No. 11-864

IN THE

Supreme Court of the United States

COMCAST CORPORATION,
COMCAST HOLDINGS CORPORATION,
COMCAST CABLE COMMUNICATIONS, INC.,
COMCAST CABLE COMMUNICATIONS HOLDINGS, INC.,
AND COMCAST CABLE HOLDINGS, LLC,

Petitioners,

v.

CAROLINE BEHREND, STANFORD GLABERSON,
JOAN EVANCHUK-KIND, AND ERIC BRISLAWN,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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The Third Circuit in this case expressly declined to consider "merits arguments" bearing directly on the propriety of class certification. Pet. App. 19a. Since that approach is irreconcilable with the one endorsed just last Term in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), Plaintiffs are forced to engage in misdirection, repeatedly emphasizing such irrelevancies as the amount of attention devoted by the district court to the certification issue or the state of Third Circuit law before *Dukes* and the decision below. Plaintiffs rely on these smokescreens because they cannot explain or deny the central points of Comcast's petition: The decision below cannot be reconciled with *Dukes*, and gives rise to a circuit split with the Eighth and Ninth Circuits.

Plaintiffs assert that the district judge invoked his "decades of trial experience" to "rende[r] findings that [they] had satisfied Rule 23(b)(3)," and that Comcast simply "disputes the district court's fact findings." Opp. 23-25. The issue here is not whether the district court made "findings," voluminous or otherwise, but whether the Third Circuit's conclusion that class certification was appropriate is legally defective and flatly contrary to *Dukes*. As *Dukes* itself illustrates, the Court has not shied away from ensuring that the lower courts faithfully apply Rule 23, even where the certification issue turns on voluminous fact and expert evidence. And Rule 23(f) authorizes *appellate* review of certification orders precisely to ensure that such orders comport with the record and the law.

The Third Circuit, after agreeing to review the district court's certification order, erroneously con-

cluded that it was unable even to *consider* Comcast's arguments that individual inquiries into the relevant geographic market, antitrust injury, and damages would overwhelm any purportedly common issues. *See* Pet. App. 19a, 28a-29a, 47a-48a. Because the Third Circuit's job is to review whether the district court was *correct*, it is hardly a defense of the decision below to claim that the district court did decide some of those issues.

The issue before this Court is not (just) whether the Third Circuit reached the correct resolution of the predominance inquiry, but whether it undertook the correct inquiry *at all*. The Third Circuit erred in refusing to consider or decide whether common issues predominate, and that error warrants review and reversal regardless of how the predominance issue ultimately is resolved. That is also a purely legal issue regarding the proper interpretation and application of Rule 23. *See Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 622-25 (1997). And this Court need not "reach into … complicated, fact-laden questions" (Opp. 25) to conclude that the *courts of appeals* must do so—even when those questions also bear on the merits of the case.

Plaintiffs also maintain that the Court's review is unnecessary because a *different* decision from a different panel of the Third Circuit—*In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008)—supposedly "embodies the Court's demands for Rule 23." Opp. 2. Indeed, they go so far as to claim there is no circuit conflict … involving *Hydrogen Peroxide*. *Id.* at 18. Even before *Dukes* was decided, Comcast had relied on *Hydrogen Peroxide* and other cases to argue that the Third Circuit was required to resolve all "merits" issues relevant to class

certification, *see*, *e.g.*, C.A. Reply Br. 27-28, and the Third Circuit's refusal to do so is indeed difficult to square with its earlier decisions. The basis for this Court's review, however, is not the Third Circuit's willingness to depart from its own precedents, but rather its demonstrable infidelity to *Dukes* (and the circuit split that it engendered in the process) in this most recent, and post-*Dukes*, decision. *See* Pet. App. 41a n.12.

The extent to which courts must resolve "merits" issues at the class-certification stage is an exceptionally important question, not least because those issues so "[f]requently" bear on the propriety of certification. *Dukes*, 131 S. Ct. at 2551; *see also* Pet. 26-28. Although *Dukes* squarely held that courts may not decline to consider issues bearing on class certification simply because they are also relevant to the merits of the plaintiff's case, that is precisely what the Third Circuit did below. This Court's review is warranted.*

I. THE DECISION BELOW CONFLICTS WITH *WAL-MART STORES, INC.* v. *DUKES*

Plaintiffs attempt to reconcile the decision below with *Dukes* in two respects. They claim initially that

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* Plaintiffs claim in a footnote that Comcast is adopting an "inconsistent positio[n]" before this Court than it had advanced below by "contend[ing] that *Judge Padova* applied an incorrect standard." Opp. 13 n.1 (emphasis added). But Comcast is challenging the *Third Circuit*'s incorrect belief that it could not resolve "merits" issues bearing on the certification inquiry. *See*, *e.g.*, Pet. App. 47a-48a. And, in any event, Plaintiffs' argument comes too late: They did not argue, nor did the Third Circuit conclude, that Comcast had waived *any* of its arguments that the evidence presented by Plaintiffs was insufficient to establish predominance.

the Third Circuit did not resurrect limitations on review of "merits" issues at the certification stage that some courts had thought, before *Dukes*, to have been required by *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974). Opp. 2. Then, somewhat inconsistently, they maintain that the Third Circuit properly understood *Eisen* as "preclud[ing] only a merits inquiry that is not necessary to determine a Rule 23 requirement," and that resolution of the issues presented by Comcast was "unnecessary for the Rule 23(b)(3) predominance questions presented below." *Id.* at 16 (internal quotation marks and emphasis omitted). Neither attempt to rationalize the Third Circuit's decision has merit.

A. Plaintiffs maintain that "at no point did the Third Circuit attempt to 'resuscitate' an incorrect interpretation of *Eisen*." Opp. 2 (quoting Pet. 3). But the Third Circuit *admitted* that it was doing so. According to the Third Circuit, *Dukes* "confirmed" that "'[f]requently [the Rule 23] "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim,' *but* Eisen *still prohibits 'a merits inquiry for any other pretrial purpose*.'" Pet. App. 14a n.6 (emphasis added). This selective quotation from *Dukes* gets the analysis backwards: The Court in *Dukes* held that *Eisen* does not impose *any* limitation on the "merits inquiry" undertaken by courts in ruling on class-certification motions.

The Court had stated in *Eisen* that "nothing in either the language or history of Rule 23 … gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." 417 U.S. at 177. But, as the Court noted in *Dukes*, "the judge [in *Eisen*] had conducted a preliminary inquiry into

the merits of a suit, not in order to determine the propriety of certification" under Rule 23, "but in order to shift the cost of notice required by Rule 23(c)(2) from the plaintiff to the defendants." 131 S. Ct. at 2552 n.6. "To the extent the quoted statement goes beyond the permissibility of *a merits inquiry for any other pretrial purpose*," the Court emphasized, "it is the purest dictum and is contradicted by our other cases." *Ibid.* (emphasis added).

This Court's reference to "any other pretrial purpose" (131 S. Ct. at 2552 n.6) clearly refers to purposes *other than ruling on class certification*. After *Dukes*, therefore, *Eisen*'s statement regarding preliminary inquiries into the merits is no longer good law in the class-certification context. And that is exactly why this Court in *Dukes* resolved the certification issue presented in that case by evaluating the strength of the proffered evidence that Wal-Mart operated under a generally applicable policy of discrimination, even though that issue "necessarily overlap[ped] with [the plaintiffs'] merits contention that Wal-Mart engage[d] in a pattern or practice of discrimination." *Id.* at 2552 (emphasis omitted). Yet the Third Circuit nonetheless expressly invoked and relied upon *Eisen* (no fewer than six times) to justify its crabbed view of the issues properly before it at the certification stage—"[t]o require more" from the plaintiffs, it insisted, would "contraven[e] *Eisen*." Pet. App. 33a.

The Third Circuit believed that its reliance on *Eisen* was warranted because, in its view, permitting "merits" inquiries at the class-certification stage "would turn class certification into a trial" and "would run 'dangerously close to stepping on the toes of the Seventh Amendment.'" Opp. 10 (quoting Pet.

App. 28a, 33a-34a). But *Dukes* squarely held that plaintiffs must *prove* any contention bearing on the propriety of certification, even if "they will surely have to prove [the issue] *again* at trial in order to make out their case on the merits." 131 S. Ct. at 2552 n.6. This requirement does not impinge on any Seventh Amendment rights because "any findings for the purpose of class certification 'do not bind the fact-finder on the merits.'" Pet. App. 14a (quoting *Hydrogen Peroxide*, 552 F.3d at 318); *see also In re IPO Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006). And even if the Third Circuit panel majority and the class-action bar (Pet. App. 34a n.10) would prefer an approach that simply accepts plaintiffs' submissions without further inquiry, this Court has chosen a different system. *See Dukes*, 131 S. Ct. at 2551 ("Rule 23 does not set forth a mere pleading standard. A party seeking class certification … must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc."). The decision below cannot be reconciled with *Dukes*.

B. Plaintiffs also acknowledge that the Third Circuit applied *Eisen* but contend, apparently in the alternative, that it did so correctly. Echoing the Third Circuit's claim that "'*Eisen* is best understood to preclude only a merits inquiry that is not necessary to determine a Rule 23 requirement,'" Plaintiffs insist that the Third Circuit declined to require proof only of "non-Rule 23 issues" that were "unnecessary for the Rule 23(b)(3) predominance questions" before the court. Opp. 15-16 (quoting Pet. App. 14a) (emphasis omitted). This argument falters at the outset: *Dukes* leaves no room for any application of *Eisen* to the class-certification inquiry. But in any event, Plaintiffs are mistaken.

The Third Circuit failed to consider Comcast's arguments not because it deemed them irrelevant to the class-certification inquiry, but instead because they were "merits arguments" that were not "properly before [the court]." Pet. App. 19a (relevant geographic market). Based on its apparent view that *Eisen* does not require Plaintiffs to prove any merits contentions at the certification stage, the court declined to resolve each of the "evidentiary" disputes raised by Comcast. *Id.* at 28a (antitrust impact). And, most tellingly, the Third Circuit insisted that Comcast's "attacks on the merits of the methodology" offered by Plaintiffs' experts "have no place in the class certification inquiry," because "[w]e have not reached the stage of determining on the merits whether the methodology is a just and reasonable inference or speculative." *Id.* at 47a-48a (damages).

If the Third Circuit had believed that Comcast's arguments were irrelevant to the class-certification inquiry, it could (and would) simply have said so. It did not (and could not), however, because each of the points raised by Comcast bears directly on the propriety of certification. *See* Pet. 19-22.

- If Plaintiffs were unable to prove that the relevant geographic market for assessing their antitrust claims was the entire Philadelphia DMA, then it would be impossible to assess their claims on a class-wide basis; rather, the court would be required to conduct individual inquiries into Comcast's alleged market power in a variety of markets within that DMA. *See*, *e.g.*, *Heerwagen* v. *Clear Channel Commc'ns*, 435 F.3d 219, 229 (2d Cir. 2006) (affirming denial of class certification "[i]n light of … substantial non-common issues regarding market power").

- If Plaintiffs were unable to establish that deterred entry by overbuilders resulted in higher prices for the entire class, then individual inquiries into antitrust impact in particular counties or regions would similarly preclude class certification. *See*, *e.g.*, *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008) ("In antitrust class actions, common issues do not predominate if the fact of antitrust violation and the fact of antitrust impact cannot be established through common proof.").

- And if Plaintiffs were unable to provide a viable model for quantifying damages on a class-wide basis, then individual inquiries into alleged damages across the range of Comcast's franchise areas would overwhelm any purportedly common issues in the case. *See*, *e.g.*, *Bell Atl. Corp.* v. *AT&T Corp.*, 339 F.3d 294, 304 (5th Cir. 2003) (denying certification of an antitrust class action because of the "need for such individualized inquiries" on damages).

Indeed, even the Third Circuit apparently recognized that the Plaintiffs could not obtain class certification unless they established a class-wide measure of damages: "To satisfy … the predominance requirement, Plaintiffs must establish that the alleged damages are capable of measurement on a class-wide basis using common proof." Pet. App. 34a. In practically the same breath, however, the court claimed that "[w]e have not reached the stage of determining on the merits whether the [damages] methodology [offered by Plaintiffs] is a just and reasonable inference or speculative." *Id.* at 47a. Plaintiffs' assertion that the Third Circuit declined to resolve only issues that were irrelevant to the class-certification inquiry

is thus belied by the very decision that they try, unsuccessfully, to explain away.

II. THE DECISION BELOW CREATES A SPLIT WITH THE EIGHTH AND NINTH CIRCUITS

Ellis v. *Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011), and *Bennett* v. *Nucor Corp.*, 656 F.3d 802 (8th Cir. 2011), correctly interpret *Dukes* as requiring resolution of all merits issues bearing on class certification. *See* Pet. 22-25. Plaintiffs are unable to reconcile the Third Circuit's decision below with either *Ellis* or *Bennett*; indeed, they do not even try. Plaintiffs instead pretend that the asserted conflict is not with the decision below, but instead with the Third Circuit's pre-*Dukes* decision in *Hydrogen Peroxide*. *See* Opp. 18 ("*Ellis* and *Hydrogen Peroxide*"); *id.* at 20 ("*Bennett* and *Hydrogen Peroxide*"). Remarkably, they even extract quotations from Comcast's petition that plainly refer to the decision below and claim that Comcast instead was criticizing *Hydrogen Peroxide*. *Compare*, *e.g.*, Opp. 20 ("Comcast … claim[s] that *Hydrogen Peroxide* 'cannot be reconciled with the Eighth Circuit's opinion'") *with* Pet. 24 ("The Third Circuit's decision similarly cannot be reconciled with the Eighth Circuit's opinion …").

The petition, however, leaves no doubt that this Court's review is warranted because the Third Circuit's position *in the decision below* departs from that of its sister circuits: "The Third Circuit's view that 'merits arguments' are 'not properly before [the court]' at the class certification stage … breaks sharply with the Eighth and Ninth Circuits." Pet. 2 (quoting Pet. App. 19a). It is hardly relevant in evaluating that circuit split whether *previous* Third Circuit decisions, not before the Court, could perhaps

have been reconciled with those of the Eighth and Ninth Circuits.

Not only do Plaintiffs mischaracterize the nature of the conflict, their discussion of the issue all but ignores the Third Circuit's decision in this case. The passage addressing the conflict between the Third and Ninth Circuits does not contain even a single mention—let alone citation—of the decision below. *See* Opp. 18-20. Instead, Plaintiffs claim only that "Judge Padova took the step missing in *Ellis* and 'judg[ed] the persuasiveness of the evidence presented,'" *id.* at 19 (quoting *Ellis*, 657 F.3d at 982), and that "the approach in *Ellis* … stands shoulder to shoulder with Judge Padova's approach, the Third Circuit's guidance on Rule 23, and this Court's precedents in *Falcon* and *Dukes*," *id.* at 20. They could hardly claim as much for the decision below, which expressly disavowed any authority to "judg[e] the persuasiveness of the evidence presented." *Ellis*, 657 F.3d at 982; *see*, *e.g.*, Pet. App. 47a-48a.

Plaintiffs' discussion of the conflict between the Third and Eighth Circuits similarly does not attempt to explain how the decision below is consistent with *Bennett*. They claim only that, "like the Third Circuit in this case, the Eighth Circuit applied a plain error review to affirm the district court's Rule 23 determination." Opp. 21. Even the Third Circuit did not believe the standard of review was plain error, *see* Pet. App. 10a-12a, but the fact that the Third Circuit reviewed and affirmed the district court's decision says nothing about whether it resolved any "merits" issues bearing on the correctness of that decision. And on that point, Plaintiffs assert only that Judge Padova—not the Third Circuit—"conducted in

this case" the same "analysis of issues pertaining to Rule 23" as the Eighth Circuit in *Bennett*. Opp. 21.

The absence of any meaningful attempt to reconcile the decision below with *Ellis* and *Bennett* makes clear that, just as Comcast argued in its petition, they are irreconcilable. And the circuit split has only deepened since the petition was filed.

In *Messner* v. *Northshore University HealthSystem*, the Seventh Circuit cited the decision below in vacating the denial of class certification in an antitrust class action. 669 F.3d 802, 822-23 (7th Cir. 2012). But even in doing so, the court rejected *exactly* the sort of limitation imposed below on the review of "merits" issues at the certification stage. Specifically, the Seventh Circuit acknowledged that it *would* be an "appropriate and limited use of merits evidence at the certification stage" for the defendants "to argue that [an expert's] methodologies were flawed." *Id.* at 823. The defendants, however, had "waiv[ed] that argument on appeal." *Id.* at 824.

The Seventh Circuit's conclusion that it would be "appropriate" to decide at the class-certification stage whether an expert's theories are "flawed" (669 F.3d at 823) accords with the post-*Dukes* decisions from the Eighth and Ninth Circuits, but is flatly inconsistent with the Third Circuit's belief that it was precluded from considering "whether the [damages] methodology [offered by Plaintiffs] is a just and reasonable inference or speculative." Pet. App. 47a. And that conflict warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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April 24, 2012