No. 17-441

IN THE
Supreme Court of the United States

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

MORGAN-LARSON, LLC, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTION PRESENTED

Beginning in 2008 and continuing at least until January 9, 2015, petitioners engaged in a continuing antitrust conspiracy to reduce the amount of propane in each tank they sold to respondents from 17 to 15 pounds while fixing prices at the 17-pound level. Despite an earlier settlement with a different class of purchasers in 2011, petitioners did not repudiate or withdraw from their conspiracy. Instead, they continued to sell tanks with reduced fill levels without adjusting the price for the reduction, leading the Federal Trade Commission to seek an injunction against petitioners' ongoing conduct in 2014.

Respondents continued to suffer harm from petitioners' "continuing violation" well into the four-year limitations period preceding the filing of respondents' Complaint. 15 U.S.C. § 15b. Every federal court of appeals to decide when a cause of action for price fixing accrues has applied this Court's precedent to affirm that, "in the case of a continuing violation" such as "a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and that injures the plaintiff, *e.g.*, each sale to the plaintiff, starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997).

The question presented is:

Whether the Eighth Circuit correctly held, consistent with every other circuit's post-*Klehr* jurisprudence, that each sale to respondents of a reduced-fill tank with an artificially inflated price pursuant to a continuing price-fixing conspiracy is an overt act that restarts the statutory period.

RULE 29.6 STATEMENT

Respondents Morgan-Larson, LLC, Johnson Auto Electric, Inc., Speed Stop 32, Inc., and Yocum Oil Company, Inc. do not have any parent corporations or affiliates that are publicly traded, and no publicly held corporation owns 10% or more of the stock of any respondent.

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INTRODUCTION

This Court long has recognized that continuing price-fixing conspiracies that cause new damages to purchasers reset the four-year statute of limitations under the Clayton Act even if the underlying conspiracy itself was hatched earlier than four years before the plaintiffs filed their suit. That principle is one of the most important and noncontroversial applications of the continuing-violation doctrine. *See, e.g.*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997). Any other rule would "improperly transform the limitations statute from one of repose to one of continued immunity." *Poster Exch., Inc. v. National Screen Serv. Corp.*, 517 F.2d 117, 127-28 (5th Cir. 1975).

Petitioners offer no persuasive reason for this Court to revisit that long-accepted doctrine in this case. Despite petitioners' attempts to manufacture a circuit split, the Eighth Circuit's en banc decision aligns with every other court of appeals to have addressed the application of the continuing-violation principle in a price-fixing conspiracy case. *See In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728, 736 (8th Cir. 2014) (holding that the timeliness question in an alleged horizontal market allocation case "is controlled by" *Klehr*). Furthermore, because this case alleges a straightforward price-fixing conspiracy, it provides no occasion for this Court to clarify the application of the continuing-violation doctrine to conduct outside of the price-fixing context.

Petitioners seek to muddy the waters by alleging a circuit conflict through snippets of quotations from non-price-fixing conspiracy cases. That effort fails. The Eighth Circuit was not presented with – and

made no effort to decide – factual situations outside the narrow antitrust price-fixing conspiracy presented by respondents' Complaint. On that point, all circuits to have addressed the question would agree that respondents' suit is timely. That judgment comports with this Court's precedent and does not warrant further review.

Nor is it necessary for this Court to address the adequacy of respondents' Complaint allegations, which the en banc court judged to be plausible and sufficient to surmount a motion to dismiss. Petitioners' criticisms raise factbound questions of settled law in a distinctive and unusual fact pattern involving antitrust-violating price-fixers that chose to continue their conspiracy after having been caught. The petition should be denied.

STATEMENT OF THE CASE

A. The Fill Levels Conspiracy

Filled Propane Exchange Tanks are portable steel cylinders pre-filled with propane gas. App. 83a, 91a-93a (CAC[1] ¶¶ 2, 38-41). Petitioners sell these tanks to respondents, which are gas stations, convenience stores, hardware stores, grocery stores, and big box retailers. App. 83a, 94a-95a (CAC ¶¶ 2, 44-45). While propane tanks may hold a maximum of 25 pounds, safety regulations dictate that they cannot be filled to more than 17 or 17.5 pounds. App. 83a-84a, 92a (CAC ¶¶ 3, 39). Before the conspiracy, both Blue Rhino and AmeriGas filled their tanks with

[1] References to "CAC" are to the Direct Purchaser Consolidated Amended Complaint, which was filed on January 29, 2015, and is reproduced in the appendix to the petition at App. 82a-119a.

17 pounds of propane. App. 83a-84a, 95a (CAC ¶¶ 3, 48).

In 2006 and 2007, Blue Rhino and AmeriGas faced an increasingly competitive market in propane fuel that created cost pressures; they began discussing with each other the possibility of either raising prices or decreasing fill levels. App. 95a-96a (CAC ¶¶ 49-50). While both Blue Rhino and AmeriGas internally considered reducing their fill levels, each recognized that individual action would not address the competitive pressures it faced. App. 96a-98a (CAC ¶¶ 51-56).

Blue Rhino's initial attempts to act unilaterally underscored this fact. Blue Rhino proposed the fill-level decrease to Walmart, which at the time was the largest retailer of Filled Propane Exchange Tanks in the country and was a purchaser from both Blue Rhino and AmeriGas. Walmart rejected the proposed change and stated it would not carry filled propane tanks with different fill levels – implying that it might shift its business to AmeriGas if Blue Rhino followed through on the fill-level reduction. App. 97a-98a (CAC ¶¶ 54-56).

On May 29, 2008, Blue Rhino proposed the fill-level reduction to Lowe's, its largest retail customer. Lowe's accepted the proposal, but only on the condition that Blue Rhino convert all of its other customers, including Walmart, to 15-pound tanks within 30 days of implementing the fill-level reduction at Lowe's. App. 98a (CAC ¶ 59).

Realizing that Walmart was the lynchpin to implementing the fill-level reduction, Blue Rhino engaged in dozens of calls, emails, and in-person meetings with AmeriGas to coordinate a united campaign. App. 85a, 98a-100a (CAC ¶¶ 8-9, 57-66).

The Complaint contains highly specific allegations of the substance of those contacts that leave no room for doubt that petitioners entered into a conspiracy. For instance, the Complaint alleges a meeting took place on or about May 23, 2008, between Blue Rhino Vice President of Operations Jay Werner and an AmeriGas vice president responsible for the Filled Propane Exchange Tanks business. App. 98a (CAC ¶ 58). AmeriGas's notes from the meeting reveal that the parties discussed sensitive commercial information, including Blue Rhino's plan (not yet discussed with any retailer) to reduce its fill levels to 15 pounds and its desire to exclude a small competitor from accessing refilling facilities that a third party was considering building. *Id.* In addition, the Complaint describes a series of phone calls on June 18 and 19, 2008, between Blue Rhino President Tod Brown and AmeriGas Director of National Accounts Ken Janish. During those calls, AmeriGas agreed that, if Blue Rhino reduced its fill levels to 15 pounds per tank, AmeriGas would follow suit. App. 85a, 98a-99a (CAC ¶¶ 9, 60). These and other communications cemented petitioners' conspiratorial agreement. App. 99a-100a (CAC ¶¶ 64-65). By the last week of June 2008, Blue Rhino and AmeriGas had agreed on both the fill-level reduction and a rollout plan: Blue Rhino would begin selling 15-pound Filled Propane Exchange Tanks on July 21, 2008, and AmeriGas would follow suit on August 1, 2008. App. 100a (CAC ¶ 66).

Thereafter, Blue Rhino and AmeriGas acted in unison, presenting their revised fill-level policy to Walmart, Home Depot, and Lowe's, and secretly coordinating during their negotiations with their customers. App. 101a-105a (CAC ¶¶ 69-88). With the only two national suppliers holding firm on the

15-pound fill level, Walmart and other large retailers were forced to accept petitioners' collusive price increase.

Beginning in June 2009, a number of *indirect* purchasers of propane tanks filed lawsuits against petitioners challenging their price-fixing conspiracy under antitrust and state law. App. 107a-108a (CAC ¶¶ 100-101, 103). However, despite entering into multiple settlements with indirect purchasers between 2009 and 2011, petitioners continued to sell Filled Propane Exchange Tanks pursuant to the conspiracy's terms until at least January 2015. At the time those settlements were entered into, *direct* purchasers were not parties to those settlement agreements and they had no means to recover *future* damages for petitioners' continued conspiracy. In 2009, respondents did not know that petitioners would continue their fill-level conspiracy after they were first sued in 2008, how much propane petitioners' tanks would contain after that suit was resolved, how many tanks respondents would purchase, whether petitioners would compete by reducing prices, what prices petitioners would charge, or how long into the future petitioners' conspiracy would continue.

B. The FTC Complaint

On March 27, 2014, the Federal Trade Commission ("FTC") issued a complaint under 15 U.S.C. § 45 against petitioners alleging substantially the same conspiracy as respondents allege here. App. 106a-107a (CAC ¶¶ 94-95). The FTC recognized that petitioners' conspiracy resulted in higher prices for consumers and that the conspiracy would "continue or recur in the absence of appropriate relief." Administrative Compl. ¶¶ 33, 61, *In re Ferrellgas Partners, L.P.*, FTC Dkt. No. 9360 (Mar. 27, 2014) ("FTC

Admin. Compl."), 2014 WL 1396496, at *5, *8; *see id.* ¶ 33 ("This reduction in fill level was in effect a 13% increase in the price of propane."), 2014 WL 1396496, at *5. In his concurring statement, Commissioner Joshua Wright explained the economic principles at stake in the FTC's action:

> It is well understood that collusion among suppliers regarding price, quantity, and other competitive terms negotiated with purchasers can harm consumers by impeding the competitive process. Here, it is self-evident that AmeriGas and Blue Rhino's agreement to reduce the amount of propane in tanks sold to Walmart has the economic effect of increasing the per unit price if prices are held constant.

Concurring Statement of Commissioner Joshua D. Wright, *In re Ferrellgas Partners, L.P.*, FTC Dkt. No. 9360 (Oct. 31, 2014) ("FTC Commissioner Wright Statement"), 2014 WL 5787605, at *4 (footnote omitted).[2]

On October 31, 2014, petitioners entered into consent agreements with the FTC, which voted on January 9, 2015, to accept them as consent orders. App. 107a (CAC ¶¶ 96-98). Pursuant to the consent agreements, petitioners agreed to cease and desist any anti-competitive agreements regarding pricing, fill levels, or coordinating communications to custom-

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[2] Petitioners claim that the FTC "did not allege that Petitioners engaged in any price-fixing," citing the FTC dissenting commissioner. Pet. 5 (citing Dissenting Statement of Commissioner Maureen K. Ohlhausen, *In re Ferrellgas Partners, L.P.*, FTC Dkt. No. 9360 (Oct. 31, 2014), 2014 WL 5787604, at *7). Commissioner Wright's concurring statement rebutted Commissioner Ohlhausen's conclusion by demonstrating the lack of any economic distinction between conspiring on price versus per-unit price.

ers, and from disclosing competitively sensitive, non-public information to each other. *Id.* (CAC ¶¶ 96-97).

Shortly after the FTC filed its complaint, a number of direct purchasers of Filled Propane Exchange Tanks filed lawsuits alleging antitrust claims. In their case investigation, respondents uncovered evidence that AmeriGas and Blue Rhino did not cease their unlawful conduct as a result of the prior lawsuit or its settlement, but instead continued to charge the conspiracy's unlawfully supracompetitive prices[3] well into the limitations period. In addition, as detailed in the Complaint, petitioners engaged in conduct to assure that they would continue to charge unlawfully supracompetitive prices:

- Through at least late 2010, AmeriGas Director of National Accounts Ken Janish had conversations with Blue Rhino employees in which Mr. Janish sought, and received from Blue Rhino, assurances that Blue Rhino would adhere to the fill-level reduction agreement and not undercut AmeriGas on price. App. 86a, 98a-99a (CAC ¶¶ 13, 60).
- Through at least 2010, AmeriGas and Blue Rhino continued to discuss pricing for contracts. App. 86a (CAC ¶ 13).
- Through at least the end of 2010, petitioners regularly communicated to assure compliance with the conspiracy. Petitioners also monitored the market to ensure that neither cheated on their anti-competitive agreement by offering a price reduction or competing for one another's customers or geographic markets. Should cheat-

[3] "Supracompetitive prices" are prices that were higher than they would have been absent the conspiracy.

ing be suspected, petitioners communicated with each other to reassure each other of their compliance with the conspiracy. App. 105a-106a (CAC ¶ 92).

- From in or about 2006 through at least the date the CAC was filed, petitioners carried out co-packing agreements, pursuant to which each petitioner agreed to refurbish and refill its competitor's propane tanks for the other company. These agreements provided an opportunity for petitioners to monitor each other's compliance with the fill-level agreement and to stay in regular contact with each other. App. 95a, 98a (CAC ¶¶ 46-47, 58).
- Petitioners allocated customers and markets to avoid competing with each other. For example, AmeriGas took Walmart's West Coast business and Blue Rhino took Walmart's East Coast business. Similarly, Blue Rhino was allocated all of Kroger's business and AmeriGas was allocated all of Albertson's business. App. 105a (CAC ¶¶ 90-91).

This ongoing coordination made it possible for petitioners to continue acting in concert to prevent free competition through at least the end of 2010, and likely through the alleged class period.

C. The District Court Order Dismissing Respondents' Complaint

The district court granted petitioners' motion to dismiss, ruling that respondents' claims were barred by the statute of limitations. App. 50a-80a. The court agreed with respondents that the filing of the FTC's administrative complaint moved the statute of limitations period back to March 27, 2010, four years prior to the administrative complaint. App. 58a.

However, although the court assumed the existence of an unlawful agreement, it rejected respondents' continuing-violation theory, holding that respondents' claims of continued sales at the supracompetitive price were not overt acts sufficient to restart the statute of limitations and that, "because no . . . price elevation occurred within the limitations period, the overt act requirement is not met." App. 61a. The court also rejected respondents' allegations of continued conspiratorial communications between petitioners into the limitations period, holding that the alleged "communications were mere reaffirmations of the prior agreement and are insufficient to constitute overt acts." App. 65a.

D. The Eighth Circuit

On appeal, an Eighth Circuit panel affirmed the district court's opinion. The Eighth Circuit subsequently granted rehearing en banc, vacated the panel decision, and reversed.

Following *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997), the Eighth Circuit en banc court held that continued sales at artificially inflated prices are overt acts under the continuing-violation theory. The en banc court explained that *Klehr*'s definition of a continuing violation follows longstanding Supreme Court precedent including *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), which describes when an antitrust claim accrues under 15 U.S.C. § 15b:

> Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. . . . In the context of a continuing conspiracy to violate the antitrust laws, such as the conspiracy in the instant case, this has usually been understood to

> mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.

Zenith, 401 U.S. at 338; *see* App. 8a-10a (citing *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968); 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 338b, at 145 (rev. ed. 1995) ("*1995 Antitrust Law*")).

The en banc court recognized that "[e]very other circuit to consider this issue applies *Klehr*, holding that each sale in a price-fixing conspiracy is an overt act that restarts the statute of limitations." App. 10a-12a. Further, the court differentiated the application of this rule in other contexts that did not involve per se antitrust violations, such as a tying claim or a merger claim. App. 13a-14a (distinguishing *Varner v. Peterson Farms*, 371 F.3d 1011 (8th Cir. 2004), and *Midwestern Machinery Co. v. Northwest Airlines, Inc.*, 392 F.3d 265 (8th Cir. 2004)). The court also noted that the rule "prevents companies from 'agree[ing] to divide markets for the purpose of raising prices, wait[ing] four years to raise prices, then reap[ing] the profits of their illegal agreement with impunity because any antitrust claims would be time barred.'" App. 16a (quoting *In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728, 736 (8th Cir. 2014)) (alterations in original).

The en banc court then held that the Complaint adequately pleaded a continuing violation with sufficient specificity to satisfy *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). App. 16a-23a. First, the court noted that the Complaint contained specific allegations of conspiracy, including that

petitioners "'engaged in dozens of calls, emails, and in-person meetings to coordinate a unified front that would leave the largest retailers and then the entire industry with no choice but to accept their demands.'" App. 18a (quoting App. 85a (CAC ¶ 8)). Second, the court concluded that respondents' "allegations that the conspiracy continued into the class period" were sufficient, observing that the allegations "list relevant individuals, acts, and conversations, providing 'factual content' to support 'the reasonable inference that the defendant is liable for the misconduct alleged.'" App. 19a-20a (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); App. 86a, 98a-99a, 105a-106a (CAC ¶¶ 13, 60, 92)). Third, the court rejected petitioners' argument that sales pursuant to the ongoing conspiracy were not overt acts because they were the "unabated inertial consequences" of a successful conspiracy. Instead, the court concluded that petitioners' success "in 'forc[ing] Walmart and other large retailers to accept the fill reduction'" and "raising the 'wholesale prices at which [they] sold propane in Filled Propane Exchange Tanks to retailers throughout the United States'" did not end the conspiracy, but "rather was a precondition to the price-fixing scheme Plaintiffs allege continued into the class period." App. 22a (quoting App. 85a (CAC ¶ 10)) (alterations in original). Finally, the court noted that petitioners did not dispute the sufficiency of respondents' allegations that, since 2008 and continuing through the class period, respondents "'purchased Filled Propane Exchange Tanks from one or more of the Defendants and . . . paid inflated per-pound prices due to Defendants' unlawful conspiracy.'" *Id.* (quoting App. 87a-88a (CAC ¶¶ 18-21)) (alteration in original).

Judge Shepherd dissented, joined by three other judges. The dissent disagreed with the majority's characterization of the factual allegations in the Complaint. App. 28a-29a. The dissent characterized the majority opinion as misinterpreting *Klehr* and adopting a new standard under which a continuing violation can be established by ongoing sales even if the live, ongoing conspiracy has ended. App. 23a.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW CORRECTLY APPLIES THIS COURT'S PRECEDENT REGARDING THE CONTINUING-VIOLATION DOCTRINE TO THIS PRICE-FIXING CONSPIRACY

An antitrust claim generally "accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). "Thus, if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future." *Id.* at 339.

Writing for the Court, Justice Breyer explained how *Zenith*'s rule applies to price-fixing conspiracies under the Clayton Act:

> [I]n the case of a "continuing violation," say, a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and that injures the plaintiff, *e.g., each sale to the plaintiff, starts the statutory period running again,* regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.

Klehr v. A.O. Smith Corp., 521 U.S. 179, 189 (1997) (emphasis added). The Court clarified that "the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period." *Id*. at 189-90. Thus, "a cause of action accrues when new overt acts occur within the limitations period, even if a conspiracy was formed and other acts were committed outside the limitations period." *State Farm Mut. Auto. Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring). *See also* II Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 320c, at 331 (4th ed. 2014) ("*2014 Antitrust Law*").

The en banc court below held that "the allegations of a price-fixing conspiracy are sufficient," App. 17a, and that respondents were injured when they "'purchased Filled Propane Exchange Tanks from one or more of the Defendants and . . . paid inflated per-pound prices due to Defendants' unlawful conspiracy,'" App. 22a (quoting App. 87a-88a (CAC ¶¶ 18-21)) (alteration in original). Applying *Klehr* and its progeny, the court correctly held that "[t]he amended complaint alleges sufficient factual matter, accepted as true, to show a continuing violation to restart the statute of limitations, and, therefore, to state a claim to relief that is plausible on its face." *Id.*

Petitioners go to great lengths to elide the simple fact that this case alleges a straightforward price-fixing conspiracy – either ignoring this aspect of the case entirely or arguing in the alternative that respondents have failed to "plausibly" allege such a conspiracy. But petitioners cannot ignore this critical aspect of the case in order manufacture a faux circuit split. And to the extent petitioners disagree

with the en banc court's plausibility analysis, such disagreement is not a valid basis for seeking this Court's review.

Klehr did not "pronounce a substantive rule" in dicta, as petitioners claim. Pet. 23. Rather, *Klehr* clarified longstanding tolling principles outlined by this Court in *Zenith* and applied uniformly in the context of price-fixing suits. Petitioners have provided no valid basis for departing from this body of law.

A. There Is No Circuit Split Over Whether A New Claim And A New Limitations Period Accrue With Each Price-Fixed Sale

Every court to apply the continuing-violation doctrine in the context of a price-fixing suit has held, as in *Zenith* and *Klehr*, that each sale to the plaintiff starts the statutory period running again. For example, the Ninth Circuit recognizes that, "each time a defendant sells its price-fixed product, the sale constitutes a new overt act causing injury to the purchaser and the statute of limitations runs from the date of the act." *Oliver v. SD-3C LLC*, 751 F.3d 1081, 1086 (9th Cir. 2014). Likewise, the Eleventh Circuit has held that, "when sellers conspire to fix the price of a product, each time a customer purchases that product at the artificially inflated price, an antitrust violation occurs and a cause of action accrues." *Morton's Mkt., Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 828 (11th Cir. 1999) (citing *Klehr*, 521 U.S. at 189), *amended on other grounds*, 211 F.3d 1224 (11th Cir. 2000). And the Fourth Circuit has applied *Klehr* similarly in a case where the plaintiffs purchased price-fixed yarn during the limitations period set forth in an arbitration agreement. *See In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 291 (4th Cir. 2007) (holding "[u]nder *Klehr* . . . the plaintiffs' claims would be timely . . . so long as the plaintiffs

made a purchase from the Defendants" within the arbitration agreement's limitation period).

Despite petitioners' assertions that "conflict" and "confusion" abound regarding how to apply the continuing-violation doctrine in antitrust conspiracy cases, petitioners cite no case in which any court has disagreed with the Eighth Circuit that, under *Zenith* and *Klehr*, a new claim and a new limitations period accrue with each price-fixed sale. Indeed, petitioners' only cited authority involving an alleged per se unlawful horizontal agreement in restraint of trade expressly recognizes that "*Klehr* simply reiterates that the antitrust laws recognize continuing violations and, more precisely, that a new § 1 claim arises each time a company sells a price-fixed product." *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 902 (6th Cir. 2009).

Similarly, the en banc court's decision below was consistent with existing Eighth Circuit authority. In *In re Wholesale Grocery Products Antitrust Litigation*, 752 F.3d 728 (8th Cir. 2014), the Eighth Circuit held that the statute of limitations did not bar a Sherman Act claim alleging that two grocery wholesalers used a written asset exchange agreement as a subterfuge to horizontally allocate customers and territories, where the exchange agreement was entered into more than four years before the plaintiff filed suit. *Id.* at 736. The Eighth Circuit held that "[t]he timeliness question in this case is controlled by *Klehr*" and thus that "'*each sale to the plaintiff*[] starts the statutory period running again.'" *Id.* (quoting *Klehr*, 521 U.S. at 189); *see also Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1052 (8th Cir. 2000) (recognizing that "each new sale by a Sherman Act price fixing defendant" constitutes a "'separate new

overt act'" and continuing violation) (quoting *Klehr*, 521 U.S. at 189).

In those circuits that have not yet addressed the application of the continuing-violation doctrine in the context of a price-fixing suit, district courts also have interpreted *Zenith* and *Klehr* to conclude that each sale of a price-fixed product constitutes a new and independent act for purposes of evaluating the timeliness of a given claim.[4]

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[4] *See In re Skelaxin (Metaxalone) Antitrust Litig.*, No. 1:12-md-2343, 2013 WL 2181185, at *29 (E.D. Tenn. May 20, 2013) (holding "Plaintiffs should be allowed to proceed with their claims because – even if most or all of the overt acts alleged as part of the continuing [horizontal] conspiracy occurred outside the limitations period – Plaintiffs have sufficiently alleged those acts resulted in Plaintiffs being overcharged for metaxalone well into the limitations period"); *In re Aspartame Antitrust Litig.*, No. 2:06-CV-1732, 2007 WL 5215231, at *3 (E.D. Pa. Jan. 18, 2007) ("Civil anti-trust cases carry a four year statute of limitation from accrual of the cause of action, *see* 15 U.S.C. § 15(b), which, in price-fixing cases, occurs when the plaintiff purchases the product at a price inflated due to anti-competitive conduct."); *In re Carbon Black Antitrust Litig.*, No. 03-10191-DPW, 2005 WL 102966, at *3 (D. Mass. Jan. 18, 2005) ("This case . . . involves a claim that the defendants took part in an ongoing price-fixing conspiracy. As the Supreme Court has observed: 'Antitrust law provides that, in the case of a "continuing violation," say, a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, "each overt act that is part of the violation and that injures the plaintiff," *e.g.*, each sale to the plaintiff, "starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times."'") (quoting *Klehr*, 521 U.S. at 189, quoting in turn 2 *1995 Antitrust Law* ¶ 338b, at 145); *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 13 Civ. 7789 (LGS), 2016 WL 5108131, at *15 (S.D.N.Y. Sept. 20, 2016) (same); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 1998 WL 474146, at *2 (N.D. Ill. Aug. 4, 1998) (in price-fixing case, purchasers can recover overcharge

B. Petitioners' Attempt To Create A Circuit Split By Relying On Non-Price-Fixing Cases Does Not Present A Valid Basis For Review

Petitioners attempt to manufacture a circuit split where none exists by contrasting the language various circuits have used to describe the conduct that would suffice to establish an overt act sufficient to restart the statute of limitations for *other types of antitrust violations* such as an unlawful merger, monopoly, or refusal to deal. Pet. 15-19.[5] As the en banc court below stated: "application of the continuing violation doctrine in the antitrust context depends on the nature of the violation." App. 14a (citing II *2014 Antitrust Law* ¶ 320c(1), at 331).

Indeed, the very cases on which petitioners rely expressly distinguish price-fixing conspiracies from

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damages for those sales that were consummated within the four years preceding the filing of their lawsuits); *see also* Kyle Graham, *The Continuing Violations Doctrine*, 43 Gonz. L. Rev. 271, 313-14 (2008) (summarizing the law of continuing violations and recognizing that "each sale made to a consumer pursuant to a price-fixing or market-allocation conspiracy will give rise to a separate claim with its own limitations period, even if these sales were the completely predictable result of a notorious agreement to manipulate the market perfected outside of the limitations period").

[5] In at least one instance, petitioners rely (at 17) on the application of the doctrine in a context outside of *antitrust* law. *See Kahn v. Kohlberg, Kravis, Roberts & Co.*, 970 F.2d 1030, 1039-42 (2d Cir. 1992) (rejecting application of continuing-violation doctrine in suit for implied rescission under the Investment Advisers Act of 1940; correctly noting that, in the antitrust context, "the statute begins to run at the time that the plaintiff sustains injury and not when the defendant acts, since anti-competitive conduct by the defendant may give rise to damages in the future which are not predictable at the time of the initial act or within the limitations period").

other types of antitrust violations. *See*, *e.g.*, *Z Techs. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 598 n.2 (6th Cir. 2014) (noting that the continuing-violation doctrine is applied differently in cases "involv[ing] price increases brought in *conspiracy* claims, not in merger monopolization"); *Midwestern Mach. Co. v. Northwest Airlines, Inc.*, 392 F.3d 265, 271 (8th Cir. 2004) ("Unlike a conspiracy or the maintaining of a monopoly, a merger is a discrete act, not an ongoing scheme. A continuing violation theory based on overt acts that further the objectives of an antitrust conspiracy in violation of § 1 of the Sherman Act or that are designed to promote a monopoly in violation of § 2 of that act cannot apply to mergers under § 7 of the Clayton Act."). Other cases not cited by petitioners make the same distinction. *See*, *e.g.*, *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1089 (10th Cir. 2006) ("'Whether an antitrust violation should be characterized as a single act or a continuing violation is best determined by considering the type of violation involved.'") (quoting 8 Julian O. von Kalinowski et al., *Antitrust Laws and Trade Regulation* 162-12 (2d ed. 2006)).

II. THE EIGHTH CIRCUIT PROPERLY EVALUATED THE PLAUSIBILITY OF RESPONDENTS' CONTINUING-VIOLATION ALLEGATIONS

The Eighth Circuit en banc court properly evaluated respondents' allegations under *Twombly* and *Iqbal*, and found that they plausibly alleged a *live* ongoing conspiracy during the limitations period. *See* App. 21a ("[T]he question here is not whether the amended complaint alleges other overt acts in addition to sales to the Plaintiffs; the issue is whether the amended complaint alleges *that the conspiracy continued* when

the sales took place. If so, under *Klehr*, 'each sale to the plaintiff,' is an overt act that restarts the statute of limitations.") (emphasis added). The court then evaluated whether the Complaint had alleged "'sufficient factual matter, accepted as true,' to demonstrate a continuing violation to restart the statute of limitations, and, therefore, 'to state a claim to relief that is plausible on its face.'" App. 22a (quoting *Iqbal*, 556 U.S. at 678, quoting in turn *Twombly*, 550 U.S. at 570).

Petitioners erroneously claim that the Eighth Circuit en banc court adopted a "wholly separate statute-of-limitations approach" for price-fixing cases. Pet. 26. They incorrectly suggest that the court formulated a "special rule" under which sales at the price-fixed price restart the statute of limitations, even if the alleged conspiracy ended long before the limitations period. Pet. 24-25. To the contrary, the Eighth Circuit simply applied the same interpretation of this Court's precedent as has every other court of appeals to address the issue. *See supra* pp. 14-15. Furthermore, petitioners mischaracterize respondents' allegations and the en banc court's application of the governing law. Petitioners incorrectly suggest that respondents allege a conspiracy that began in 2008 and affirmatively *ended* before the limitations period began. The Complaint alleges that the conspiracy did not end, but rather continued into the limitations period and caused harm through sales of price-fixed propane.

Plausibility is analyzed by looking at the Complaint as a whole, not by splitting it into separate parts as in Judge Shepherd's dissent and as urged by petitioners. *See Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) ("[T]he complaint

should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible."); *Vila v. Inter-Am. Inv. Corp.*, 570 F.3d 274, 285 (D.C. Cir. 2009) (factual allegations should be "viewed in their totality"). "[A]llegations concerning [acts] that do not themselves constitute violations because they are barred by the statute of limitations still may be considered in assessing the plausibility of timely claims." *McDonough v. Anoka Cnty.*, 799 F.3d 931, 946 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 2388 (2016). Thus, petitioners err in suggesting that the Complaint's allegations of continued conspiracy must be independently plausible, while ignoring the rest of the allegations in the Complaint.

The en banc court properly concluded that the Complaint alleged a continuing violation sufficient to restart the statute of limitations because it alleged "(1) 'a pricing fixing conspiracy;' (2) 'that brings about a series of unlawfully high prices sales' during the class period; and (3) 'sale[s] to the plaintiff[s]' during the class period." App. 16a (quoting *Klehr*, 521 U.S. at 189) (alterations in original). In Part II.C of their petition, petitioners acknowledge that the Eighth Circuit en banc majority allowed the case to go forward based on (1) continued sales at the 15-pound fill level at 17-pound prices; and (2) alleged communications and monitoring between petitioners to assure compliance with the terms of the conspiracy within the limitations period. Pet. 30.

Regarding the first category, petitioners argue that the continued sales at the 15-pound fill level are "at most" parallel conduct. *Id.* However, as the en banc court explained, "'[a]n allegation of parallel conduct . . . gets the complaint close to stating a claim.'" App. 18a (quoting *Twombly*, 550 U.S. at 557) (alterations

in original). "With 'further factual enhancement,' plaintiffs can 'nudge[] their claims across the line from conceivable to plausible.'" *Id.* (quoting *Twombly*, 550 U.S. at 557, 570) (alteration in original). Petitioners themselves argue that price-fixing conspiracies "cannot survive" absent some enforcement mechanisms. Pet. 27. By this logic, given respondents' detailed factual allegations of explicit collusion prior to the limitations period, such continued, price-fixed sales support the plausible inference of a continuing conspiracy – and certainly the continuation of a conspiratorial agreement is more plausible than petitioners' competing suggestion that additional price-fixed sales occurred through parallel conduct alone. For example, the Complaint alleges that "Blue Rhino's President, Tod Brown, and AmeriGas's Director of National Accounts, Ken Janish, exchanged seven phone calls on June 18 and 19, 2008, during which AmeriGas agreed that if Blue Rhino reduced its fill levels to 15 pounds per tank, AmeriGas would follow suit." App. 85a (CAC ¶ 9). Defendants later "engaged in dozens of calls, emails, and in-person meetings to coordinate a unified front that would leave the largest retailers and then the entire industry with no choice but to accept their demands." *Id.* (CAC ¶ 8). These allegations include "details about what was said, when, and to whom." Pet. 31. In conjunction with allegations of continued conspiratorial pricing during the limitations period, these allegations are more than sufficient at the pleading stage, where all reasonable inferences must be made in respondents' favor. *See Minch Family LLLP v. Buffalo-Red River Watershed Dist.*, 628 F.3d 960, 965 (8th Cir. 2010); *Kubiak v. City of Chicago*,

810 F.3d 476, 480-81 (7th Cir.), *cert. denied*, 137 S. Ct. 491 (2016).[6]

In contrast, petitioners mischaracterize *Twombly*'s pleading standard to *require* allegations of "ongoing enforcement or fine-tuning" to plausibly plead an ongoing conspiracy. Pet. 27-28. *Twombly* does not go so far, but, even if it did, respondents satisfy that standard through Complaint allegations that, "during calls and meetings with AmeriGas executives occurring at least as late as 2010, [Ken] Janish [of AmeriGas] repeatedly dismissed concerns that Blue Rhino might undercut AmeriGas on price or fill levels with words to the effect of, 'I talked to Blue Rhino, and that's not going to happen.'" App. 86a (CAC ¶ 13). *See also* App. 99a (CAC ¶ 62).

Petitioners further argue that there is "no reason to deem" elevated prices as "sufficient by themselves to sustain price-fixing allegations when they are insufficient . . . to sustain other sorts of allegations." Pet. 28. However, petitioners themselves provide the reason; they acknowledge that "basic economic theory establishes that a price-fixing conspiracy 'cannot survive absent some enforcement mechanism because

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[6] Petitioners' suggestion that the Complaint must specifically allege the level of post-2008 prices has no basis in law or economics. Pet. 31. As explained by FTC Commissioner Wright:

> The mere fact that AmeriGas and Blue Rhino's agreement did not preclude the possibility that they would continue to compete on price or other terms is of little consequence for antitrust analysis. Indeed, if such competition were enough to absolve otherwise anticompetitive concerted action, even a conspiracy to fix nominal prices would be lawful so long as the colluding rivals continued to compete on quality or quantity. Fortunately, antitrust law requires a different and more economically sensible result.

FTC Commissioner Wright Statement, 2014 WL 5787605, at *4.

otherwise the incentives to cheat are too great.'" Pet. 27 (quoting *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1233 (3d Cir. 1993) (citing Richard A. Posner, *Economic Analysis of Law* 265-66 (3d ed. 1986))). Because price-fixing conspiracies are inherently unstable, continued sales at the conspiratorial price provide plausible evidence that the conspirators are continuing actively to adhere to their agreement.[7] In the absence of an ongoing conspiracy, the most plausible outcome is for prices to fall back to the pre-conspiratorial level. Thus, the act of selling a product at a fixed price, in and of itself, constitutes an overt act pursuant to an existing price-fixing conspiracy under basic principles of antitrust law or criminal conspiracy. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253 (1940) ("[T]he conspiracy contemplated and embraced, at least by clear implication, sales to jobbers and consumers in the Mid-Western area at the enhanced prices. The making of those sales supplied part of the 'continuous cooperation' necessary to keep the conspiracy alive."). This conclusion is also consistent with the longstanding principle that "a conspiracy . . . is presumed to exist until there has been an affirmative showing that it has terminated." *E.g.*, *United States v. Lewis*, 759 F.2d 1316, 1343 (8th Cir. 1985).

Further, respondents pleaded additional facts during the limitations period beyond simply continued pricing at the conspiratorial level. As the Eighth

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[7] Petitioners also suggest an alternative explanation related to their "legitimate co-packing agreements," Pet. 30 n.10; however, respondents alleged that petitioners used those very same co-packing agreements as opportunities to conspire on fill levels, App. 95a, 98a (CAC ¶¶ 46-47, 58).

Circuit en banc court explained, those allegations went beyond "'naked assertion[s] devoid of further factual enhancement'" to list "relevant individuals, acts and conversations, providing 'factual content' to support 'the reasonable inference that the defendant is liable for the misconduct alleged.'" App. 20a (quoting *Iqbal*, 556 U.S. at 678) (alteration in original).

Respondents alleged that "Defendants' anticompetitive conduct lasted at least from July 21, 2008 through January 9, 2015," and "as a result of the[ir] anticompetitive conduct . . . Defendants have charged Plaintiffs and members of the proposed Class supracompetitive prices for Filled Propane Exchange Tanks throughout the Class Period." App. 113a-114a (CAC ¶¶ 120-123). Despite the settlement agreement with indirect purchasers in 2010, respondents alleged that "Defendants maintained their illegally agreed-upon fill levels rather than resuming competition, preserving the unlawfully inflated prices that their conspiracy had produced." App. 110a, 114a (CAC ¶¶ 108, 124-125).

More specifically, respondents pleaded that, in 2008, AmeriGas Director of National Accounts Ken Janish told Blue Rhino President Tod Brown that "it would follow closely behind Blue Rhino if it successfully implemented its fill reduction, and that it would not sell both 15-pound and 17-pound tanks," and that "Janish had similar conversations with employees of Blue Rhino on numerous occasions from at least as early as 2007 until at least late 2010." App. 98a-99a (CAC ¶ 60). Respondents allege that, "[t]hrough at least the end of 2010, Defendants regularly communicated to assure compliance with the conspiracy," "monitor[ing] the market to ensure that neither cheated on their anticompetitive agreement by offer-

ing a price reduction or competing for one another's customers or geographic markets." App. 105a-106a (CAC ¶ 92). Additionally, "during calls and meetings with AmeriGas executives occurring at least as late as 2010, Janish repeatedly dismissed concerns that Blue Rhino might undercut AmeriGas on price or fill levels with words to the effect of, 'I talked to Blue Rhino, and that's not going to happen.'" App. 86a, 99a (CAC ¶¶ 13, 62). These allegations of specific facts that the conspiracy was alive go well beyond "generalized allegations" of continuing conspiratorial conduct. Pet. 31.[8] Instead they list relevant individuals, acts, and conversations, providing "factual content" to support "the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

Respondents' allegations of communications during the limitations period also include just the sort of "fine tuning" behavior that petitioners erroneously argue is required to allege a continuing conspiracy. Pet. 27-28. As the Eighth Circuit explained in *Midwestern Machinery*, a cartel is an "ongoing scheme" that inherently requires continued communications between co-conspirators in order to endure, and those communications are evidence of a continuing violation. 392 F.3d at 275. In the context of a horizontal conspiracy, continued meetings to monitor compliance with the conspiracy "are overt acts that begin a new statute of limitations because they serve to further

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[8] By pointing to such allegations, in addition to sales at the conspiratorial price, respondents' counsel clearly did not "concede" at oral argument that respondents lack any factual allegations of a live, ongoing conspiracy during the limitations period, contrary to Judge Shepherd's characterization in his dissent. Pet. 31; App. 29a.

the objectives of the conspiracy." *Id.* at 269. Any other rule would be incoherent, because ongoing communications to ensure no one is reducing prices or competing for particular customers independently qualify as unlawful acts, and thus would be actionable even absent the earlier conspiracy. *See* II *2014 Antitrust Law* ¶ 320(c)(2), at 334. For the same reason, petitioners' further suggestion that respondents' continuing-violation claim is somehow weakened by allegations that petitioners' conspiracy "succeeded" in 2008 makes little sense. Pet. 30; *see also* App. 22a ("This success did not end the conspiracy, but rather was a precondition to the price-fixing scheme Plaintiffs allege continued into the class period.").

III. THIS CASE DOES NOT PRESENT A SUITABLE VEHICLE FOR ADDRESSING THE VARIOUS CONCERNS EXPRESSED IN THE CERTIORARI PETITION

This case is not an appropriate vehicle for clarifying the application of the continuing-violation doctrine in the various contexts invoked by petitioners through cases cited as allegedly in conflict with the en banc decision below. Because respondents' Complaint raises allegations of a clear price-fixing agreement, there is no occasion for this Court to consider the other circumstances in which antitrust violations may support a continuing-violation theory. For the same reason, this case does not present an opportunity for the Court to clarify when enforcement of a tying contract or a refusal to deal is an overt act that restarts the statute of limitations under the continuing-violation doctrine because each of those circumstances is highly fact-specific and none of those facts is presented by the instant case. Petitioners' disappointment with the en banc court's decision

does not justify the wider-searching examination of antitrust continuing-violation contexts they seek to question. Because the continuing-violation theory is so well-settled in price-fixing cases, petitioners' main complaint boils down to questioning the application of settled law in a factbound situation.

Nor is this case a good vehicle for addressing whether *Klehr*'s rule applies when there is no plausible showing of "a live, ongoing conspiracy sometime in the limitations period." App. 27a (Shepherd, J., dissenting); *see* Pet. 12-13, 22-25, 28. The Complaint here *does* sufficiently allege a live conspiracy continuing during the limitations period. *See supra* pp. 7-8, 24-25. Thus, the issue that petitioners strenuously claim must be clarified is not squarely presented by this case.

IV. THIS NARROW CASE PRESENTS NO UNSETTLED ISSUE OF NATIONAL IMPORTANCE

The continuing-violation doctrine, as articulated in *Klehr* and applied by all courts of appeals, including the Eighth Circuit, appropriately balances the policies protected by statutes of limitations (repose, elimination of stale claims, and certainty) with the policies advanced by aggressive enforcement of the antitrust laws (e.g., protection of competition). By permitting recovery for those damages sustained during the limitations period, the usual policies behind statutes of limitations are preserved while still holding defendants accountable for their continuing unlawful conduct. As the Fifth Circuit stated, a contrary rule would "improperly transform the limitations statute from one of repose to one of continued immunity." *Poster Exch., Inc. v. National Screen Serv. Corp.*, 517 F.2d 117, 127-28 (5th Cir. 1975).

Petitioners would have the Court believe that an affirmation here could leave price-fixers impermissibly vulnerable to "perpetual suits," leading to the "inevitable erosion of the Clayton Act statute of limitations." Pet. 32-33. Judge Shepherd's dissent expresses a similar concern. App. 31a n.6. But there is little risk of such a catastrophe. Not only does the continuing-violation doctrine as laid out by *Klehr* limit a plaintiff's incentive to delay bringing a suit by limiting damages to only those sustained during the limitations period (here, beginning four years prior to the FTC filing suit), but a plaintiff's ability to *prove* causation for injuries sustained far into the future is inherently limited. *See*, *e.g.*, *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 458 (6th Cir. 2011) ("The passage of time between an agreement and a defendant's later actions may affect the plausibility of an inference that the actions were connected to the agreement.").[9]

It is simply untrue that, as a result of the application of the continuing-violation doctrine here, companies will face liability in perpetuity. Usually, where defendants' anti-competitive conduct is brought

[9] Petitioners suggest (at 33) that the continuing-violation rule explained in *Klehr* is somehow inconsistent with *Rotella v. Wood*, 528 U.S. 549, 554 (2000). However, *Rotella* reaffirmed *Klehr*'s holding that the Clayton Act's accrual rule allowing recovery for *injuries* incurred by plaintiffs during the four-year limitations period (but not before) properly balances competing policy interests. *Id.* at 558 (citing *Zenith*, 401 U.S. at 338).

Further, whereas here, due to petitioners' co-packing agreements, petitioners may have alternative explanations for maintaining their fill level at 15 pounds, Pet. 30 n.10, such circumstances are unique to this case and unlikely to recur in other price-fixing cases. Such circumstances thus provide little basis for this Court's review.

to light, defendants *cease* their conspiracy and prices/fill levels return to levels created by competitive market conditions. It is indeed the bold defendant who continues to sell at collusive, supracompetitive prices even after its illegal conduct has been exposed and a settlement with some of their customers reached. But when price-fixers continue to engage in unlawful conduct, they should not benefit from the repose provided by statutes of limitations. *See Hyde v. United States*, 225 U.S. 347, 369 (1912) ("Having joined in an unlawful scheme, . . . until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law."). Any other rule would "improperly transform the limitations statute from one of repose to one of continued immunity." *Poster Exch.*, 517 F.2d at 127.

Petitioners erroneously claim that nothing prevented respondents from filing suit when the alleged conspiracy was publicly revealed in 2009. Pet. 34. Respondents could not have anticipated that petitioners would continue to conspire and sell propane tanks at inflated prices even after settling claims with indirect purchasers. Nor, apparently, could the FTC, which brought an action nearly five years *after* petitioners' public settlement with indirect purchasers (and less than a year before the instant suit). Pursuant to the consent agreements that resolved the FTC's enforcement action, petitioners agreed to cease and desist any anti-competitive agreements regarding pricing, fill levels, or coordinating communications to customers, and to abstain from disclosing competitively sensitive, non-public information to each other. App. 107a (CAC ¶¶ 96-97). Such relief would have been unnecessary had petitioners already abandoned their conspiracy and returned to

competition. *See* FTC Admin. Compl. ¶ 61, 2014 WL 1396496, at *8. Even if respondents could have anticipated petitioners' failure to repudiate their conspiracy, respondents could not have sought damages from petitioners in 2009 based on future overcharges because such damages would have been "speculative" or "unprovable." *Zenith*, 401 U.S. at 339. Indeed, in 2009, many members of plaintiffs' class may not have yet purchased propane tanks and would not have even had standing to sue. Thus, any such suit at that time would have been doomed as unripe and failing to plead antitrust injury.

Finally, petitioners argue that "[r]epose is especially valuable in antitrust, where tests of legality are often vague [and] business practices can be simultaneously efficient." Pet. 33 (second alteration added). However, because this case involves an alleged price-fixing conspiracy, none of these justifications for repose applies here, and this case is thus not the proper opportunity for the Court to address these concerns. Price fixing long has been understood to be the "supreme evil of antitrust." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). As explained by Commissioner Wright:

> [N]o one – including but not limited to the parties – has presented a plausible efficiency justification that might suggest the collusion between Ameri-Gas and Blue Rhino to reduce the amount of propane in tanks . . . was somehow procompetitive. This enforcement action therefore simply does not implicate traditional concerns over false positives and the fear that the Commission might inadvertently chill procompetitive behavior.

FTC Commissioner Wright Statement, 2014 WL 5787605, at *4 (footnote omitted).

The Eighth Circuit panel's decision, to respondents' knowledge, is the only instance in which a court of appeals has refused to apply the rule described in *Klehr* to a case involving a per se unlawful price-fixing claim brought by direct purchasers that paid illegally inflated prices within the limitations period. The Eighth Circuit en banc decision reversing the panel correctly concluded that, where defendants have *continued* to charge supracompetitive prices or otherwise prevent a return to competitive conditions, despite a prior lawsuit, the statute of limitations should not shield them from liability for the new and additional harm their continuing violations caused. That decision is consistent with decades-old precedent from this Court that has been uniformly applied by the courts of appeals. Further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

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