14-577

No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CARPENTER CO., ET AL.,

Petitioners,

v.

ACE FOAM, INC., ET AL., individually and on behalf of all others similarly situated,

and

GREG BEASTROM, ET AL., individually and on behalf all others similarly situated,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In what is likely the largest class action ever certified, the Sixth Circuit held that the district court did not abuse its discretion in certifying two antitrust classes under Federal Rule of Civil Procedure 23 that potentially include hundreds of millions of members seeking more than $9 billion in treble damages, even though (i) the classes contain vast numbers of uninjured members and (ii) individualized damages assessments are necessary to determine whether and to what extent any class member is entitled to damages. This decision exacerbates existing circuit conflicts over whether class certification is proper where a class suffers from either deficiency.

The questions presented are:

I. Whether the standing requirements of Article III apply to all members of a class certified under Rule 23; and

II. Whether certifying a class under Rule 23(b)(3) is improper where individualized damages issues predominate, and where plaintiffs rely exclusively on aggregate damages models that calculate damages purportedly incurred by the class as a whole, rather than by individual class members.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Carpenter Co., E. R. Carpenter, L.P., Carpenter Holdings, Inc., Flexible Foam Products, Inc., Foamex Innovations, Inc., Future Foam, Inc., Hickory Springs Manufacturing Co., Leggett & Platt, Incorporated, Mohawk Industries, Inc., Woodbridge Foam Corp., Woodbridge Sales & Engineering, Inc., and Woodbridge Foam Fabricating, Inc., were defendants in the multidistrict litigation consolidated in the district court, *In re Polyurethane Foam Antitrust Litigation*, N.D. Ohio Case No. 10-02196, were petitioners-appellants in Sixth Circuit Case No. 14-302, and are petitioners in this Court. Carpenter Co., E. R. Carpenter, L.P., Carpenter Holdings, Inc., and Leggett & Platt, Incorporated, have resolved their disputes with the Direct Purchasers and are proceeding in the district court and in this Court only with respect to the Indirect Purchaser class. Vitafoam, Inc. and Vitafoam Products Canada Ltd. are defendants in the district court, but were not parties in Sixth Circuit Case No. 14-302, and are not parties to this petition. Domfoam International, Inc., and Valle Foam Industries were defendants in the district court but are no longer parties to these proceedings.

Ace Foam, Inc., Adams Foam Rubber Co., Cambridge of California, Inc., GCW Carpet Wholesalers, Inc., Foam Factory, Inc., J&S Packaging, Inc., and VFP Acquisitions were named representatives for the Direct Purchaser plaintiffs in the district court, were respondents-appellees in Sixth Circuit Case No. 14-302, and are respondents in this Court. Greg Beastrom, Seth Brown, Marjean Coddon, Susan Gomez, Joseph Jasinski, Henry Johs, Joseph Lord,

Kirsten Luenz, Gerald & Kathleen Nolan, Kory Pentland, Jonathan Rizzo, Michael Schwartz, Larry Scott, Catherine Wilkinson, Jeffrey S. Williams, Driftwood Hospitality Management, and The Parker Company were named representatives for the Indirect Purchaser plaintiffs in the district court, were respondents-appellees in Sixth Circuit Case No. 14-302, and are respondents in this Court.

Pursuant to Rule 29.6 of this Court, undersigned counsel state as follows:

Carpenter Co., E. R. Carpenter, L.P., Carpenter Holdings, Inc., Flexible Foam Products, Inc., Foamex Innovations, Inc., Future Foam, Inc., Hickory Springs Manufacturing Co., Woodbridge Foam Corp., Woodbridge Sales & Engineering, Inc., and Woodbridge Foam Fabricating, Inc., are not publicly traded.

No parent or publicly held company owns 10% or more of the stock of Carpenter Co., E. R. Carpenter, L.P., Carpenter Holdings, Inc., Flexible Foam Products, Inc., Foamex Innovations, Inc., Future Foam, Inc., Hickory Springs Manufacturing Co., Mohawk Industries, Inc., Woodbridge Foam Corp., Woodbridge Sales & Engineering, Inc., or Woodbridge Foam Fabricating, Inc.

State Street Corporation is a beneficial holder of over 10% of Leggett & Platt, Incorporated's common stock, on behalf of individual owners who each individually own less than 10% of Leggett & Platt, Incorporated's stock.

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Carpenter Co., E. R. Carpenter, L.P., Carpenter Holdings, Inc., Flexible Foam Products, Inc., Foamex Innovations, Inc., Future Foam, Inc., Hickory Springs Manufacturing Co., Leggett & Platt, Incorporated, Mohawk Industries, Inc., Woodbridge Foam Corp., Woodbridge Sales & Engineering, Inc., and Woodbridge Foam Fabricating, Inc. (collectively, "Defendants") respectfully submit this petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–11a) and the district court's certification order (App. 12a–167a) are unreported. The Sixth Circuit denied a timely petition for permission to appeal the class certification order pursuant to Federal Rule of Civil Procedure 23(f).

JURISDICTION

The Sixth Circuit's judgment denying permission to appeal was entered on September 29, 2014. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

Federal Rule of Civil Procedure 23 and Article III of the United States Constitution are reproduced in the Appendix, *infra*, at 168a–177a.

STATEMENT

In this consolidated multidistrict antitrust case, the district court certified two classes that together include potentially hundreds of millions of class members and seek more than $9 billion in treble damages based on allegations that Defendants, manufacturers of a wide variety of flexible polyurethane foam and foam products, engaged in a decade-long conspiracy to fix prices.

This gargantuan class action—which is likely the largest ever certified and upheld by a federal court of appeals—sweeps together dissimilar purchasers of a vast number of distinct products sold by disparate groups of Defendants at varying prices in a variety of markets over more than a decade. They cover a kaleidoscope of different purchasers and products, ranging from furniture manufacturers purchasing seat padding, to individuals buying foam pillows, and hotel chains acquiring new mattresses. The *only* common thread is some connection to polyurethane foam, a truly ubiquitous product that is found in virtually every home, office, and vehicle in America. Given the tremendous breadth of this class action, it is impossible to even ascertain whether a given purchase is traceable to any Defendant, let alone which purchasers suffered *any* injury or are entitled to *any* measure of damages, without resorting to fact-intensive individualized inquiries.

The Sixth Circuit's decision condoning certification of these classes subverts the requirements of Article III, Rule 23, the Rules Enabling Act, and due process. Review is warranted because the decision below exacerbates entrenched conflicts among the

courts of appeals over the appropriate standards governing class certification.

First, the Sixth Circuit's decision sanctions the district court's certification of two classes indisputably containing vast numbers of uninjured class members. Though the Third, Seventh, and Tenth Circuits have held that only a single member of a class must have standing, the Second, Eighth, Ninth, and D.C. Circuits have recognized that Article III requires *all* class members to have standing. By relieving the class members of their obligation to satisfy the "irreducible constitutional minimum of standing" under Article III, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992), the decision below—like prior decisions from the Third, Seventh, and Tenth Circuits—allows Rule 23 to impermissibly modify the requirements of Article III, in violation of the Rules Enabling Act, and to expand the jurisdiction of federal courts, in violation of Rule 82.

Second, the Sixth Circuit has approved class certification here even though individual damages calculations will inevitably overwhelm common issues, in violation of this Court's decision in *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013). The Fifth, Sixth, Seventh, and Ninth Circuits have similarly contravened *Comcast* by disregarding this Court's holding that individualized issues related to the calculation of damages can preclude a finding that common issues predominate. The Tenth and D.C. Circuits, however, have correctly recognized that individualized damages determinations can preclude class certification under Rule 23. The courts of appeals are also conflicted over whether aggregate damages models—which calculate damages for the class as a

whole rather than for individual class members—like those relied upon by Plaintiffs here, can be used to satisfy the predominance requirement. This aggregate approach to damages, which has been rejected by the Second, Fourth, and Ninth Circuits, but accepted by the Sixth and Tenth Circuits, arbitrarily and improperly obscures the differences among class members, resulting in windfalls for some while potentially undercompensating others, and strips class action defendants of their right to present "defenses to individual claims," in violation of the Rules Enabling Act and due process. *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011); *see also Comcast*, 133 S. Ct. at 1433 (accepting "arbitrary" damages models "would reduce Rule 23(b)(3)'s predominance requirement to a nullity").

The Court should grant review to resolve these important and recurring questions, and it should do so at this juncture because the extraordinary amount of damages sought by Plaintiffs virtually ensures that the mere fact of class certification will end this litigation, regardless of the underlying merits of Plaintiffs' claims. *See, e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011) (noting "the risk of 'in terrorem' settlements that class actions entail" because "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims"); *Shady Grove Orthopedic Assocs.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class accordingly places pressure on the defendant to settle even unmeritorious claims."). Because each Defendant faces joint and several liability for more than $9 billion in treble

damages—an astronomical figure that is between 20 to 170 times each Defendant's annual foam product *revenues*, not profits—the pressure to settle is magnified exponentially here. Indeed, multiple Defendants quickly settled once class certification was granted. The fundamentally flawed standards used to justify the certification of the massive classes here should not be permitted to sound the death knell of this or any other litigation.

1. Defendants are manufacturers and sellers of flexible polyurethane foam ("flexible foam") and foam products. Flexible foam is "near ubiquitous, appearing in a vast array of product uses." App. 14a. Defendants manufacture foam or foam products for a wide variety of uses. For example, Defendant Future Foam manufactures foams for the furniture industry, while Defendant FXI produces foam for home, healthcare, electronics, industrial, personal care, and transportation uses. *Id.* at 20a. By contrast, Defendant Mohawk never manufactured any foam, but instead made carpet cushion from scrap foam purchased from other manufacturers. *Id.* at 21a.

Flexible foam is created from a mixture of two chemicals, both of which are principally manufactured in the Gulf Coast region and whose prices are largely governed by petroleum prices. App. 14a. Together, these two chemicals account for roughly 90 percent of foam production costs. *Ibid.*

2. Plaintiffs allege that Defendants conspired to fix and raise the price of flexible foam and foam products to allocate customers over a period of more than a decade. App. 23a–24a. Plaintiffs allege that the announcement by chemical manufacturers of

price increases provided Defendants with a pretext for allegedly collusive flexible foam price increase announcements. In response to the chemical manufacturers' announcements, Plaintiffs allege that Defendants would reach an agreement on the amount and date of price increase announcements for their foam, and would send coordinated price increase announcement letters to their customers. Defendants would also allegedly exchange these letters among themselves to help self-police their alleged co-conspirators' compliance with the scheme. *Id.* at 24a.

Plaintiffs contend that *every* price increase announced by *every* Defendant to *every* customer during the 11-year class periods was "the result of conspiratorial discussions among Defendants on pricing." App. 25a. And even if customers rejected the announced price increases, Plaintiffs claim that these announcements were the "starting points for negotiations" and thus increased *every* transaction's price. 6th Cir., No. 14-302, A333.[1] This far-fetched claim does not account for the evidence of highly-varying price announcement and pricing practices, the thousands of intermediaries, or the wide variety of distribution channels through which different foam outputs or products are sold in distinct markets in diverse locations to a wide variety of consumers. Indeed, each sale is subject to countless intervening events that inform the ultimate price that any entity

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[1] All references to "A" page numbers are to the sealed appendix filed with the Sixth Circuit in support of Defendants' Rule 23(f) petition.

or individual paid for any particular purchase(s) of flexible foam or foam products. Plaintiffs' allegations similarly disregard the market reality that each of the countless varieties of foam and foam products—including different kinds of slabstock foam, fabricated foam, and rebond carpet cushion—possesses its own unique end uses, raw-material inputs, and supply-and-demand characteristics.

3. Plaintiffs sought certification under Rule 23(b)(3) of two damages classes that included persons and entities who directly or indirectly purchased flexible foam or foam products from Defendants over the course of more than a decade beginning on January 1, 1999. App. 17a–18a.

The "Direct Purchaser" class includes all persons or entities that purchased flexible foam directly from Defendants and their alleged co-conspirators during the class period for purchases "from or delivery into the United States." App. 15a–16a. The "Indirect Purchaser" class includes "individual consumers and 'authorized managing agents' for hotels and other entities" that purchased products containing Defendants' foam, other than for resale, in 29 states and the District of Columbia at some point during the class period. *Id.* at 18a–19a. The scope of the two classes is striking; they could collectively include hundreds of millions of American consumers and businesses.

4. The district court concluded that the requirements of Rule 23 were satisfied and certified the two proposed classes.

a. In certifying both classes, the court rejected Defendants' argument that broad swathes of the pu-

tative class lacked Article III standing because they had not suffered any injury fairly traceable to Defendants' alleged conduct. The district court adopted the view expressed in *Kohen* v. *Pacific Investment Management Co.*, 571 F.3d 672 (7th Cir. 2009), that "includ[ing] persons who have not been injured by the defendant's conduct . . . does not preclude class certification" if "nearly all class members suffered injury." App. 49a.

The district court also endorsed the flawed testimony of Plaintiffs' experts, who each claimed that all or nearly all class members suffered an antitrust impact that could be proven with common evidence.[2]

The Direct Purchasers' expert, Dr. Jeffrey Leitzinger, purported to find a common antitrust impact by relying on flawed regression results and a strained definition of antitrust impact. Dr. Leitzinger did not attempt to demonstrate injury for each class member, or even the majority of class members; rather, he claimed his models "demonstrate[d] impact for customers who account for 99 percent of *sales*." App. 89a (emphasis added). In fact, Dr. Leitzinger's model was not able to estimate *any* impact for 4,204, or nearly 23%, of the more than 18,000 purchasers in his sample (which did not in-

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[2] Defendants objected to the admissibility of Plaintiffs' expert evidence under Federal Rules of Evidence 702 and 703. *See Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U. S. 579 (1993). Although the district court denied Defendants' *Daubert* motions and found that the testimony of Plaintiffs' experts satisfied the threshold standards for admissibility, that does not resolve the distinct inquiry of whether this testimony was sufficient to justify class certification. *See Comcast*, 133 S. Ct. at 1431 n.4.

clude any data from Defendants Woodbridge and Mohawk). 6th Cir., No. 14-302, A917–A918; A1005–A1006; A883. And for those purchases that Dr. Leitzinger did analyze in his model, in over 65% of the cases his calculations showed that the claimed impact of the alleged conspiracy was not statistically different from zero. *Id.* at A914–A915. Dr. Leitzinger was able to reach his inflated 99% sales figure only by ignoring these defects; he testified that if a given customer made $1 million in purchases that were not impacted by the alleged conspiracy and $1 in purchases that were (even if the impact effect was not statistically significant), he would deem that customer as impacted and count the entire $1,000,001 in sales in his "all or nearly all" sales analysis. *Id.* at A1007.

The Indirect Purchasers' expert, Dr. Russell L. Lamb, relying on an economic theory known as the "law of one price," opined that all indirect purchasers suffered an antitrust impact from the alleged conspiracy because price increases were *always* passed on to indirect purchasers by wholesalers and retailers, no matter how convoluted the distribution chain or how atypical the market conditions in a given local retail market. App. 136a–137a. This theoretical presumption, however, was unsupported by empirical evidence and ignored the realities of complex distribution chains, including the fact that many direct purchasers absorbed price increases and did not pass those costs on to indirect purchasers, or passed them on in varying degrees through multiple layers of distribution that culminated in local retail markets with differing competitive conditions. *See id.* at 144a. In fact, Plaintiffs' experts have previously ad-

mitted that this so-called "law of one price" is a theory that "frequently doesn't hold when actual markets are concerned." Jeffrey Leitzinger & Russell L. Lamb, *The Predominance Requirement for Antitrust Class Actions—Can Relevant Market Analysis Help?*, A.B.A. Sec. of Antitrust L., Econ. Committee Newsl., Spring 2007, at 23 n.19; *see also Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 466–67 (1992) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.").

The district court also disregarded evidence that the Indirect Purchaser class includes large numbers of uninjured members, including several of the class representatives. For example, two named Plaintiffs purchased foam or foam products while acting as agents on behalf of others and were reimbursed for those purchases. 6th Cir., No. 14-302, A767–68; A775. The court also rejected Defendants' argument that it is impossible to ascertain without fact-intensive individual inquiries who falls within the Indirect Purchasers class because very few, if any, end products (such as sofas) identify the *foam* manufacturer. App. 152a–155a.

b. The district court also concluded, relying on Plaintiffs' experts' statistical models and averaging, that damages could be determined on an aggregate, classwide basis. Each of Plaintiffs' expert's models purported to calculate damages for the classes in the aggregate based on an average overcharge rate—in other words, the average antitrust impact to the average class member. *See* 6th Cir., No. 14-302, A672; A930–931. Plaintiffs' experts openly admitted that this methodology "assumes that the anticompetitive

effect of the alleged price-fixing conspiracy is the same for all customers" at all times during the class period. *Id.* at A929–A930; *see also id.* at A646–A649. Accordingly, under these models, all of the various purchasers (ranging from hotels and other businesses to individual consumers) that are swept within the classes stand to recover a portion of an average award of damages, regardless of the actual amount of damages (if any) they actually incurred. This aggregated approach to damage quantification—when combined with the inclusion of uninjured members in the class—obviously overstates total claimed damages. While the Direct Purchaser Plaintiffs contend that their expert's model systematically "understates the overall damages," they fail to defend the accuracy of their aggregate damages calculation. 6th Cir., No. 14-302, Dkt. 69 at 14 (Nov. 10, 2014) (emphasis omitted).

The district court acknowledged the shortcomings of Plaintiffs' models, but dismissed them because the models purportedly only calculate, but do not actually "award," damages. App. 110a. The court further concluded that "[q]uestions of allocation need not definitively be resolved now." *Ibid.*

5. Defendants petitioned for permission to appeal under Federal Rule of Civil Procedure 23(f). The Sixth Circuit—in an eight-page order addressing the merits of Defendants' petition—explained why the class certification order was not "questionable," concluded that the district court did not abuse its discretion in certifying both classes, and accordingly denied the petition. App. 10a–11a.

The Sixth Circuit rejected Defendants' standing argument and held that the district court "did not abuse its discretion" and had properly "defin[ed] the classes here." App. 5a–6a. The Sixth Circuit also held that the district court "did not abuse its discretion or violate *Comcast*" in certifying the two classes, although it did not grapple with Plaintiffs' method of calculating an aggregate damages award based on an average overcharge rate, or with Plaintiffs' proposal to award every class member an average recovery. *Id.* at 6a–7a.

REASONS FOR GRANTING THE PETITION

This case squarely presents the Court with an opportunity to resolve conflicts on important and recurring issues of class action law, and to provide valuable guidance to all lower courts that will ensure that both absent class members and class action defendants, many of whom are faced with potentially ruinous liability, are afforded the protections of due process and Rule 23.

The courts of appeals are deeply divided over whether absent class members must have Article III standing. The Seventh Circuit's holding in *Kohen* that only one member of a certified class must have sustained any injury or damages conflicts with this Court's precedents and with decisions from the Second, Eighth, Ninth, and D.C. Circuits. The Court should grant review to resolve the conflict and establish a uniform standard, consistent with the requirements of Article III, that every class member must have standing to have their claims adjudicated by a federal court.

The Court should also grant the petition to resolve the conflict among the courts of appeals concerning whether, post-*Comcast*, district courts can certify classes where individualized damages issues predominate. Not only will individualized damages issues "inevitably overwhelm" the common issues posed by the classes certified by the district court in this case, *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1433 (2013), but the Sixth Circuit's decision also will allow Plaintiffs to rely on aggregate damages models that obscure individualized damages calculations through arbitrary estimates, harming absent class members and Defendants alike. *See ibid.* (rejecting proposition that "at the class-certification stage *any* method of measurement is acceptable, so long as it can be applied classwide, no matter how arbitrary the measurements may be"). This lax interpretation of Rule 23(b)(3)'s predominance requirement not only violates the Rules Enabling Act and due process, but also directly contravenes this Court's ruling in *Comcast*. The Court should grant review to provide guidance to the lower courts and clarify that Rule 23(b)(3) precludes class certification where individualized damages issues predominate.

Review at this juncture is critical, particularly because of the sweeping breadth of the certified classes and the astronomical amount of damages Plaintiffs seek. In fact, the Indirect Purchasers class—which potentially includes *hundreds of millions* of Americans who have purchased mattresses, carpet cushion, upholstered furniture, or other foam products over the course of a decade—is likely the *largest* class that has ever been certified and upheld by a federal court of appeals. The coercive effect of certifying these

sprawling classes is exacerbated by the punitive threat of treble damages, potentially exposing Defendants to more than $9 billion in liability and creating tremendous pressure to settle these claims long before there is a litigated final judgment.

The pressure to settle is further amplified because of the risk that Defendants will be improperly deprived at trial of their due process right to "present every available defense," *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks and citation omitted), and forced to litigate against a fictional aggregate that impermissibly obscures the significant differences between class members and could preclude them from showing that individual class members have suffered no injury and thus have no entitlement to damages. Immediate review is needed to ensure that these important issues do not evade scrutiny.

I. THE COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE STANDING REQUIREMENTS OF ARTICLE III APPLY TO ALL MEMBERS OF A CERTIFIED CLASS.

It is elementary that Article III of the Constitution requires plaintiffs seeking to litigate a claim in federal court to demonstrate the "irreducible constitutional minimum of standing." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). An individual lacks standing unless he has been affected "in a personal and individual way," *id.* at 560 n.1, and he cannot rely on any injury others may have suffered to satisfy this requirement. *See Warth* v. *Seldin*, 422 U.S. 490, 501 (1975) ("[T]he plaintiff . . . must allege a distinct and palpable injury to himself . . . ."). A

plaintiff's obligation to meet Article III's standing requirement continues at every "stage[] of the litigation." *Lujan*, 504 U.S. at 561.

This Court has recognized that Article III's constitutional standing requirement is not lessened by the class action procedural device. *See Allen* v. *Wright*, 468 U.S. 737, 750 (1984); *see also Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2550 (2011) (emphasizing that class representative must "suffer the same injury" as class members) (internal quotation marks omitted). In fact, this Court has instructed that "[i]n an era of frequent litigation [and] class actions, . . . courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1449 (2011).

Despite the fundamental constitutional prerequisite that plaintiffs demonstrate standing to have their claims adjudicated by a federal court, the courts of appeals are deeply divided over whether Article III's standing requirement applies to all plaintiffs in a class action lawsuit, with some courts holding that uninjured persons can assert claims in federal court simply because their claims have been aggregated with others through the class action procedural device. This flawed approach allows a procedural rule to alter the substantive law, in violation of the Rules Enabling Act, 28 U.S.C. § 2072(b), and to impermissibly expand the jurisdiction of the federal courts, in violation of Federal Rule of Civil Procedure 82. *See Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997).

The district court below followed the Seventh Circuit's decision in *Kohen* v. *Pacific Investment Management Co.*, 571 F.3d 672 (7th Cir. 2009), which held that "'includ[ing] persons who have not been injured by the defendant's conduct . . . does not preclude class certification.'" App. 49a (quoting *Kohen*, 571 F.3d at 677). The certification order thus hinges on the erroneous legal premise that absent class members need not have standing under Article III.

The Court should grant review to resolve the conflict between the courts of appeals on this issue, and make clear that the standing requirements of Article III apply equally to all class members.[3]

1. Four of the seven circuits that have considered this issue have held that *all* members of a certified class must have standing to have their claims adjudicated in federal court.

The Second Circuit held in *Denney* v. *Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006), that "no class may be certified that contains members lacking Article III standing." *Id.* at 264. *Denney* held that the class must "be defined in such a way that anyone within it would have standing." *Ibid.* Applying those principles, the Second Circuit affirmed certification because all members of the class *had* suffered

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[3] The pending petition for a writ of certiorari in *BP Exploration & Production Inc.* v. *Lake Eugenie Land & Development, Inc.*, No. 14-123, also presents the question whether courts can, consistent with Rule 23 and Article III, certify classes that include numerous members who have not suffered any injury caused by the defendant.

some injury fairly traceable to defendants' conduct. *Id.* at 262, 266.

The Eighth Circuit adopted the same approach as the Second in *Halvorson* v. *Auto-Owners Insurance Co.*, 718 F.3d 773 (8th Cir. 2013), holding that "[i]n order for a class to be certified, each member must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision." *Id.* at 778; *accord Avritt* v. *Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) (holding that to the extent California law allows "a single injured plaintiff [to] bring a class action on behalf of a group of individuals who may not have had a cause of action themselves, it is inconsistent with the doctrine of standing as applied by federal courts").

Likewise, the Ninth Circuit has also held that "'no class may be certified that contains members lacking Article III standing.'" *Mazza* v. *Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) (quoting *Denney*, 443 F.3d at 264) (alteration omitted). The D.C. Circuit has also recently suggested that all absent class members must have Article III standing. In *In re Rail Freight Fuel Surcharge Antitrust Litigation*, the court held that to satisfy the predominance requirement of Rule 23, plaintiffs were required to show "that *all* class members were in fact injured by the alleged conspiracy." 725 F.3d 244, 252 (D.C. Cir. 2013) (emphasis added). The court emphasized that it "expect[ed] the common evidence to show all class members suffered *some* injury." *Ibid.*

2. By contrast, the Third, Seventh, and Tenth Circuits have all held that absent class members do

not need to satisfy the standing requirements of Article III, and thus have held that uninjured persons who would lack standing to pursue their claims in federal court in an individual lawsuit nonetheless can do so merely because their claims are joined with others through the class action procedural device.

In *Kohen*, the Seventh Circuit held that "one named plaintiff with standing . . . is all that is necessary" and "as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied." 571 F.3d at 676–77. *Kohen* cited this Court's decision in *United States Parole Commission* v. *Geraghty*, 445 U.S. 388 (1980), but nothing in *Geraghty* supports the Seventh Circuit's holding that absent class members are excused from establishing they have standing under Article III. To the contrary, *Geraghty* merely held "that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied" and did not address whether absent class members needed to meet the requirements of Article III. *Id.* at 404.

The Seventh Circuit in *Kohen* attempted to distinguish the Second Circuit's holding in *Denney* as a case that "focus[ed] on the class definition" and merely prohibited a class definition from being "so broad that it sweeps within it persons who could not have been injured by the defendant's conduct." *Kohen*, 571 F.3d at 677. But this ignores that the Second Circuit squarely held in *Denney*—in direct conflict with *Kohen*—that "no class may be certified that contains members lacking Article III standing." *Denney*, 443 F.3d at 264.

Following *Kohen*, the Tenth Circuit has also held that "Rule 23's certification requirements neither require all class members to suffer harm or threat of immediate harm nor Named Plaintiffs to prove class members have suffered such harm." *DG ex rel. Stricklin* v. *Devaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010). The Tenth Circuit explicitly adopted *Kohen*'s conclusion that even the likely possibility that a class "includes persons unharmed by a defendant's conduct should not preclude certification." *Id.* at 1201 (citing *Kohen*, 571 F.3d at 677).

Similarly, the Third Circuit held in *Krell* v. *Prudential Insurance Co. of America*, 148 F.3d 283 (3d Cir. 1998), that absent class members need not have standing under Article III. Rather, according to the Third Circuit, only the named parties must establish standing under Article III, and "'[o]nce [the] threshold individual standing by the class representatives is met, a proper party to raise a particular issue is before the court, and there remains no further separate class standing requirement in the constitutional sense." *Id.* at 306–07 (citation omitted).

By relieving absent class members of their obligation to establish Article III standing, the Third, Seventh, and Tenth Circuits—and now the Sixth Circuit—excuse countless litigants from Article III's "irreducible constitutional minimum of standing" merely because their claims are aggregated through the procedural device of Rule 23. *Lujan*, 504 U.S. at 560.

This Court has held that Rule 23 must be "interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure" such as Rule 23 "'shall not

abridge, enlarge or modify any substantive right.'" *Amchem*, 521 U.S. at 613 (quoting 28 U.S.C. § 2072(b)). Yet that is exactly the result of eliminating the requirements of Article III for absent class members: It is a modification of the law that expands the right of uninjured persons to pursue claims in federal court. Interpreting Rule 23 to allow uninjured persons to have their claims adjudicated in federal court also violates the principle that the Federal Rules of Civil Procedure "do not extend" the "jurisdiction of the district courts." Fed. R. Civ. P. 82; *see Amchem*, 521 U.S. at 613.

Moreover, this approach impermissibly eliminates defendants' right to challenge the standing of uninjured persons, in violation of this Court's decision in *Dukes*, the Rules Enabling Act, and due process. *See Dukes*, 131 S. Ct. at 2561 (holding that "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims").

3. Had the district court followed the decisions of the Second, Eighth, Ninth, and D.C. Circuits, rather than the Seventh Circuit's decision in *Kohen*, it would have been forced to deny class certification. As Plaintiffs' own experts' models prove, both classes contain large numbers of members who have suffered no injury and thus lack standing.

Dr. Leitzinger's model for the Direct Purchasers class admittedly was unable to determine whether there was any impact for nearly 23% of the purchasers in his sample. 6th Cir., No. 14-302, A917–A918; A1005–A1006. And over 65% of the impact estimates yielded by his model were no different from

zero based on standard measures of statistical significance. *Id.* at A914–A915. Moreover, in many instances prices actually *decreased* after price announcement letters were disseminated. For example, across the full time period included in Dr. Leitzinger's impact analysis, 15% of poured foam prices declined after price announcement letters (while 25% did not change), and 21% of prices for carpet cushion products also declined (while 19% remain unchanged). *Id.* at A892.

Dr. Lamb's impact models for the Indirect Purchasers class also revealed that large numbers of class members were uninjured, primarily because his models could prove no common injury to direct purchasers, which in turn precludes a finding of common injury to indirect plaintiffs. In a flawed attempt to address this shortcoming, Dr. Lamb made the arbitrary assumption that all direct purchasers uniformly paid the same 9.66% overcharge. 6th Cir., No. 14-302, A316.

Moreover, undisputed evidence shows that numerous members of the Indirect Purchasers class could not have been injured at all because price increases were not invariably and inflexibly passed on by wholesalers and retailers, as Dr. Lamb erroneously presumed based on an economic theory that does not hold in the real world. For example, one of the largest mattress manufacturers in the United States testified that it absorbed the majority of price increases it received from foam manufacturers and did not pass them on to hundreds of thousands—if not millions—of customers, all of whom are nonetheless included in the class. 6th Cir., No. 14-302, at A1185–A1186; *see also id.* at A1189, A1192, A1196. And

given that there are potentially hundreds of millions of purchasers swept into the Indirect Purchasers class, there is no way even to identify the membership of the class—let alone exclude uninjured purchasers—without countless individualized inquiries.

* * *

The Court should grant review to resolve the conflict among the courts of appeals and stop the improper use of Rule 23 as a mechanism to circumvent the constitutional mandate of Article III.

II. THE COURT SHOULD GRANT REVIEW TO RESOLVE THE CIRCUIT SPLIT REGARDING THE IMPACT OF INDIVIDUALIZED DAMAGES ISSUES ON RULE 23(B)(3)'S PREDOMINANCE REQUIREMENT IN LIGHT OF *COMCAST*.

This case also presents the Court with an ideal opportunity to address two critical issues, on which the courts of appeals are deeply divided, relating to the interplay between damages and Rule 23(b)(3)'s predominance requirement.

First, despite this Court's holding in *Comcast*, that "[q]uestions of individual damage calculations" can preclude a finding that common issues predominate, 133 S. Ct. at 1433, the Fifth, Sixth, Seventh, and Ninth Circuits continue to dismiss damages as irrelevant to the predominance analysis, in direct conflict with both *Comcast* and post-*Comcast* decisions from the Tenth and D.C. Circuits. As the decision below demonstrates, this intractable defiance of *Comcast* continues to grow more entrenched.

Second, the Sixth and Tenth Circuits have held that statistical models that calculate only aggregate

damages for the entire class and rely on averaging to determine the amount of damages each individual class member is entitled to recover are sufficient to satisfy Rule 23(b)(3)'s predominance requirement. By contrast, the Second, Fourth, and Ninth Circuits have rejected this approach because it effectively creates fictional plaintiffs who are statistical composites of the class, and thus results in an impermissible alteration of the law and a violation of due process.

As this Court has recognized, damages classes are "'the most adventuresome' innovation," and Rule 23(b)(3) is "[f]ramed for situations in which 'class-action treatment is not as clearly called for.'" *Amchem*, 521 U.S. at 614–15 (citation omitted); *see also Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (Rule 23 "imposes stringent requirements for certification that in practice exclude most claims"). This Court's guidance is urgently needed to resolve these persistent and deepening conflicts and ensure that Rule 23(b)(3)'s procedural protections are not circumvented.

1. In *Comcast*, this Court held that an antitrust class action was "improperly certified under Rule 23(b)(3)" because the plaintiffs' damages model fell "far short of establishing that damages [were] capable of measurement on a classwide basis" and thus the plaintiffs could not "show Rule 23(b)(3) predominance." 133 S. Ct. at 1432–33. Certification was improper because, without an adequate damages model, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Id.* at 1433. In other words, this Court held in *Comcast* that individual issues relating to damag-

es could, without more, preclude certification under Rule 23(b)(3).

a. The D.C. Circuit in *Rail Freight* correctly recognized what this Court held in *Comcast*: "No damages model, no predominance, no class certification." 725 F.3d at 253. According to the D.C. Circuit, "[c]ommon questions of fact cannot predominate where there exists no reliable means of proving classwide injury in fact." *Id.* at 252–53. Courts therefore must subject "statistical models that purport to show predominance" to a "hard look." *Id.* at 255. And if a defendant's critiques of a proposed damages model are correct, "that is not just a merits issue," but instead "would shred the plaintiffs' case for certification." *Id.* at 252–53; *see also id.* at 253 ("When a case turns on individualized proof of injury, separate trials are in order.").

The Tenth Circuit in *Wallace B. Roderick Revocable Living Trust* v. *XTO Energy, Inc.*, 725 F.3d 1213 (10th Cir. 2013), similarly recognized that, after *Comcast*, courts "should consider the extent to which material differences in damages determinations will require individualized inquiries" because "predominance may be destroyed" if such "individualized issues will overwhelm those questions common to the class." *Id.* at 1220.

b. Other courts of appeals, however, have either ignored or affirmatively rejected *Comcast*'s holding that individualized damages issues can overwhelm any common questions and destroy predominance, thus precluding class certification.

The Sixth and Seventh Circuits both rejected the holding of the majority in *Comcast* after this Court

vacated their prior decisions and remanded for reconsideration in light of *Comcast*. *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); *Butler* v. *Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014). In *Whirlpool*, the Sixth Circuit followed the *Comcast* dissent's assertion that "'individual damages calculations do not preclude class certification under Rule 23(b)(3)'" and that in "'the mine run of cases, it remains the "black letter rule" that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members.'" 722 F.3d at 860–61 (quoting *Comcast*, 133 S. Ct. at 1437 (Ginsburg & Breyer, JJ., dissenting)). The Seventh Circuit in *Butler* likewise held that "[i]f the issues of liability are genuinely common issues," individualized damages issues do not preclude a finding of predominance. 727 F.3d at 801–02.

Similarly, in *Leyva* v. *Medline Industries Inc.*, 716 F.3d 510 (9th Cir. 2013), the Ninth Circuit held that "damage calculations alone cannot defeat certification" and that "[t]he amount of damages is invariably an individual question and does not defeat class action treatment." *Id.* at 513–14 (internal quotation marks and citations omitted). It misconstrued *Comcast* as holding only that "plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." *Id.* at 514. The Ninth Circuit again recently reiterated that its "circuit precedent" prohibited the denial of class certification due to individualized damages issues, and described those decisions rejecting *Com-*

cast's holding regarding damages and the predominance requirement as "compelling." *Jimenez* v. *Allstate Ins. Co.*, 765 F.3d 1161, 1167–68 (9th Cir. 2014).

Likewise, the Fifth Circuit, agreeing with *Whirlpool*, *Butler*, and *Leyva*, held in *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014), *petition for cert. filed*, No. 14-123 (Aug. 1, 2014), that it was "a misreading of *Comcast*" to interpret it as "preclud[ing] certification under Rule 23(b)(3) in any case where the class members' damages are not susceptible to a formula for classwide measurement." *Id.* at 815 & n.104.

c. This manifestly erroneous view of *Comcast*—under which damages issues are treated as irrelevant to the predominance analysis and cannot preclude class certification under Rule 23(b)(3)—dictated the district court's class certification analysis in this case. Relying on *Whirlpool* and *Butler*, the court concluded that "*Comcast* did not alter" the "predominance burden," App. 39a, and that "the presence of 'some individualized damages issues' will not preclude class treatment if common issues otherwise predominate," *id.* at 106a (citation omitted)). While the district court purported to require Plaintiffs to show that "damages are 'susceptible of measurement across the entire class for purposes of Rule 23(b)(3)'," *id.* at 105a (quoting *Comcast*, 133 S. Ct. at 1433)), it instead approved damages models that did no such thing. *See infra* Part II.2. The district court also minimized the fact that "questions of allocation" of damages "will likely require individualized analysis," and held that this "does not cause individual is-

sues to predominate over common questions in this case." App. 110a–111a.

The decisions below therefore exacerbate an entrenched and deepening conflict over the proper interpretation of *Comcast*. And the relevance of individualized damages issues to Rule 23(b)(3)'s predominance requirement is critically important; indeed, it is a key threshold question in every case in which certification of a damages class is sought. While *Comcast* should have resolved this issue once and for all, multiple courts of appeals have refused to follow it. The Court should grant review and make clear that it meant what it said in *Comcast*—damages issues are not exempt from the predominance analysis, and if plaintiffs fail to present a viable method of calculating damages on a classwide basis, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class," precluding certification. 133 S. Ct. at 1433.

2. This case will also allow the Court to resolve the conflict among the courts of appeals over whether damages models that calculate only aggregate damages of the entire class are sufficient to satisfy Rule 23(b)(3)'s predominance requirement.

To obtain class certification, Plaintiffs relied on damages models that did not attempt to calculate each class member's damages based on the actual antitrust impact on that individual member. Rather, Plaintiffs' experts instead proposed damages models that calculated aggregate damages for the entire class as a whole, based on purported average overcharge rates. *See* App. 136a–137a. Plaintiffs have conceded that they rely on an aggregate damages

approach that uses average overcharge rates to supposedly calculate impact on class members in the "aggregate"—a measure that can (at best) calculate only the *average* antitrust impact to the *average* class member, which risks both over- and undercompensating absent class members. 6th Cir., 14-302, Dkt. 64 at 18–19 (Oct. 6, 2014); Dkt. 62 at 20 (Oct. 6, 2014).

These aggregate damages models, which lump together the disparate experiences of individual class members for purposes of calculating damages, will result in an average damages award for all class members, regardless whether they suffered any injury at all. This shortcut approach to damages obscures differences among the class, and will inevitably result in arbitrary and unjustified windfalls to numerous class members who have no valid claim for damages, while undercompensating others who may have suffered legitimate injury. This harms absent class members and defendants alike. And because the members of the certified classes here are so extraordinarily varied, the harms stemming from Plaintiffs' arbitrary damages models are particularly severe.

a. Multiple courts of appeals have rejected the use of aggregate damages models to circumvent the need for individualized analysis of damages. In *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), the Second Circuit recognized that "[r]oughly estimating the gross damages to the class as a whole and only subsequently allowing for the processing of individual claims"—precisely what will occur at any trial in this case—"would inevitably alter defendants' substantive right to pay damages re-

flective of their actual liability." *Id.* at 231. This approach "offends both the Rules Enabling Act and the Due Process Clause" because it will inevitably result in a "damages figure that does not accurately reflect the number of plaintiffs actually injured by defendants and that bears little or no relationship to the amount of economic harm actually caused by defendants." *Ibid.* Moreover, when "the mass aggregation of claims" is used "to mask the prevalence of individual issues," "the right of defendants to challenge the allegations of individual plaintiffs is lost, resulting in a due process violation." *Id.* at 232.

The Fourth Circuit in *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998), rejected a similar approach. There the "plaintiffs' expert based his [damages] testimony on abstract analysis of 'averages'" and "admitted that he had not attempted to calculate the damages that any individual [class member had] suffered" and focused "instead on the fictional typical" class member. *Id.* at 343 (citation omitted). The Fourth Circuit rejected this approach, concluding that the fact that this averaging-based "shortcut was necessary in order for [the] suit to proceed as a class action should have been a caution signal to the district court that class-wide proof of damages was impermissible." *Ibid.*; *see also id.* at 344 ("[P]laintiffs enjoyed the practical advantage of being able to litigate not on behalf of themselves but on behalf of a 'perfect plaintiff' pieced together for litigation.").

The Ninth Circuit similarly recognized in *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974), that "allowing gross damages by treating unsubstantiated claims of class members collectively

significantly alters substantive rights under the antitrust statutes," and that the "enlargement or modification of substantive statutory rights by procedural devices is clearly prohibited by the Enabling Act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure." *Id.* at 90.

The district court below, however, held that Plaintiffs' averaging-based, aggregate damages approach was permissible under the Sixth Circuit's decision in *In re Scrap Metal Antitrust Litigation*, 527 F.3d 517 (6th Cir. 2008). *See* App. 105a. In *Scrap Metal*, the Sixth Circuit held that "[d]amages in an antitrust class action may be determined on a class-wide, or aggregate, basis" and approved the use of a damages model (which was developed by Dr. Jeffrey Leitzinger, the same expert retained by the Direct Purchaser Plaintiffs in this case) that calculated "an aggregate recovery" based on the assumption that each plaintiff had incurred an identical "undercharge." 527 F.3d at 534 (internal quotation marks omitted).

The Tenth Circuit likewise recently rejected a challenge to a similar aggregate damages model in *In re Urethane Antitrust Litigation*, 768 F.3d 1245 (10th Cir. 2014), holding that a class action defendant "has no interest in the method of distributing the aggregate damages award among the class members." *Id.* at 1269.

By sanctioning the use of aggregate damages models, the Sixth and Tenth Circuits have endorsed an improper shortcut that manufactures predominance by ignoring and obscuring individualized issues, impermissibly alters the substantive law, and

violates due process, as the Second, Fourth, and Ninth Circuits have all recognized.

Because they preclude an individualized assessment of the actual injury suffered by class members, aggregate damages models strip defendants of their due process right to present "every available defense." *Lindsey*, 405 U.S. at 66 (internal quotation marks and citation omitted). This approach to damages also violates this Court's holding in *Dukes* that "a class cannot be certified on the premise that [a defendant] will not be entitled to litigate its statutory defenses to individual claims." 131 S. Ct. at 2561; *see also Carrera* v. *Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013).

Sanctioning the use of aggregate damages models violates this Court's holding in *Comcast* that "arbitrary" damages models cannot be used to subvert Rule 23(b)(3)'s predominance requirement. 133 S. Ct. at 1433. As this Court explained, if "any method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be," then "Rule 23(b)(3)'s predominance requirement" would be reduced "to a nullity." *Ibid.* After *Comcast*, "[i]t is now clear . . . that Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance—the rule commands it." *Rail Freight*, 725 F.3d at 255.

The damages models here—which do not reflect the actual injury incurred by any individual class member, but instead purport to represent the aggregate harm to a fictionalized composite of the class, and then divvy out average damages to class mem-

bers regardless of the amount of harm, if any, they have suffered—are the definition of arbitrary and cannot survive the "hard look" that *Comcast* and Rule 23 require.

In fact, the Direct Purchasers confirmed the arbitrariness of their expert's model when they attempted to defend it below by claiming that it "understates the overall damages." 6th Cir., No. 14-302, Dkt. 69 at 14 (Nov. 10, 2014) (emphasis omitted). Even if that were true (it is not), due process prohibits class representatives from sacrificing the claims of absent class members merely to obtain class certification. *See Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 810-14 (1985) (due process protects rights of "absent plaintiff class members").

As this Court has instructed, Rule 23 "must be . . . applied with the interests of absent class members in close view," and Rule 23(b)(3)'s predominance requirement is specifically designed to "protect[] absentees by blocking unwarranted or overbroad class definitions," because its "mission" is to "assure the class cohesion that legitimizes representative action in the first place." *Amchem*, 521 U.S. at 620, 623, 629. To allow class representatives to rely on aggregate damages models that purport to systematically understate absent class members' damages, merely in order to manufacture predominance and obtain certification, would violate these principles and "create[] perverse incentives for class representatives to place at risk potentially valid claims for monetary relief." *Dukes*, 131 S. Ct. at 2559; *see also Amchem*, 521 U.S. at 629 ("[T]he rulemakers' prescriptions for class actions may be endangered by 'those who embrace [Rule 23] too enthu-

siastically just as [they are by] those who approach [the Rule] with distaste.'" (citation omitted; alterations in original)).

The Court should grant review to resolve the conflict over whether aggregate damages models can be used to satisfy Rule 23(b)(3)'s predominance requirement, and whether the intractable individual damages issues in this case preclude class certification under *Comcast*.

III. This Case Is an Excellent Vehicle to Resolve the Questions Presented.

This unprecedented case involves two sprawling classes that together cover potentially *hundreds of millions* of widely disparate class members, many of whom have suffered no injuries; a decade-long class period; and treble damages potentially exceeding $9 billion. This radical class certification ruling sets a dangerous precedent: If these classes can be certified, there is no limit to the bounds of Rule 23. The ruling also cleanly implicates at least three mature, entrenched, and deepening circuit splits. There is thus no better vehicle to address these issues. And given the crushing liability at stake, these critical issues will likely evade the Court's review if the petition is not granted and Defendants are forced to settle before there is a litigated final judgment.

The Sixth Circuit's unusually substantive decision declining to review the district court's certification order provides the Court with the opportunity to resolve these conflicts so that the district court may correct its certification decisions prior to a trial on the merits. Orders from appellate courts declining to review Rule 23(f) petitions rarely include such sub-

stantive analysis. But here the Sixth Circuit analyzed whether the district court abused its discretion in certifying the classes. App. 5a–9a. Because the Sixth Circuit's substantive decision reveals its reasoning in concluding that the district court did not err, it squarely presents the conflicts over Article III standing and individualized damages issues for this Court's review.

This Court has made clear that its jurisdiction extends to court of appeals decisions denying permission to appeal. *See Hohn* v. *United States*, 524 U.S. 236, 238–41 (1998); *United States* v. *Nixon*, 418 U.S. 690, 692 (1974); 28 U.S.C. § 1254(1) (certiorari jurisdiction extends to "any civil or criminal case" that is "in the court of appeals"). The Court also has jurisdiction to review the merits of the district court's certification order. In fact, that is precisely what the Court did in *Standard Fire Insurance Co.* v. *Knowles*, 133 S. Ct. 1345 (2013), an analogous case in which petitioners sought review of a remand decision arising under the Class Action Fairness Act. Though the court of appeals in *Standard Fire* declined to review the district court's order, the Court granted review over the plaintiff's objection, reviewed the district court's reasoning, and reversed. *Id.* at 1348; *see also Dart Cherokee Basis Operating Co.* v. *Owens*, 134 S. Ct. 1788 (2014). The Court should do the same here.

Plaintiffs have nonetheless argued below that this Court cannot address whether class certification is appropriate here because, after engaging in a review of the merits of the district court's ruling, the Sixth Circuit denied Defendants' Rule 23(f) petition. If accepted, this formalistic distinction would provide a roadmap for the courts of appeals to insulate class

certification decisions from this Court's review, which would frustrate the purpose of interlocutory review under Rule 23(f). *See* Fed. R. Civ. P. 23(f) advisory committee's note (1998) (emphasizing intended "expansion of present opportunities to appeal" under Rule 23(f), particularly where the certification "decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation"). By Plaintiffs' lights, the Ninth Circuit in *Dukes* and the Third Circuit in *Comcast* could have precluded this Court's review if they had issued the exact same opinions upholding certification and simply labeled them as denials of Rule 23(f) petitions. That cannot be correct, and this Court's prior decisions in analogous situations demonstrate that it is not.

* * *

The courts below have sanctioned a shortcut approach to class certification that impermissibly alters the law, masks differences among class members through admitted averaging and arbitrary estimates, and strips Defendants of their right to contest individual claims. As a result, Defendants now face the prospect of over $9 billion in treble damages even though many class members suffered no injury whatsoever, and even though fairly calculating individualized damages—an undertaking Plaintiffs did not even attempt—is a task of overwhelming complexity. The Court should grant review to establish uniform standards for class certification that comport with the constitutional mandates of Article III and due process, as well as the requirements of Rule

23, Rule 82, and the Rules Enabling Act, and reverse the certification of the sweeping classes here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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