Supreme Court, U.S.
FILED
MAR 9 - 2015
OFFICE OF THE CLERK

No. 14-1091

IN THE

Supreme Court of the United States

THE DOW CHEMICAL COMPANY,
Petitioner,

v.

INDUSTRIAL POLYMERS, INC., QUABAUG CORP., AND SEEGOTT HOLDINGS, INC., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in certifying a class under Federal Rule of Civil Procedure 23(b)(3), courts may *presume* class-wide injury from an alleged price-fixing agreement, even when prices are individually negotiated and individual purchasers frequently succeed in negotiating away allegedly collusive overcharges.

2. Whether a class may be certified or a class-wide damages judgment affirmed where plaintiffs' common "proof" of damages is a model that (a) does not purport to determine the actual damages of most class members, but instead applies an "average" overcharge estimated from a sample of transactions of very different purchasers, or (b) assumes that defendants engaged in multiple antitrust violations, even though plaintiffs attempted to prove only one violation at trial.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption.

RULE 26.9 STATEMENT

The Dow Chemical Company ("Dow") is a publicly held corporation with no parent corporation. No publicly held corporation owns more than 10 percent of Dow's stock.

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PETITION FOR A WRIT OF CERTIORARI

The Dow Chemical Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at 768 F.3d 1245 and reproduced at Pet. App. 1a-45a. The Tenth Circuit's unpublished order denying rehearing is reproduced at Pet. App. 123a. The district court's opinion granting class certification is reported at 251 F.R.D. 629 and reproduced at Pet. App. 85a-122a. The district court's opinion denying Dow's motion to decertify the class and its post-trial motion for judgment as a matter of law is unpublished and reproduced at Pet. App. 46a-84a.

JURISDICTION

The court of appeals entered judgment on September 29, 2014, Pet. App. 1a, and denied rehearing on November 7, 2014, Pet. App. 123a. On December 22, 2014, Justice Sotomayor extended the time for filing a petition for a writ of certiorari to and including March 9, 2015. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

This case involves Federal Rule of Civil Procedure 23(b)(3), the Rules Enabling Act, 28 U.S.C. §2072, and the Clayton Act provision authorizing a private cause of action to seek damages for antitrust violations, 15 U.S.C. §15(a), which are reproduced at Pet. App. 124a-126a.

INTRODUCTION

This case presents important and recurring questions of class action procedure that arise from the lower courts' widespread use of "shortcuts" that permit class certification and class-wide adjudication of complex antitrust damages actions by stripping defendants of the defenses they have against *individual* claims. Plaintiffs are a class of industrial purchasers of polyurethane chemicals who alleged that defendants colluded to issue coordinated price increase announcements, and then tried to make those proposed increases "stick." It is undisputed that actual prices were set through robust price negotiations, and that class members—many large corporations with unquestioned purchasing power—frequently negotiated away *any* increase. These market realities should have prevented class certification. The presence of one issue that could be proved using *common* evidence (*i.e.*, the existence of a conspiracy) did not predominate over issues requiring *individualized* evidence (*i.e.*, whether each plaintiff paid overcharges and the amount of each plaintiff's damages).

The court of appeals, however, upheld the use of two shortcuts that enabled the district court to certify a class—and to sustain a trebled-damages judgment in excess of $1 billion—in a case that the framers of Rule 23(b)(3) would never have imagined suitable for class treatment. In so ruling, the Tenth Circuit created one new circuit split, deepened another, and flouted recent pronouncements by this Court that were clearly intended to return the class action device to its original, more modest roots.

First, the Tenth Circuit endorsed the misguided "prevailing view" among lower courts that alleged price-fixing creates "an inference of class-wide impact

even when prices are individually negotiated"—an inference the court deemed "especially strong" in light of "evidence that the conspiracy artificially inflated the baseline for price negotiations." Pet. App. 13a. The court relied on this "inference"—which it applied as a "presumption"—to find that injury was a common issue that could be tried on class-wide basis, rather than through inquiries into the fact-specific negotiations of individual plaintiffs. In so ruling, the Tenth Circuit created a clear circuit split. The First and Fifth Circuits have held that predominance cannot be based on a presumption of class-wide injury where prices are individually negotiated; in such circumstances, "proof of antitrust injury is bound to be individualized," 2A P.E. Areeda & H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* §398(c), at 423, n.14 (2013). The Eighth Circuit has likewise ruled that proof of a price-fixing conspiracy is not proof of common injury, and class-wide harm cannot be assumed where there is evidence that some purchasers avoid overcharges.

The Tenth Circuit is not unique in its zeal to resolve complex antitrust lawsuits on a class basis. District courts routinely presume class-wide harm even where prices are individually negotiated. Because interlocutory review of these decisions is rare and class certification usually coerces settlement, the presumption will continue to be used in the district courts of many circuits beyond the Tenth unless this Court intervenes now.

Use of that presumption, moreover, violates defendants' due process rights and the Rules Enabling Act. Petitioner's right "to litigate its statutory defenses to individual claims," *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011),

included the fundamental right to show that it was not liable to individual plaintiffs that suffered no injury because they experienced no price increases. But by presuming class-wide injury, the lower courts stripped Dow of that right: the nature of class adjudication, which precludes litigation focused on thousands of unnamed class members, prevented Dow from litigating its defense to a key element of antitrust liability—impact—for *individual* claims.

Second, the Tenth Circuit approved class certification based on a shortcut that relieved plaintiffs of establishing damages on a class-wide basis. Plaintiffs' expert developed models to estimate overcharges on sales to one-quarter of the class, and found no overcharges on 10% of these transactions. He then extrapolated from these data to calculate damages for the rest of the class. But he assumed that *every* extrapolated transaction involved an overcharge. His extrapolations thus purported to prove that named plaintiff Quabaug Corporation was entitled to damages, even though evidence showed that it successfully negotiated away price hikes. The extrapolations also purportedly "proved" damages during periods when the models themselves found prices were competitive. In approving an aggregate damages award based on such extrapolations, the Tenth Circuit deepened an existing split between the Sixth Circuit and the Second, Fourth, Seventh and Ninth Circuits, which have rejected use of such methodologies because they clearly abridge defendants' rights, in violation of due process principles and the Rules Enabling Act.

Finally, the Tenth Circuit excused yet another defect in plaintiffs' damages methodology. Their damages model was designed on the assumption that defendants violated the antitrust laws in two distinct

ways—price fixing and market allocation. At trial, however, plaintiffs eschewed the "customer and market allocation" part of their original case. Notwithstanding the much more limited theory of liability plaintiffs tried to prove, their expert made no adjustment to his model. This is the same fatal flaw, *by the same expert*, condemned in *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013).

This Court should grant the petition to resolve the conflicts among the circuits and continue the course it set in *Wal-Mart* and *Comcast* of returning Rule 23 to the limited procedural device it was intended to be when it was adopted in 1966.

STATEMENT OF THE CASE

1. This case involves an alleged conspiracy affecting four categories of chemicals used to make polyurethane products: polyether polyols, TDI, MDI, and systems products. Pet. App. 3a. The plaintiff class is composed of approximately 2,400 businesses that purchase those chemicals to make polyurethanes for a wide variety of consumer and industrial products, including seat cushions, mattresses, insulation, building materials, coatings, adhesives, and sealants.

As the district court observed, the four categories of chemicals each contains "myriad" chemicals with different "pricing structures." Pet. App. 107a. Actual prices and terms of sale vary from customer to customer, because they are determined in "individual[ized] negotiations" between the customer and manufacturer. *Id.* Indeed, the fact of individualized price negotiation is an integral component of the alleged conspiracy. According to plaintiffs, this was not a conspiracy to set actual prices, but "to issue announcements of price increases

by an amount within some range and to try to match those price increases and then to stick to them as best they could" in negotiations with individual customers. AA0862.

In opposing plaintiffs' motion to certify the class, defendants showed that there are compelling reasons why such an alleged conspiracy, even if it occurred, would not have harmed all customers. Some customers were protected by contractual provisions that prohibited price hikes for the duration of the contract. AA2007, 2012-14, 2018-19; AA2050-52, 2056-57, 2059-62. Some had bargaining leverage because they could purchase chemicals from alternative suppliers, not alleged to be part of the conspiracy (AA0402-03; AA1833-37, 1875-76, 1879-80), or could use non-polyurethane substitutes (AA0402-03; AA1838; AA2010, 2016, 2019-20; AA2049, 2055-56, 2058). And some were sophisticated corporations that used the volume of their purchases—and the threat of taking business to another manufacturer—to obtain lower prices. See, *e.g.*, AA2007, AA2008, AA2014, AA2054. As the district court found, that is what named plaintiff Quabaug did when it "refused to take the price increase" from Huntsman in January 2001 and began "purchasing its system from Bayer at five cents per pound less." Pet. App. 11a.

2. Despite the individualized negotiations and variance in actual prices, the district court certified a class of industrial purchasers of polyurethane products. Pet. App. 122a. The court acknowledged that sales of "basic chemicals" (*i.e.*, MDI, TDI, and polyols) "were characterized by individual negotiations, variations in contractual relationships and the like." *Id.* at 104a. It ruled, however, that class-wide impact could be shown through common

evidence that defendants "coordinated price increase announcements," which "presumably establishes an artificially inflated baseline from which any individualized negotiations would proceed." *Id.* In the case of systems (which are unique packages of chemicals and additives that are custom-designed to meet the needs of particular customers), the court thought class-wide impact could be shown with common evidence because systems prices are based "to some extent" on the "costs of the basic chemicals that make up the systems." *Id.* at 106a.

The court was "not nearly as persuaded that the issue of damages is amenable to class-wide proof," given "the myriad of products, pricing structures, individual[ized] negotiations and contracts at issue." Pet. App. 107a. Indeed, as noted, the court found that named plaintiff Quabaug—a "typical" class member—had been able to negotiate a substantial price *decrease*. *Id.* at 119a. But the "possibility that individual issues may predominate the issue of damages," the court concluded, could be addressed by bifurcating the damages phase or decertifying the class as to individualized damages. *Id.* at 108a.

3. Defendants sought interlocutory review under Rule 23(f), which the Tenth Circuit denied. *In re Urethane Antitrust Litig.*, No. 08-602 (10th Cir. Sept. 2, 2008). All the defendants except Dow settled. Pet. App. 4a.

Plaintiffs then retained a new statistical expert, Dr. James McClave, who developed regression models and extrapolations purporting to show class-wide injury and to quantify damages to the class. See Pet. App. 17a. After moving unsuccessfully to exclude McClave's testimony, Dow moved to decertify the class, arguing that his models did not show injury and damages on a class-wide basis, and that

certification was improper under *Wal-Mart*, a decision issued after the class was certified. The court deferred consideration of the decertification motion until after trial. AA0716.

4. At trial, Dr. McClave testified that his statistical analysis showed "'that nearly all class members had been impacted or overcharged'" during the conspiracy. Pet. App. 22a. McClave's analysis included regression modeling that purported to predict the prices of TDI, MDI, and polyols (but not systems) in the absence of collusion. AA0970, 0992-94. He explicitly assumed that prices were distorted by two antitrust violations—(1) price-fixing and (2) allocation of customers and markets. Using his models and data from the purchases of approximately 25% of the class, McClave estimated but-for "competitive prices," and deemed the differences between them and actual prices "overcharge[s]." AA0968.

For the 25% of the class whose transactions he modeled, McClave totaled the "overcharges" he observed. To calculate damages for the remaining 75% of class members, however, he relied solely on "extrapolations." AA0879-80; AA1033-34. Although he had found *no* overcharges on 10% of the transactions he modeled (AA2416), he assumed that *every* extrapolated transaction involved an overcharge (AA0879-80; AA1420-23; AA2415-16). He thus calculated damages for 75% of the class by applying his contrived average percentage overcharge to *every* transaction. AA1033-36. Adding the damages calculated by the two methods, McClave testified that total damages for the class were $1,125,608,094 between January 1, 1999 and December 31, 2003. Between November 24, 2000 and December 31, 2003,

McClave said damages were $496,680,046.[1] AA1007; AA1587-88.

5. Dow's economic expert, Dr. Keith Ugone, testified that several fundamental errors rendered McClave's models wholly unreliable. AA1393-419. Ugone also criticized McClave's extrapolations because they assumed damages for every transaction regardless of whether the customer actually was overcharged. AA1419-28.

Dow also showed that McClave's assumption of a uniform overcharge on every transaction is contradicted by evidence of the actual transactions themselves. Dow provided numerous examples of a broad array of customers that refused to accept announced price increases and used their bargaining power to force manufacturers to make price concessions to retain their business. Foamex repeatedly played the defendants off each other to get better prices. AA1330-36; AA1768-70. Great Dane benefited from a "price war" between Dow and BASF, AA1703, while Woodbridge received price protections and offers of "lower prices almost weekly in an attempt to secure" its business, AA1735-37. Leggett and Platt even sent Dow an email saying that it was throwing Dow's price increase announcement in the "circle file" and that Dow "should check out who is sending this B S and terminate them immediately—before someone reminds us of announced recent price increases that deteriorate below the existing price." AA1743; *see also, e.g.*, AA1228-30 (GE Appliances

[1] McClave provided the latter calculation because the statute of limitations barred recovery of damages prior to November 24, 2000, absent a finding of fraudulent concealment. Because the jury found no overpayment by the class plaintiffs prior to November 24, 2000, the question of fraudulent concealment was not addressed by the jury.

"play[ed] Bayer and Dow off each other"); AA1672 (Dow offered GE Appliances $3 million to switch business from Bayer); AA1445; AA1703-06 (Whirlpool switched its business from Bayer to BASF because Bayer announced a price increase, and BASF countered with a lower price); AA1686 (Bayer email stating that Huber "is not changing the price in their system" and Bayer "will not be able to get a higher price ... no matter what we invoice them!"); AA1635-38 (Bayer secured purchases from JM Huber "at $0.005/lb less at the expense of Huntsman"); AA1733 (Bayer reduced prices to FFP to meet a "very aggressive offer" from Dow); AA1683-85 (customers switching to Huntsman to avoid Bayer price increase).

These are not isolated examples. As summarized at trial by Dow's economist, Professor Kenneth Elzinga, defendants' internal documents revealed hundreds of instances in which one manufacturer offered to reduce prices to obtain new business or to retain existing business. AA1330-37, 1341-43.

Plaintiffs did not dispute that this competition occurred. Instead, their economist (Dr. Solow) claimed it was just evidence of "cheating" or a temporary "break[] down" of the cartel. SA2723-24. However labeled, the undisputed trial evidence confirmed that manufacturers were not able uniformly to make the announced price increases "stick" in individual negotiations. AA1527; AA1279-92, 1303. In addition, prices fluctuated, moved in different directions, and often *declined* after price increase announcements. AA1275-305; AA1756; AA1761-67. There were thus always lower-priced alternatives to the "price leader." *Id.* These wildly varying circumstances made it impossible to prove class-wide injury in one stroke.

6. Nonetheless, the jury found a conspiracy, but no overpayment before November 24, 2000, and damages of $400,049,039 thereafter. AA0513-15. In conjunction with briefing on Dow's motion for judgment as a matter of law, the district court allowed the parties to supplement the outstanding motion to decertify. Pet. App. 56a. The district court then denied both motions.

Because the decertification motion was filed on the "eve of trial," the court deemed it untimely except as to "issues based on events occurring at trial or based on the Supreme Court's recent *Comcast* opinion." *Id.* at 56a-57a. It then ruled that the arguments "failed on their merits." *Id.* at 58a.

The court acknowledged that McClave's models showed that some class members "did not suffer any damages." Pet. App. 58a. The court "agree[d] with plaintiffs," however, that "all members of the class may be shown to have been impacted by a conspiracy that elevates prices above the competitive level, even if some members may have mitigated their damages or otherwise did not suffer damages that may be quantified." *Id.*

The court rejected Dow's challenge to McClave's extrapolations, saying Dow did not seek to exclude his testimony on this basis, no expert opinion showed the "method was unreliable," and no "relevant precedent" supported Dow's argument. Pet. App. 59a. The court also rejected Dow's argument that, because McClave assumed defendants engaged in two antitrust violations and his models were not adjusted when plaintiffs chose to pursue only one violation at trial, those models were invalid under *Comcast*. *Id.* at 62a.

The district court also rejected Dow's argument that the jury verdict establishes that McClave's models were wholly unreliable. The jury found *no* overcharges before November 2000—a 23-month period during which McClave's models predicted over *$620 million* in "overcharges." Because the models were identical for both periods, the jury had no basis for concluding that the models accurately predicted overcharges after November 2000, but not before. Nevertheless, the court affirmed the jury's award of damages for the latter period. Pet. App. 67a-68a.

After trebling the verdict and subtracting amounts paid by the settling defendants, the court entered judgment of $1,060,847,117, plus interest. Pet. App. 46a-48a.

7. The Tenth Circuit affirmed. Acknowledging "that some of the plaintiffs may have successfully avoided damages" through negotiations, the court held that the district court had discretion to treat impact as a common question because, under "the prevailing view, price-fixing affects all market participants, creating an inference of class-wide impact even when prices are individually negotiated. Pet. App. 13a. That inference "is especially strong" where there is "evidence that the conspiracy artificially inflated the baseline for price negotiations." *Id.* The "presence of individualized damages issues," the court added, "would not change this result." *Id.* 15a.

The Tenth Circuit rejected Dow's argument that plaintiffs' use of extrapolation violated *Wal-Mart*'s prohibition against "Trial by Formula." 131 S. Ct. at 2561. The court deemed *Wal-Mart* inapplicable because plaintiffs used extrapolation "only to approximate damages," not "to prove Dow's liability." Pet. App. 18a.

The Tenth Circuit also excused McClave's failure to adjust his damages models to correspond with plaintiffs' theory of liability at trial. It reasoned that, "unlike the claimants in *Comcast*, our plaintiffs did not concede that class certification required a method to prove class-wide damages through a common methodology." Pet. App. 20a. The court also reasoned that, because McClave testified that "'nearly all class members had been impacted or overcharged,'" his testimony allowed the district court "to find a 'fit' between plaintiffs' theory of liability (a nationwide conspiracy to fix prices) and the theory of class-wide damages." *Id.* at 22a. The "'disconnect'" between the antitrust violations McClave assumed in constructing his models and the violation plaintiffs pursued at trial was irrelevant because McClave's "report was never introduced into evidence," and the "district court could see that the common issues of liability had predominated over individualized issues" at trial. *Id.* at 24a.

The Tenth Circuit also saw no significance to the fact that McClave's models found over $620 million in overcharges before November 24, 2000, but the jury found none. The court speculated that the "jury might have limited the conspiracy period while agreeing with Dr. McClave's analysis of pricing after November 24, 2000." Pet. App. 41a.

REASONS FOR GRANTING THE PETITION

I. WHETHER CLASS-WIDE HARM CAN BE PRESUMED IN ANTITRUST CASES IS A RECURRING AND IMPORTANT ISSUE THAT DIVIDES THE LOWER COURTS.

The propriety of presuming class-wide harm to satisfy Rule 23(b)(3)'s predominance requirement in antitrust cases is a recurring and critically important

issue that has divided the lower courts. Plaintiffs' ability to prove injury to all class members is critical to meeting the predominance requirement because the one issue that can be established through common proof (*i.e.*, collusion) "does not establish civil liability under §4 of the Clayton Act." *Alabama* v. *Blue Bird Body Co.*, 573 F.2d 309, 317 (5th Cir. 1978). Even "in a case involving horizontal price fixing, ... plaintiffs [a]re still required to 'show that the conspiracy caused *them* an injury for which the antitrust laws provide relief.'" *Atl. Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 344 (1990).[2] Predominance therefore requires a showing, "through common evidence, that all class members were in fact injured." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013); see also *Blades* v. *Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005) ("plaintiffs need to demonstrate that common issues prevail as to the existence of a conspiracy *and* the fact of injury") (emphasis added).

Here, plaintiffs alleged that the conspiracy injured purchasers by making them pay supra-competitive prices. That should have precluded class certification because, as the leading antitrust treatise explains, "[w]hen transaction prices are negotiated," "proof of antitrust injury is bound to be individualized." 2A Areeda & Hovenkamp, *supra*, §398c, n.14. The Tenth Circuit, however, affirmed class certification by embracing the presumption of class-wide harm,[3]

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[2] *See also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008) ("liability ... requires showing that class members were injured"); *Windham* v. *Am. Brands, Inc.*, 565 F.2d 59, 65 (4th Cir. 1977) (en banc) ("a mere finding of violation does not result in liability").

[3] Although called an "inference," the device the Tenth Circuit actually used to justify the finding of predominance was a

commonly used by district courts to facilitate class certification in complex antitrust cases. That decision creates a clear circuit conflict and is wrong. Presuming class-wide harm violates the original understanding of Rule 23(b)(3). Worse, it strips defendants of their defenses to individual claims, in violation of the Rules Enabling Act and due process.

A. The Courts Are Divided Over Whether Class-Wide Harm Can Be Presumed When Prices Are Negotiated.

In contrast to the Tenth Circuit, the First, Fifth and Eighth Circuits do not permit use of a presumption of class-wide harm where, as here, actual prices vary as a result of individual negotiations or other factors. In *Robinson* v. *Texas Automobile Dealers Ass'n*, plaintiffs alleged car dealers conspired to charge a separate vehicle tax in addition to the regular sales price. 387 F.3d 416, 419 (5th Cir. 2004). In certifying the class, the district court presumed that the separate charge—which plainly increased the starting point for negotiations—"increase[d] the final purchase price for every consumer." *Id.* at 423. The Fifth Circuit rejected this presumption, stating that it "defie[d] the realities of haggling that ensues in the American [automobile] market." *Id.* Because purchasers could negotiate away the additional charge, proof of impact required

"presumption"—a conclusion that defendants had the burden of rebutting. Indeed, it was an irrebuttable presumption, since the court applied it despite the substantial evidence that individual class members were able to avoid the announced price increases through individual negotiations. *See* 21B C.A. Wright & K.W. Graham, Jr., *Federal Practice and Procedure: Evidence* §5122.1, at 419-23 (2d ed. 2005) (distinguishing inference and presumption); *see also infra* §I.B. (showing presumption is effectively irrebuttable).

"evidence regarding *each purported class member and his transaction,*" which "would destroy any alleged predominance." *Id.* at 423-24; see also *Blue Bird Body*, 573 F.3d at 327-28 (reversing class certification in case of alleged conspiracy among school bus manufacturers because "impact" is a question unique to each purchaser and, "given the diverse nature of the school bus market," the Fifth Circuit had "difficulty envisioning how the plaintiffs can prove in a manageable manner that the conspiracy ... did in fact cause damage").

Similarly, in *In re New Motor Vehicles Canadian Export Antitrust Litigation*, the First Circuit reversed class certification in a case involving an alleged conspiracy to increase car prices by preventing importation of lower-priced Canadian cars. Noting plaintiffs' obligation to show "that each member of the class was in fact injured," the court rejected plaintiffs' reliance "on an inference that any upward pressure on national pricing would necessarily raise the prices actually paid by individual consumers." 522 F.3d 6, 28-29 (1st Cir. 2008). "There is an intuitive appeal to this theory," the First Circuit stated, "but intuitive appeal is not enough." *Id.* at 29.

Finally, the Eighth Circuit has recognized that evidence that a conspiracy raised average prices, or prices for some class members, does not provide a basis for presuming that all class members have been injured. In *Blades*, farmers alleged a conspiracy to charge supra-competitive list price premiums on genetically modified (GM) seeds. Although plaintiffs produced "evidence suggesting that appellees adhered to a price-fixing agreement that raised the average price of GM seeds," 400 F.3d at 573, the Eighth Circuit affirmed denial of class certification. Noting that prices for the seeds "varied widely, and [that]

some farmers paid negligible premiums or no premiums at all," *id.* at 572, the court explained that "[t]he undisputed presence of negligible and zero list premiums indicates that if appellees performed their agreement, their performance was not across the board," *id.* at 573. To show injury from price inflation, therefore, *each* plaintiff would need to present evidence that the price of the seeds *he or she purchased* was inflated. *Id.* at 573-74.

The class in this case could not and would not have been certified in the First, Fifth, or Eighth Circuits. Evidence that a conspiracy raised the starting point for negotiations, or raised prices for some buyers, would not remotely permit a court to presume that *all* buyers were harmed, given "the diverse nature of the [polyurethane] market," *Blue Bird Body*, 573 F.3d 327-28, "the realities of the haggling that ensues in th[at] market," *Robinson*, 387 F.3d at 423, and "[t]he undisputed presence of negligible and zero [damage transactions]," *Blades*, 400 F.3d at 573. Evidence that creates an inference that prices paid by all buyers increased "is not enough." *New Motor Vehicles*, 522 F.3d at 29. Thus, if instead of proceeding in Kansas, by the luck of the MDL draw, the case had been assigned to a court in Nebraska, Massachusetts, or Texas, there would be no $1 billion plus judgment. Outcome by geography is unacceptable and only this Court can correct it.

Moreover, the presumption of class-wide harm is routinely (and improperly) used to certify classes in price-fixing cases. The district court decision on which the Tenth Circuit relied, see Pet. App.13a & n.7, explained that a "*litany* of antitrust price-fixing cases ... have ... rejected the argument that diverse purchasing practices prevent a showing of common impact." *In re Foundry Resins Antitrust Litig.*, 242

F.R.D. 393, 410 (S.D. Ohio 2007) (emphasis added). See also, *e.g.*, *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 326, 345 (E.D. Mich. 2001) ("courts have *routinely* rejected ... [defendants'] arguments" based on "differences in prices paid by class members, where the plaintiffs show that the 'minimum baseline for beginning negotiations, or the range of prices which resulted from negotiations, was artificially raised'") (emphasis added); *In re Commercial Tissue Prods.*, 183 F.R.D. 589, 595 (N.D. Fla. 1998) (same); J. Davis & E. Cramer, *Antitrust Class Certification and The Politics of Procedure*, 17 Geo. Mason L. Rev. 969, 986 (2010) (plaintiffs seeking certification on the theory that "the baseline from which prices were set is higher" "win this battle *the vast majority of the time*") (emphasis added).

Despite its widespread nature, the practice of presuming class-wide injury even where prices are individually negotiated typically escapes appellate review. It is difficult to obtain interlocutory review, 2 J.M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* §7.2 (10th ed. 2013) (circuits agree that interlocutory "review of class certification decisions should not be routine"), and class certification frequently forces settlement, see *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978); Fed. R. Civ. P. 23, advisory committee's 1998 note on subd. (f). There is accordingly no reason to allow the issue to "percolate." This case presents a rare opportunity for this Court to address this profoundly important question of class-action procedure in antitrust litigation.

B. Presuming Class-Wide Harm Where Prices Are Negotiated Evades The Stringent Requirements Of Rule 23 And Violates The Rules Enabling Act And Due Process.

By using a presumption of class-wide harm, the Tenth Circuit effectively eviscerated the exacting requirements of Rule 23, and violated the Rules Enabling Act and Dow's due process rights.

As noted earlier, under the antitrust laws, proof of individual injury is a liability prerequisite, not a question of damages. *Atl. Richfield*, 495 U.S. at 344 (even in price-fixing cases, plaintiffs are required to show "'that the conspiracy caused *them* an injury'"); *J. Truett Payne Co.* v. *Chrysler*, 451 U.S. 557, 570 (1981) (Powell, Brennan, Marshall & Blackmun, J.J., concurring) ("plaintiff has the burden of proving the fact of antirust injury.... Only when this fact has been proved may a court properly be lenient in the evidence it requires to prove the amount of damages."). If the plaintiffs here had brought individual actions, each would have had to prove it paid an overcharge. Rule 23 does not lessen that burden. *Wal-Mart*, 131 S. Ct. at 2561 (rules of procedure may not "'abridge ... any substantive right'").

The Tenth Circuit lost sight of the fact that class certification is extraordinary, not a procedure to be routinely deployed whenever there is numerosity. *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," a principle that applies even where plaintiffs are attempting to "'vindicate the policies underlying the antitrust' laws"). Under Rule 23's stringent requirements, the existence of widespread

negotiations by industrial customers who played manufacturers off each other to avoid overcharges should have precluded certification. See *supra* at 6, 9-10.

In addition, use of a presumption of class-wide harm to certify a class strips defendants like Dow of their right to assert "defenses to individual claims," *Wal-Mart*, 131 S. Ct. at 2561, because certification precludes the assertion of those defenses. In a class action, defendants can obtain discovery from named plaintiffs to determine if they were injured and will adequately represent the class. But defendants cannot seek discovery on the merits of the claims of each absent class member. A "defendant seeking discovery from absent class members bears the burden of demonstrating that the discovery concerns common, rather than individualized, issues." 3 W.B. Rubenstein, *Newberg on Class Actions* §9:16 (5th ed. 2013). Indeed, defendants cannot "propound discovery on each class member's individualized issues, [as] such discovery would frustrate the rationale behind Rule 23's representative approach to litigation." *Id.*

Thus, class certification effectively extinguishes a defendant's ability and right to litigate impact/liability defenses to individual claims. Without discovery, a defendant cannot mount those defenses at trial, and any effort to do so would be inconsistent with—indeed, in defiance of—the class certification order itself.

Accordingly, Dow introduced evidence at trial of some individual negotiations (which it obtained from defendants' own files or from third-parties) to defend against the claim that there was a conspiracy. But Dow could not introduce the individualized (and voluminous) evidence needed to show that it was not

liable to hundreds of individual class members who avoided injury-causing overcharges through negotiations. Submission of such evidence would have defeated the purpose of certification—*i.e.*, promoting "efficiency and economy." *Am. Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 553 (1974). Respondents were thus wrong in claiming that "Dow had the opportunity to introduce evidence at trial" that individual class members suffered no impact, and instead elected "to pursue a preclusive class-wide defense verdict on all issues." Opp. to Petn. for Reh'g 10. Dow had no choice given the certification order but to litigate on a class-wide basis. As a 2010 law review article co-authored by an antitrust class action practitioner explains, "the reality is that" antitrust class-action trials "*rarely, if ever*" address "common impact." Davis & Cramer, *supra*, at 973 (emphasis added).

In cases like this, therefore, the presumption of class-wide harm operates as a Catch 22: the presumption permits use of procedures that effectively preclude rebuttal of the presumption for individual claims. And there is no realistic way to escape this Catch 22. Interlocutory review of certification rulings is exceedingly rare, *supra* at 18, as are decisions to reconsider class certification rulings. 3 *Newberg*, *supra*, §7:35 at 181.

Where prices are individually negotiated, therefore, class certification based on a presumption of harm deprives a defendant of its right under the antitrust laws to challenge an individual plaintiff's proof of injury. This alteration of a defendant's substantive rights violates the Rules Enabling Act, which provides that the rules of procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). It also violates due process. *Lindsey*

v. *Normet*, 405 U.S. 56, 66 (1972) ("'Due process requires that there be an opportunity to present every available defense'"). Using the presumption to find predominance is thus tantamount to certifying a class on the impermissible "premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *Wal-Mart*, 131 S. Ct. 2561.

These improprieties are the product of a belief that every alleged antitrust violation must have a class action damages remedy. That was not the intent of Rule 23(b)(3), which was intended to "achieve economies of time, effort, and expense, ... *without sacrificing procedural fairness or bringing about other undesirable results.*" Fed. R. Civ. P. 23 advisory committee's 1966 note on subd. (b)(3) (emphasis added). In fact, the drafters of Rule 23 made clear that not all antitrust cases are suitable for class treatment. *Id.* ("[p]rivate damage claims by numerous individuals arising out of concerted antitrust violations may *or may not* involve predominating common questions" warranting certification under subsection (b)(3)) (emphasis added). Yet, "for at least two decades courts have *routinely* certified classes in antitrust cases in which direct purchasers seek damages—perhaps more regularly *than in any other field of substantive law.*" Davis & Cramer, *supra*, at 983-84 (emphases added).

To be sure, class-wide harm may properly be presumed in a consumer class action, where prices are not negotiated, so proof of a collusive price increase necessarily proves injury to all purchasers. See *Blue Bird Body*, 573 F.2d at 324. No such proof was or could have been offered here. And what makes the lower courts' rights-abridging presumption particularly illegitimate is that many plaintiffs have

the financial wherewithal and economic motivation to file suit individually. Indeed, some class members opted out and filed their own trebled damages suits.[4]

C. This Case Is An Excellent Vehicle To Resolve The Propriety Of Presuming Class-Wide Injury.

Respondents argued below (and presumably will do so again here) that the presumption of injury fell out of the case because there was ample evidence at trial—including, most significantly, statistical evidence—to prove that nearly all class members paid injury-causing overcharges. Opp. to Petn. for Reh'g 4-8. In fact, the Tenth Circuit squarely held that Dr. McClave's extrapolations—which were the *only* statistical evidence of the overcharges supposedly paid by three-fourths of the class—did *not* establish class-wide harm, but were used only to calculate damages. More fundamentally, the practice of using statistical models to prove class-wide injury where prices are negotiated is itself an impermissible alteration of defendants' substantive rights, and thus underscores—rather than renders moot—the impropriety of using a presumption to justify certification.

1. In this case, the presumption was dispositive of the issue of class-wide harm. Beyond approving the district court's reliance on that presumption, Pet. App. 13a, the Tenth Circuit cited evidence proving *only* the prerequisites for invoking the presumption, *not* evidence that each plaintiff was injured. See *id.* at 14a (Dow witnesses "acknowledged that price-increase announcements had affected the *starting*

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[4] *See In re Urethane Antitrust Litig.*, 2013 WL 6587972 (D. Kan., Dec. 16, 2013) (rejecting summary judgment motion of three plaintiffs that opted out of this case).

point for price negotiations") (emphasis added); *id.* (district judge "could reasonably weigh the evidence and conclude that price-fixing would have affected the entire market, *raising the baseline prices* for all buyers") (emphasis added); *id.* at 37a ("*some* of the announcements were partially or fully accepted") (emphasis added). And plaintiffs themselves repeatedly argued that their evidence supported a presumption of class-wide harm.[5]

Moreover, while both Dr. McClave and Dr. Solow testified about class-wide impact, their opinions were based on McClave's statistical analysis, which used regression models to calculate overcharges for 25% of the class and extrapolations to calculate overcharges for the other 75%. The Tenth Circuit squarely held that Dr. McClave's extrapolations did *not* establish class-wide impact. Pet. App. 18a. It stressed this point because class-wide impact plainly cannot be *proven* on the basis of extrapolations that simply *assumed* an overcharge on every transaction in the face of regression models and other evidence demonstrating that many transactions had no overcharge. It is thus indisputable that testimony predicated on those extrapolations did not and cannot support a finding of class-wide injury.

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[5] *See* Pls. Response Br. 32 (an "*inference* of class-wide impact is 'particularly strong' where, as here, there is a top-down conspiracy involving senior executives") (emphasis added); *id.* ("[t]he industry's economic structure ... further supports that *inference*") (emphasis added); *id.* at 33 ("the new prices provided 'an *artificially inflated baseline* from which any individualized negotiations would proceed'") (emphasis added); *id.* at 34 ("*certain* increases had been 'full[y]' ... or at least 'partially' successful in inflating prices") (citations omitted) (emphasis added).

2. More fundamentally, where prices are the product of individualized negotiations, forcing defendants to litigate the issue of class-wide injury based on statistical models alters defendants' right to challenge each individual's claims. In a suit brought by an individual customer, a defendant can show that the customer threw price increase announcements in the "circle file" and dismissed them as "B S," AA1743, because it could play sellers off one another or rely on substitute products, AA1228-30; AA1672; AA1445; AA1703-06; AA1686; AA1635-38; AA1658; AA1683-85. This evidence is readily understood by jurors and can readily refute claims that an individual customer paid overcharges.

In the class setting, however, a defendant can discover such evidence only from named (usually cherry-picked) plaintiffs, cannot discover such evidence from absent members (the overwhelming majority of the class), and, in any event, cannot introduce such individualized evidence at trial as to hundreds of class members. See *supra* §I.B. Instead, defendants are forced into a "battle of experts" in which they must ask lay jurors to reject the opinion of plaintiffs' credentialed witnesses on technical matters of econometric modeling, such as whether the models are the product of statistical "overfitting," improperly used exports instead of domestic sales as a proxy for demand, or were validated using the proper statistical tests. The ability to challenge an expert's opinion is a defense, but it is manifestly not the same defense that is available to contest an *individual's* proof of damages. Thus, presuming class-wide injury inevitably "modif[ies]" a defendant's substantive rights, which the Rules Enabling Act prohibits.

II. THE TENTH CIRCUIT'S DECISION ON CLASS-WIDE DAMAGES CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

A. The Lower Courts Are Divided Over Whether Class-Wide Damages Can Be Based On Estimated Averages.

This Court should also review the decision below to resolve the separate conflict among the circuits over the propriety of calculating class-wide damages based on estimated "averages." As noted, plaintiffs' witness, James McClave, found no overcharges on 10% of the transactions he modeled, and there was evidence that individual class members avoided many price increases through negotiations. But, in extrapolating from the transactions he modeled, McClave assumed that *every* transaction involved an overcharge—even during months when his "sample" showed negotiations had produced competitive market prices. See AA1097; AA1575-78. For example, McClave found that named plaintiff Quabaug was entitled to damages on transactions where the district court itself found that Quabaug successfully avoided price hikes. Pet. App. 119a (documenting Quabaug's avoidance of announced price increase).

The Tenth Circuit held that this use of averages was proper—and escaped *Wal-Mart's* condemnation of "Trial by Formula," 131 S. Ct. at 2561—because extrapolation was used "only to approximate damages," not to prove liability. Pet. App. 18a. This ruling deepens a conflict between the Second, Fourth, Seventh and Ninth Circuits, on the one hand, and the Sixth Circuit, on the other hand. See *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 534-35 (6th Cir. 2008) ("'[d]amages in an antitrust class action may be determined on a classwide, or aggregate, basis'"). Use

of such techniques to determine damages, moreover, violates the Rules Enabling Act and due process by denying defendants the right to contest the fact or extent of damages.

In *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), the Second Circuit rejected a methodology that estimated the percentage of class members who had valid claims, then based total damages "on an estimate of the average loss for each plaintiff." *Id.* at 231. "[S]uch an aggregate determination," the Second Circuit explained, would likely result in a "damages figure that does not accurately reflect the number of plaintiffs actually injured" or "the amount of economic harm actually caused by defendants." *Id.* When damages are calculated based on a "mass aggregation of claims, the right of defendants to challenge the allegations of individual plaintiffs is lost, resulting in a due process violation." *Id.* at 232. Precisely what happened here.

Similarly, in *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, the Fourth Circuit rejected a damages calculation based "on abstract analysis of 'averages.'" 155 F.3d 331, 343 (4th Cir. 1998). In attempting to measure damages caused by an allegedly improper failure to spend advertising funds, the plaintiffs relied on "an average profit margin" and "an estimate of 'on average how many additional cars would have come in per week in the typical Meineke dealers' shop had the additional advertising dollars been spent.'" This focus on a "fictional" "'typical franchisee operation'" was an invalid "shortcut" that should have alerted the district court "that class-wide proof of damages was impermissible." *Id.*

In a suit involving an alleged conspiracy to add telephone surcharges to hotel room rates, the Ninth Circuit similarly explained that a proper damages

calculation would require individualized proof from each plaintiff "that he patronized the hotel while the surcharge was in effect and that he absorbed the cost of the surcharge." *In re Hotel Tel. Charges*, 500 F.2d 86, 89 (9th Cir. 1974). The proposed alternative—"allowing gross damages by treating unsubstantiated claims ... collectively"—was improper, because it "significantly alters substantive rights under the antitrust statutes." *Id.* at 90.[6]

The Seventh Circuit likewise agrees that, while calculating class-wide damages is permissible if the task is a "'mechanical'" or "'formulaic'" task "'for a computer program,'" it is improper where there is variation in the degree or fact of harm. *Espenscheid* v. *DirectSat USA, LLC*, 705 F.3d 770, 773 (7th Cir. 2013). In *Espenscheid*, a class of over 2,000 alleged that defendant had failed to pay minimum wages, and plaintiffs sought to establish class-wide damages from a sample of 42 class members. The court explained that, even if the sample was truly "representative,"

> this would not enable the damages of any members of the class other than the 42 to be calculated. To extrapolate from the experience of the 42 to that of the 2341 [other class members]

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[6] Contrary to the Tenth Circuit's mistaken view, the Ninth Circuit has not recently held that extrapolations may be used to calculate class-wide damages. Pet. App. 18a. In *Jimenez* v. *Allstate Ins. Co.*, 765 F.3d 1161 (9th Cir. 2014), the Ninth Circuit affirmed a district court's decision rejecting plaintiffs' motion to use representative testimony and sampling at the damages phase. *Id.* at 1167. The Ninth Circuit did, however, allow use of sampling to establish liability in that overtime-pay case, and the defendant has sought this Court's review of that distinct issue. *See* 83 U.S.L.W. 3638 (Jan. 27, 2015) (No. 14-910) (petition for cert. filed on other grounds).

> would require that all 2341 have done roughly the same amount of work, including the same amount of overtime work, and had been paid the same wage.

Id. at 774. Because there was no such uniformity, extrapolations based on samples would inevitably "confer a windfall" on some class members. *Id.*

Under the reasoning of those decisions, the lack of uniformity in the experiences of the 2,400 industrial class members would have precluded use of sampling and extrapolations to determine damages in this case. Plaintiffs did not all purchase the same products or all pay the same price. By assuming that every "extrapolated" transaction involved the same average overcharge, when the evidence and their own models showed they did not, McClave calculated damages for a fictional "typical" purchaser, and thereby conferred windfalls on many who suffered no harm or significantly less harm, thereby infringing Dow's substantive rights.

The Tenth Circuit's decision deepening the conflict with these circuits is surprising—and particularly deserving of review—because it is so at odds with *Wal-Mart*. There, this Court condemned a procedure whereby liability and damages were to be determined for a sample of class members, and "[t]he percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings." 131 S. Ct. at 2561. Such a "Trial by Formula," this Court unanimously concluded, impermissibly abridged the defendant's rights. *Id.*

The Tenth Circuit believed *Wal-Mart* "does not prohibit certification based on the use of extrapolation to calculate damages." Pet. App. 18a. But this crabbed reading is untenable and should be corrected before it gets more traction among the lower courts. This Court disapproved a methodology that used sampling, averages and extrapolation to determine *both* liability *and* damages (*i.e.*, an "entire class recovery," 131 S. Ct. at 2561). It nowhere suggested, much less stated, that the procedure was impermissible only to the extent it was used to determine liability. To the contrary, the procedure was improper because it altered the defendant's substantive rights. *Id.* And, as the Second, Fourth, Seventh, and Ninth Circuits have all recognized, extrapolating from averages to determine damages on an aggregate basis fundamentally alters a defendant's substantive right to contest the fact or extent of damages of any individual plaintiff.

Nor does waiver, see Pet. App. 17a, pose an obstacle to review of this issue. Although the panel held the motion to decertify was waived because it was filed too close to trial, the district court recognized that Dow's motion was timely "with respect to issues based on events occurring *at trial.*" *Id.* at 57a (emphasis added). At trial, Dow directly challenged the propriety of McClave's extrapolation. Dow's expert testified at trial that McClave's extrapolation techniques were statistically inappropriate and improperly assumed overcharges for every transaction regardless of whether the customer was actually injured. See AA1419-33, 1436-40.

Thus, the Tenth Circuit's "waiver" finding is yet another legally invalid use of Rule 23 to abridge defendants' rights (and expand plaintiffs'). Plaintiffs have the burden of proving "at trial" all elements of

their claim for every class member entitled to damages under the judgment. *Wal-Mart,* 131 S. Ct. at 2552 n.6. When plaintiffs fail to meet their burden, the defendant has a right to ask the court to decertify the class or enter judgment for the defendant as a matter of law. See, *e.g.*, Fed. R. Civ. P. 23(c)(1)(C) (order granting class certification "may be altered or amended before final judgment"); *Boucher* v. *Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir. 1999) ("courts are 'required to reassess their class rulings as the case develops'"); *Stastny* v. *S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 276 & n.13 (4th Cir. 1980) (concluding that, when "a full trial has revealed an underlying failure of proof on the merits of the class claim," decertification rather than class-wide judgment for defendants is the better course).

Dow sought both forms of relief. After trial, it filed a motion for judgment as a matter of law, arguing that testimony that relied on estimated averages and extrapolation did not discharge plaintiffs' burden of proof, and Dow renewed its motion to decertify on that same ground. *Compare* Pet. App. 56a, *with id.* at 66a. Dow's right to contest the sufficiency of plaintiffs' proof of damages could not be forfeited based on its "untimely" filing of a motion to decertify before trial—a motion it was not obligated to file at all.

As the Fourth Circuit recognized in *Broussard,* a judgment "cannot stand" when the class action device expands the substantive rights of individual plaintiffs by allowing them to litigate "on behalf of a 'perfect plaintiff,'" and thus to satisfy the elements of their claim "with no proof" as to any actual plaintiffs before the court. 155 F.3d at 344-45. That describes precisely what use of McClave's extrapolations permitted here. Accordingly, the Tenth Circuit's

contrived waiver ruling provides no barrier to review of its erroneous interpretation of *Wal-Mart* or to resolution of the circuit split over use of estimated averages to determine class-wide damages.

B. Plaintiffs' Models Violated *Comcast*'s Requirements.

Finally, this Court should grant review because the Tenth Circuit refused to decertify the class despite plaintiffs' use of damages models infected by the same error, committed by the same putative expert, that this Court condemned in *Comcast.* Plaintiffs' models assumed violations of the antitrust laws under two theories, but when plaintiffs disavowed one theory prior to trial, McClave did not adjust the models. Plaintiffs' damages case thus was not "'consistent with [their] liability case.'" 133 S. Ct. at 1433. The Tenth Circuit's unwillingness to apply a directly applicable precedent of this Court reflects the same mindset that gives rise to the shortcuts that so infect this case: once committed to providing a Rule 23(b)(3) class action remedy, courts are unwilling to correct the error following a jury verdict.

These dynamics explain the strained distinctions the Tenth Circuit relied on to forgive plaintiffs' failure to ensure that their damages models conformed to their liability theory. First, the Tenth Circuit deemed it significant that plaintiffs here (unlike in *Comcast*) "did not concede that class certification required a method to prove class-wide damages through a common methodology." Pet App. 20a; see also *id.* at 23a. Under this facile reasoning, damages can be calculated using "*any* method of measurement ... no matter how arbitrary," *Comcast,* 133 S. Ct. at 1433, as long as a claim of predominance is based on issues other than damages.

Alternatively, the Tenth Circuit believed that the pre-trial posture of *Comcast* made that case materially different. Here, the Tenth Circuit stated, "by the time Dow presented its [*Comcast*] argument, Dr. McClave had already testified ... 'that nearly all class members had been impacted or overcharged.'" Pet. App. 22a. As a result, the Tenth Circuit concluded, "the district court had the discretion to find a 'fit' between the plaintiffs' theory of liability and the theory of class-wide damages"—a "'fit'" that "had been missing" in *Comcast*. *Id.* The obvious flaw in this reasoning is that McClave's trial testimony was predicated on his uncorrected models. Just like the conclusions in his pre-trial reports, therefore, McClave's trial testimony is based on a "methodology that identifies damages that are not the result of the wrong" plaintiffs prosecuted at trial. *Comcast*, 133 S. Ct. at 1434.

The idea that the district court could retroactively "fix" the flaw in the damages model based on McClave's trial testimony about the scope of injury is particularly improper given the jury's verdict. McClave's methodology predicted over $620 million in damages during a 23-month period when the jury found *zero* damages. The jury thus did not agree that nearly all class members were injured during the period of the alleged conspiracy.

In all events, district courts have no "discretion" to accept invalid conclusions from a flawed damages study merely because a witness repeats those mistakes at trial. And neither the district court nor the court of appeals has discretion to ignore the holdings of this Court.

* * *

Class certification frequently compels defendants to settle. In massive cases such as this one, moreover, the pressures to do so are even greater, given the specter of treble damages and joint and several liability for the last non-settling defendant. Use of shortcut presumptions and averaging to facilitate certification (and to uphold resulting damage awards) significantly exacerbates these pressures. So too does the unwillingness of lower courts to correct erroneous class certification decisions once a trial is held. This case starkly illustrates the problems that arise when lower courts shoehorn complex cases into the Rule 23(b)(3) mechanism, which was never intended to play that role. This case is a natural follow-on to *Wal-Mart* and *Comcast*. Just as in those cases, the Court here can resolve the conflicts among the lower courts, and ensure that the "'adventuresome innovation'" of Rule 23(b)(3), *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 614 (1997), is applied, as originally intended, to "achieve economies of time, effort, and expense, ... *without sacrificing procedural fairness or bringing about other undesirable results.*" Fed. Rule Civ. Proc. 23 advisory committee's 1966 note on subd. (b)(3) (emphasis added).

CONCLUSION

For the foregoing reasons, the petition should be granted.

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March 9, 2015

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