context and beyond. The standards that govern class certification, particularly in large antitrust cases, hold outsized significance for the outcome of a case. As this Court has recognized, "[a] district court's ruling on the certification issue is often the most significant decision rendered in … class-action proceedings." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 339 (1980). That is so because "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978); *see also Concepcion*, 563 U.S. at 350 (noting "the risk of 'in terrorem' settlements that class actions entail"). "Even in the mine-run case, a class action can result in 'potentially ruinous liability.'" *Shady Grove Orthopedic Assocs.* v. *Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) (citation omitted).

Defendants therefore often face "insurmountable pressure … to settle" if a class is certified, irrespective of the strength of plaintiffs' claims on the merits. *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *accord In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774, 780 (3d Cir. 2009).

That pressure is amplified in the antitrust context, where the combination of treble damages and joint and several liability makes the pressure to settle greater still. "The risks associated with antitrust class actions … dictate that most cases will be on the fast track to settlement shortly after class certification, long before a summary judgment motion or merits adjudication of any kind can play a role." John T. Delacourt, *Protecting Competition by Narrowing* Noerr*: A Reply*, 18 Antitrust 77, 78 (2003); *see also* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 262 (2010) (reporting average settlement value of over $163 million in certified antitrust class actions). Plaintiffs here, for example, seek over $11 *billion* in treble damages.

The reality that the purely procedural device of class actions, by dint of the risk of massive potential liability resulting from the aggregation of individual claims, may skew the *substantive* result reached in many cases provides a powerful reason to ensure that the standards governing class certification are correct. Yet in part precisely because settlement pressures bring many cases to an end long before final judgment, opportunities for this Court to clarify the controlling standards and to correct lower courts' misapprehensions of those standards are relatively rare. Interlocutory review of class-certification decisions is available only in a court of appeals' discretion. Fed. R. Civ.

P. 23(f). Consequently, what is "often the most significant decision rendered in" a putative class action (*Roper*, 445 U.S. at 339) may never reach appellate review—especially in cases where certification is granted and the pressure to settle is greatest.

This case, in which Rule 23(f) review was granted, thus provides a prime opportunity for the Court to provide guidance on these important issues. The impact and damages questions were thoroughly pressed and passed upon below. And each is outcome-determinative: If the Seventh Circuit's conclusion as to either impact or damages is overturned, common issues would not predominate, and the certification order it affirmed could not stand. Indeed, the court's refusal even to engage the expert record, and its cavalier treatment of the damages issues, are so glaringly wrong under this Court's cases that this Court could resolve several of the conflicts created by the decision below by summary disposition. This Court should seize the chance to resolve the lower courts' disagreement and provide much needed clarity on these recurring questions of federal law.

CONCLUSION

The Seventh Circuit's multiple departures from this Court's and other circuits' precedent amply suffice to merit this Court's intervention, either in the form of plenary review or summary reversal. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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