No. 17-441

In The
Supreme Court of the United States

FERRELLGAS PARTNERS, L.P., ET AL.,

Petitioners,

v.

MORGAN-LARSON, LLC, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF DRI–THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

DRI-The Voice of the Defense Bar (www.dri.org) is an international membership organization composed of more than 22,000 attorneys who defend the interests of industries, businesses, and individuals in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of the civil defense bar; promoting appreciation of the role of defense lawyers in the civil justice system; anticipating and addressing substantive and procedural issues germane to defense lawyers and fairness in the civil justice system; and preserving the civil jury. To help foster these objectives, DRI participates as *amicus curiae* at both the certiorari and merits stages in carefully selected Supreme Court cases which present questions that are exceptionally important to civil defense attorneys, their clients, and the conduct of civil litigation.

The question presented here—whether or how plaintiffs in putative class-action price-fixing litigation can plead a plausible "continuing violation" in order to circumvent the Clayton Act's otherwise

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* DRI certifies that no counsel for a party authored this brief in whole or part, and that no party or counsel other than the *amicus curiae*, its members, and its counsel, made a monetary contribution intended to fund preparation or submission of this brief. As required by Supreme Court Rule 37.2(a), Petitioners' and Respondents' counsel of record received timely notice of DRI's intent to file this *amicus* brief. Counsel for both Petitioners and Respondents have consented to the filing of this brief.

ironclad four-year statute of limitations, 15 U.S.C. § 15b—implicates three of DRI's core civil justice goals: (i) strict enforcement of statutory limitations periods for filing private-party damages suits; (ii) dismissal of civil actions at the pleadings stage for failure to allege sufficient facts stating a plausible claim for relief; and (iii) class-action fairness, especially prior to certification.

DRI takes no position on the merits of Respondents' price-fixing claims. But we share the four dissenting Eighth Circuit judges' concerns that the five-judge en banc majority opinion "incorrectly interprets Supreme Court precedent, fails to hold the plaintiffs' complaint to the plausibility standard of Twombly and Iqbal, and ignores the purposes of the antitrust statute of limitations." App. 23a (Shepherd, J., dissenting).

The language of § 15b—"Any action to enforce any cause of action under section 15 . . . *shall be forever barred* unless commenced within four years after the cause of action accrued" (emphasis added)—is so stark and unforgiving, it could be mistaken for a statute of repose. *See generally California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2049 (2017) ("a statute that sets forth its time limitations in unusually emphatic form . . . cannot easily be read as containing implicit exceptions") (internal quotation marks omitted). Yet, over a strong dissent, the en banc majority misinterpreted this Court's case law—*Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997), and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971)—in a way that reads into § 15b a gaping continuing violation

exception for price-fixing cases, an exception that repeatedly extends the antitrust limitations period virtually *ad infinitum*. The majority's misplaced reliance on an out-of-context fragment of dicta in *Klehr* that "'each sale to the plaintiff[s]' in a price-fixing conspiracy 'starts the statutory period running again,'" App. 16a (quoting *Klehr*, 521 U.S. at 189), fails to recognize that a continuing violation based on sales requires "a plausible showing of a *live, ongoing conspiracy* . . . sometime in the limitations period," *id.* 26a, 27a (Shepherd, J., dissenting) (emphasis added); *see* Pet. at 22-25, 28. Compounding this error, "[t]he majority's holding flies in the face of Twombly and Iqbal . . . since virtually all of the amended complaint comprises either factual allegations from before the limitations period or naked assertions and conclusions." App. 28a-29a.

The proper scope and application of the continuing violation doctrine in antitrust law is a subject of considerable importance to the civil litigation defense bar. Despite efforts at reform, class actions, including in the antitrust field, continue to be filed at an alarming rate with the objective of pressuring defendants to enter into substantial settlements of any suit that survives a motion to dismiss. For this reason, defendants' ability at the outset of class-action litigation to challenge the adequacy of pleadings, invoke statutes of limitations, and pursue additional grounds for dismissal is extraordinarily important.

DRI believes that this case affords the Court an excellent opportunity to provide the clarification and/or refinement compelled by decades of lower

court confusion, uncertainty, and disagreement over the parameters and implementation of the continuing violation doctrine in private-party antitrust litigation. *See* Pet. at 14-21; *see generally* Elad Peled, *Rethinking the Continuing Violation Doctrine: The Application of Statutes of Limitations to Continuing Tort Claims*, 41 Ohio N.U. L. Rev. 343, 346 (2015) ("Nearly every writer who addresses the continuing violation doctrine [including in antitrust law] characterizes it as confusing, incoherent, and inconsistent."). The fact that the en banc Eighth Circuit was sharply divided over what constitutes a continuing violation in a price-fixing case only exacerbates "the current forest of confusion." *Klehr*, 521 U.S. at 197 (Scalia, J., concurring in part and concurring in the judgment). Equally important, this case illustrates the close relationship between the requirement to plead "a plausible claim for relief [to] survive[] a motion to dismiss," *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)), and the specific circumstances constituting a continuing violation that repeatedly reboots the antitrust limitations period.

DRI's *amicus* brief discusses why this Court's review is needed to ensure that the important purposes served by the antitrust statute of limitations are not obstructed or undermined by a protracted continuing violation rule—the sort of rule that the slim en banc majority held enables Respondents to proceed with their belated me-too efforts to cash-in on an alleged price-fixing conspiracy that long ago became stale. This brief

also highlights the need for this Court to reinforce the applicability of *Twombly* pleading standards to antitrust claims which purport to survive a motion to dismiss grounded on the four-year statute of limitations.

SUMMARY OF ARGUMENT

Statutes of limitations not only provide defendants with repose from alleged or actual liability, but also promote judicial economy and serve the broader public interest. These attributes are especially important where, as here, defendants are targeted in me-too, treble-damages, putative class-action antitrust litigation years after an alleged price-fixing conspiracy supposedly succeeded; timely, widely known, private-party litigation has been settled; and the unequivocally worded, four-year, antitrust statute of limitations, 15 U.S.C. § 15b, has expired.

As the petition for writ of certiorari explains, the Eighth Circuit's 5-4 en banc opinion is only the latest example of how circuit courts long have split on exactly what a "continuing violation" means in the antitrust context, and how the "continuing violation doctrine" should be applied, here in a price-fixing case, where defendants move to dismiss based on § 15b. Extending the limitations period for years, or even decades, based on vague allegations of a continuing violation defeats the objectives of the antitrust statute of limitations: In addition to depriving defendants of repose, a protracted continuing violation exception to the statute of limitations impairs development of testimony and other evidence needed to defend against complex

antitrust allegations, and in turn, facilitates plaintiffs' pursuit of such claims. It also subjects antitrust defendants to costly pretrial discovery, or compels them to enter into substantial settlements of unproven claims concerning business practices that in reality may benefit consumers or otherwise be pro-competitive. A lax or fuzzy continuing violation exception also is contrary to the antitrust pleading standard established in *Twombly* as a prerequisite for overcoming a motion to dismiss.

ARGUMENT

REVIEW IS NEEDED TO ENSURE THAT THE CONTINUING VIOLATION DOCTRINE DOES NOT UNDERMINE THE OBJECTIVES OF THE ANTITRUST STATUTE OF LIMITATIONS

A. Statutes of Limitations Promote Civil Justice

This Court repeatedly has recognized "'the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.'" *Gabelli v. SEC*, 568 U.S. 442, 448 (2013) (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)).

With the "basic objective of repose," *Rotella*, 528 U.S. at 554, statutes of limitations allow defendants "to rely on settled expectations that liability will not attach for acts long past." Elad Peled, *supra* at 350. "Statutes of limitations are designed to encourage plaintiffs 'to pursue diligent prosecution of known claims.'" *California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. at 2049 (quoting *CTS Corp. v.*

Waldburger, 134 S. Ct. 2175, 2183 (2014)). They "'promote justice by preventing surprises through [plaintiffs'] revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *CTS Corp.*, 134 S. Ct. at 2183 (quoting *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944)); *see also United States v. Kubrick*, 444 U.S. 111, 117 (1979) ("Statutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time . . . they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.").

B. The Antitrust Statute of Limitations Serves the Public Interest

Section 4B of the Clayton Act, 15 U.S.C. § 15b—the antitrust statute of limitations—was enacted in 1955. *See* 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 320a at 328 (4th ed. 2015). To replace varying state statutes of limitations and the problems they engendered, Congress amended the Clayton Act by "establishing a uniform 4-year statute of limitations for antitrust damage suits brought by private parties or the United States." S. Rep. No. 84-619 (1955), *as reprinted in* 1955 U.S.C.C.A.N. 2328, 2331. After surveying relevant state limitations periods—which ranged from 1 to 20 years but averaged 4 years—the

Senate Committee on the Judiciary "concluded that a period of 4 years is a fair and equitable period of time to govern private treble damage actions brought under the antitrust laws." *Id.* at 2332. In choosing a four-year limitations period, the committee recognized that "a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and overburden the calendars of courts." *Id.* at 2333.

According to Areeda & Hovenkamp, *supra* at 327, "Supreme Court decisions from the 1960s and earlier were almost casual about plaintiffs who sat on their rights." But unlike "those years of rapidly expanding antitrust liability . . . In today's world, a more constant scope of liability has led to an increasing concern that known violations be challenged promptly." *Ibid.*

As with any statute of limitations, judicial enforcement of § 15b helps not only to even the litigation playing field, but also to facilitate the adjudicative process. *See Z Tech. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 603 (6th Cir. 2014) (§15b "is designed to prevent . . . parties sleeping on their rights"); *see also Klehr*, 521 U.S. at 187. Indeed, in view of the complexities of antitrust litigation, "[r]epose is especially valuable." Areeda & Hovenkamp, *supra* at 325; *see also* App. 32a (Shepherd, J., dissenting) ("[T]he need for timely prosecution of claims is especially great in antitrust law."). One reason is that "[a]ntitrust liability depends not only on the parties' acts but also on many surrounding circumstances . . . matters that

may be hard to reconstruct long afterwards." Areeda & Hovenkamp, *supra* at 326.

When this Court held that by analogy, the four-year antitrust statute of limitations should apply to civil RICO actions, the Court explained that "[b]oth statutes bring to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate." *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 151 (1987); *see also Rotella*, 528 U.S. at 557 ("Both statutes share a common congressional objective of encouraging civil litigation to supplement Government efforts to deter and penalize the respectively prohibited practices."). But insofar as "private attorneys general" serve the public by seeking treble damages for alleged violations of the antitrust laws, that public benefit is delayed or destroyed by the seemingly interminable continuing violation rule devised by the en banc majority. Instead, "it is appropriate to encourage suits as soon as possible to stop (or at least compensate) harm to the public." *Midwestern Mach. Co. v. Northwest Airlines, Inc.*, 392 F.3d 265, 272 (8th Cir. 2004).

C. An Expansive Continuing Violation Exception Would Defeat the Purpose of the Antitrust Statute of Limitations

Respondents' "core allegations"—that Petitioners successfully conspired in 2008 to decrease the fill levels of their pre-filled propane exchange tanks—"were well-known to the world by mid-2009 at the latest." Pet. at 7. Rather than filing suit then, or at least prior to expiration of the four-year statute of

limitations in 2012, the present wave of copycat litigation did not begin until 2014. *See id.* at 6, 7. And according to the petition, Respondents conceded that under their continuing violation theory, they could have waited *much* longer. *See id.* at 7.

Assuming for the sake of argument that Respondents' price-fixing claims are valid, their tardiness in filing suit has correspondingly postponed conferring upon the public, or at least upon consumers of pre-filled propane tanks, whatever public benefit their "private attorney general" litigation might provide. *Cf. Rotella*, 528 U.S. at 558. As discussed above, "[i]t is especially important that antitrust challenges be timely made, thus minimizing the social costs of antitrust violation but giving the parties repose for conduct that is lawful." Areeda & Hovenkamp, *supra* at 326.

Prompt resolution of antitrust claims serves the public interest also because conduct that private-party plaintiffs allege is unlawful actually may be *pro*-competitive. *See, e.g.*, *Midwestern Mach.*, 392 F.3d at 272 ("[A] pro-competitive merger and an anti-competitive one are hard to discern from each other, but exposing a firm to perpetual liability under the Clayton Act simply because its business history includes a merger would chill pro-competitive business combinations."); *see also* Areeda & Hovenkamp, *supra* at 325-26 (noting that "many business practices can be simultaneously efficient and beneficial to consumers but also challengeable as antitrust violations . . . assessing antitrust consequences is often difficult, and reasonable minds might differ on that question").

Here, for example, despite Respondents' unproven antitrust claims, both Petitioners have continued to fill their exchangeable propane tanks to 15 pounds. *See* Pet. at 9. Doing so *benefits* consumers by avoiding the marketplace confusion that a change back to 17 pounds would create, and also by enabling pro-competitive, cost-efficient, and consumer-convenient co-packaging arrangements under which Petitioners can refill each other's tanks.

Under a prolonged continuing violation exception to the four-year statute of limitations, however, the never-ending threat of being subjected to speculative, opportunistic, and even repetitive treble-damages suits, which are very costly and inherently risky to defend to final judgment, may cause companies to abandon or alter business practices that in reality are pro-competitive. A continuing violation doctrine that renders the statute of limitations unavailable as a Federal Rule of Civil Procedure 12(b) ground for dismissal at the threshold of antitrust litigation also can produce overwhelming pressure to settle, even in antitrust suits that are devoid of merit. *See Twombly*, 550 U.S. at 558 ("[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery . . . but quite another to forget that proceeding to antitrust discovery can be expensive."); Pet. at 33 (discussing the immense costs of discovery in antitrust cases not dismissed at the pleadings stage).

And where, as often is the case when consumers are involved, antitrust litigation is filed in the form of a class action, allowing the litigation to proceed to certification only increases the compulsion to settle.

See Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 455, 485 (2013) (Scalia, J., dissenting)) ("Certification of the class is often, if not usually, the prelude to a substantial settlement by the defendant because the costs and risks of litigating further are so high."), *id.* at 495 n.9 (Thomas, J., dissenting) (referring to "*in terrorem* settlement pressures" following class certification); Fed. R. Civ. P. 23(f) advisory comm. note (1998) ("An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.").

A judge-made continuing violation exception to the antitrust statute of limitations cannot serve the public interest if it indefinitely postpones "private attorney general" prosecution of antitrust allegations, or as here, allows tardy plaintiffs to pursue claims that already have been settled with other private parties and the federal government. *See* Pet. at 4-6. Nor can a distended continuing violation rule be fair to antitrust defendants if, as a practical matter, it deprives them of repose concerning alleged antitrust liability that already has been addressed through settlement. Such a continuing violation principle would defeat the purpose of the congressionally mandated limitations period established by the unequivocal language of § 15b. As a result, "[r]efusing to extend the statute of limitations in this case ensures that the statute continues to have meaning." *Midwestern Mach.*, 392 F.3d at 276. The Court should grant certiorari to get the lower courts back on track so that antitrust plaintiffs no longer will be able to derail the statute

of limitations and avoid pre-discovery, pretrial dismissal with vague allegations of continuing conspiratorial conduct during the limitations period.

D. Any Continuing Violation Exception Must Comply With This Court's *Twombly* and *Iqbal* Pleading Standards

In *Twombly*, this Court "address[ed] the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct." *Twombly*, 550 U.S. at 553. "[T]he Court held in *Twombly* [that] the pleading standard [Federal Rule of Civil Procedure 8(a)(2)] announces . . . demands more than an unadorned, the-defendant-unlawfully harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. at 678. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ibid.* (quoting *Twombly*, 550 U.S. at 570).

The *Twombly* pleading standard means that to establish a continuing violation for antitrust statute of limitations purposes, a complaint must contain a "plausible allegation of a live, ongoing conspiracy occurring within the limitations period." App. 30a (Shepherd, J., dissenting). As the dissenting circuit judges explain, Respondents' amended complaint simply fails to satisfy that requirement. *Ibid.*

Twombly's applicability underscores the need for this Court to revisit the continuing violation doctrine insofar as it extends or renews the four-year limitations period established by § 15b. This case squarely provides the Court the opportunity to establish, at least for price-fixing conspiracy claims,

the elements that must be plausibly pleaded in order to allege a continuing violation that survives a motion to dismiss based on the statute of limitations. A vague, broad, elastic, or other easily satisfied continuing violation rule only invites the sort of loose or formulaic allegations that the Court in *Twombly* held is unfair to antitrust class-action defendants. To say the least, such a rule would make it difficult—despite the strongly worded antitrust statute of limitations—for defendants to obtain dismissal of hackneyed claims prior to being foisted into the costly throes of discovery and trial, or alternatively, compelled to settle claims that may be groundless.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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