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

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The questions presented in the Petition are:

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.

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amici curiae* state the following:

Atlantic Legal Foundation is a not for profit corporation incorporated under the laws of the Commonwealth of Pennsylvania. It has no corporate shareholders, parents, subsidiaries or affiliates.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm that provides effective legal advice, without fee, to parents, scientists, educators, and other individuals and trade associations. Among other things, the Atlantic Legal Foundation's mission is to advance the rule of law in courts and before administrative agencies by advocating limited and efficient government, free enterprise, individual liberty, school choice, and sound science.

Atlantic Legal Foundation's leadership includes distinguished legal scholars and practitioners from across the legal community. Atlantic Legal Foundation has an abiding interest in the application of sound principles of law to the use of the class action mechanism, and has appeared as

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[1] Pursuant to Rule 37.2(a), timely notice of intent to file this *amicus* brief was provided to the parties, the parties have consented to the filing of this brief. Petitioner and Respondents have lodged with the Court "blanket consents" to the filing of amicus briefs in support of both parties.

Pursuant to Rule 37.6, *amicus* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

amicus curiae or counsel for *amicus curiae* in numerous cases before this Court, including, of relevance here, *Wal-Mart Stores, Inc. v. Dukes,* 131 S.Ct. 2541 (2011) and *Am. Express Co. v. Italian Colors Rest.,* 133 S.Ct. 2304 (2013).

Amicus is concerned that the Tenth Circuit's decision deprives class action defendants of due process and other protections. *Amicus* believes that review by this Court is necessary to ensure compliance by all federal courts with the requirements of Rule 23 and this Court's jurisprudence.

INTRODUCTORY STATEMENT

The petition asks this Court to address an important and recurring question of class action law on which the courts of appeals are divided: the relevance of individualized damages issues to the predominance requirement of Rule 23(b)(3) in light of *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

This petition arises from a nationwide class action on behalf of approximately 2,400 industrial purchasers of polyurethane products. Plaintiffs sued under the Sherman Antitrust Act, 15 U.S.C. § 1, and the Clayton Antitrust Act, 15 U.S.C. § 15(a), alleging that defendant polyurethane manufacturers conspired to issue coordinated price-increase announcements, and then tried to make those price increases "stick." *See* Appellant's Appendix (AA) at 0862.

Plaintiffs moved for class certification under Rule 23(b)(3). Defendants opposed certification, arguing that whether individual class members were injured by the alleged conspiracy required individualized determinations and could not be resolved through common evidence. Pet. App. 5a-6a, 97a-98a.

Plaintiffs are a class of industrial purchasers of chemical components of polyurethane who allege that defendants conspired to issue coordinated price increase announcements for different categories of chemicals and then tried to impose the proposed increases.[2] Actual prices, however, were set through price negotiations between suppliers and buyers, and some class members (many of whom are large enterprises with purchasing power and alternative sources of raw materials) frequently avoided price increases.[3] The presence of some class members who incurred no price increases and thus no damages should have prevented class certification.

The presence of one issue – the existence of a conspiracy to "signal" price increases – that could

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[2] As the district court observed, the four categories of chemicals each contains "myriad" chemicals with different "pricing structures." Pet. App. 107a.

[3] The district court itself acknowledged that actual prices and terms of sale are determined in "individual[ized] negotiations" between the customer and manufacturer and vary from customer to customer. Pet. App. 107a.

be proved using common evidence did not predominate over issues requiring individualized evidence (whether a plaintiff paid overcharges and the amount of each plaintiff's damages).

The district court, like other trial courts, used "shortcuts" in complex antitrust damages actions – an inference of class-wide impact even when prices are individually negotiated and the use of plaintiffs' expert's models to estimate overcharges and extrapolation from those models to calculate damages for the class to certify the class. Over defendants' objections, the district court certified a class comprised of all industrial purchasers of polyurethane products during the alleged conspiracy period. Pet. App. 122a. The district court rejected defendants' argument for decertification, reasoning that the industry's standardized pricing structure, as reflected in product price lists and parallel price-increase announcements, "*presumably* establishe[d] an artificially inflated baseline" for negotiations. Pet. App. at 104a (emphasis added). Although the trial court was "not nearly as persuaded that the issue of damages is amenable to class-wide proof," the "possibility that individual issues may predominate the issue of damages" did not preclude certification. Pet. App. at 107a-108a.[4]

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[4] Defendants sought interlocutory review of the district court's certification order, but the Tenth Circuit denied review, *In re Urethane Antitrust Litig.*, No. 08-602 (10th Cir. Sept. 2, 2008). All defendants except Dow then

(continued...)

On appeal, the Tenth Circuit agreed that Dow's pricing adjustments "did not always result in actual price increases," Pet. App. 4a, that buyers "sometimes avoided price hikes by negotiating with the supplier," *id.*, and that "some of the plaintiffs may have successfully avoided damages," *id.* at 12a, but nonetheless affirmed the district court's class certification and judgment on the basis that price-fixing "creat[es] an inference of class-wide impact even when prices are individually negotiated" because of "evidence that the conspiracy artificially inflated the baseline for price negotiations." Pet. App. 13a.

The court relied on this "inference" to find that injury was a common issue that could be tried on class-wide basis, rather than through evidence of specific negotiations of individual plaintiffs. That presumption, however, violates defendants' due process right "to litigate its statutory defenses to individual claims," *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011).

The Tenth Circuit also approved class certification based on a shortcut that obviated the need for plaintiffs to establish actual damages on a class-wide basis. Instead, the court of appeals approved the use of models developed by plaintiffs' expert to estimate overcharges on sales to a 25% sample of the class; the expert then extrapolated from this sample data to calculate damages for the

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[4](...continued)
settled. Pet. App. 4.

whole class.[5] But the models and the expert's extrapolations, were demonstrably faulty: First, the same expert found no overcharges on 10% of the sampled transactions, but he nevertheless assumed that every transaction involved an overcharge. His extrapolations thus purported to prove, for example, that one of the named plaintiffs, Quabaug Corporation, was entitled to damages, even though evidence showed that this purchaser avoided any price hikes. Second, the extrapolations also purportedly proved damages during periods when the models themselves found prices were competitive.

These shortcuts may be "efficient," but they deprived defendants of defenses they have against individual claims. The result was a treble damage judgment of more than $1 billion ($400 million jury verdict trebled), plus interest. Pet. App. at 46a-48a.

Petitioner argues that the damages model in this case is defective because it purports to quantify the injury in fact to all class members resulting from the defendants' alleged collusive

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[5] The Tenth Circuit denied Dow's motion to decertify the class on the basis that Plaintiffs used extrapolation sampling "only to approximate damages," not "to prove Dow's liability." Pet. App. at 18a. The panel reasoned that because plaintiffs' expert testified that "nearly all class members had been impacted or overcharged," the trial court could find a "fit" between plaintiffs' theory of class-wide liability and their theory of class-wide damages. *Id.* at 22a.

conduct, but the model finds injury where none exists. This should have blocked class certification because common questions of fact cannot predominate where no reliable means of proving classwide injury in fact has been advanced by the plaintiff class.

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 violate due process and the Rules Enabling Act.

There was yet another flaw in plaintiffs' damages proof. The damages model assumed that defendants violated the antitrust laws in two distinct ways – price fixing and market allocation. At trial, however, plaintiffs abandoned the customer and market allocation theory of their original case. But, notwithstanding the more limited theory of liability that plaintiffs tried to prove at trial, their expert made no adjustment to his model. The lower courts, in overlooking this flaw, failed to apply the proper standard for measuring damages, in violation of *Comcast*, because "a model purporting to serve as evidence of damages in [a] class action must measure only those damages attributable to [the class liability] theory." *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1433 (2013).

This Court should grant the petition to resolve the conflicts among the circuits and apply Rule 23 in a manner consistent with fundamental

constitutional principles, as it did in *Wal-Mart* and *Comcast*.

SUMMARY OF ARGUMENT

Amicus urges this Court to grant review because clear circuit splits exist on the proposed questions.

We focus in this brief on the issue of damages and the "predominance" requirement. The Tenth Circuit, along with the Fifth, Sixth, Seventh, and Ninth Circuits, has held that individualized damages issues are not relevant to the predominance requirement of Rule 23(b)(3), in conflict with this Court's decision in *Comcast*. The District of Columbia Circuit, in *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244 (D.C. Cir. 2013) has held that damages issues are relevant to the assessment of "predominance" at the class certification stage.

The certification of the classes in this case – as in many other antitrust, as well as securities and Title VII, class actions and the extraordinary amount of damages awarded plaintiffs virtually ensures that the merits of many such cases will not be litigated, regardless of the underlying merits of plaintiffs' claims. *See, e.g., AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740, 1752 (2011) (class actions entail "the risk of 'in terrorem' settlements" because "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims"). If the class certification in this case is allowed to stand, it will serve as a template for other class action

plaintiffs seeking to have massive antitrust and other cases certified as class actions and to thus coerce defendants to settle without ever trying the merits of the claims.

Amicus believes that the district court and the Tenth Circuit in this case did not correctly apply this Court's decision in *Comcast*.

It is important that the Court reaffirm that its teaching in *Comcast* and resolve this conflict on a fundamental issue that affects numerous and potentially enormous – in terms both of number of class members and potential (or in this case, actual) damage awards – Rule 23(b)(3) class actions.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CIRCUIT SPLIT REGARDING THE EFFECT OF NOT REQUIRING PROOF OF INDIVIDUALIZED DAMAGES ISSUES ON DUE PROCESS RIGHTS AND THE REQUIREMENT OF RULE 23.

Amicus submits that there is a pressing need to resolve the conflict among the courts of appeals concerning whether district courts can certify classes where individualized damage issues predominate. This conflict persists despite this Court's teaching in *Comcast Corp.* v. *Behrend,* 133 S. Ct. 1426, 1433 (2013) that individualized

damages issues will "inevitably overwhelm" the common issues in large class action cases such as this one.[6]

A party seeking to maintain a class action must show that the numerosity, commonality, typicality, and adequacy-of-representation requirements of Rule 23(a) have been met, *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. —, 131 S.Ct. 2541, and must satisfy at least one of Rule 23(b)'s provisions by admissible evidence.[7] In addition, class resolution must be "superior to other available methods for the f*air* and efficient adjudication of the controversy." (*Id*., emphasis added.). In adding "predominance" and "superiority" to the criteria for certification, the Advisory Committee sought to cover cases "in which a class action would achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness. . . ." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997), *citing* Adv. Comm. Notes, 28 U.S.C.App., p. 697. "Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a) and Congress added "procedural safeguards for

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[6] This case involves is the same flaw in proof of common damages, by the same expert, as this Court found wanting in *Comcast.*

[7] The same analytical principles govern certification under both Rule 23(a) and Rule 23(b). *Comcast* at 1428-29.

(b)(3) class members beyond those provided for (b)(1) or (b)(2) class members (*e.g.,* an opportunity to opt out), and the court's duty to take a 'close look' at whether common questions predominate over individual ones." *Comcast* at 1432 (citations omitted).

Meeting the predominance requirement entails more than adducing common evidence that the defendants colluded to "signal" price increases. The plaintiffs must also be able to prove, through common evidence, that all class members were in fact injured by the alleged conspiracy. *See Amchem*, 521 U.S. at 624; *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244, 252 (D.C. Cir. 2013).[8]

In *Comcast,* this Court held that an antitrust class action was "improperly certified under Rule 23(b)(3)" because plaintiffs' damages model fell "far short of establishing that damages [were]

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[8] Proof of damages is essential because a successful antitrust plaintiff must prove more than just the fact that collusive behavior occurred: "The antitrust injury requirement cannot be met by broad allegations of harm to the 'market' as an abstract entity. Although all antitrust violations, under both the *per se* rule and rule-of-reason analysis, 'distort' the market, not every loss stemming from a violation counts as antitrust injury." *See Atl. Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 339 n. 8 (1990); *see also In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244, fn 5 (D.C. Cir. 2013).

capable of measurement on a classwide basis" and thus the plaintiffs could not "show Rule 23(b)(3) predominance." 133 S. Ct. at 1432-33. Without an adequate damages model, certification was improper because "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Id*. at 1433.

A number of courts of appeal have correctly understood and applied *Comcast*'s mandate. The D.C. Circuit in *In re Rail Freight Fuel Surcharge Antitrust Litigation*, *supra*, recognized what this Court held in *Comcast* – that accurate damages expert's models are essential to an antitrust class action – and "No damages model, no predominance, no class certification." 725 F.3d at 253. "Common questions of fact cannot predominate where there exists no reliable means of proving classwide injury in fact." *Id*. at 252-53. Courts therefore must subject "statistical models that purport to show predominance" to a "hard look." *Id*. at 255. If Dow's critiques of plaintiffs' damages model are correct – and a*micus* believes they have merit – it "would shred the plaintiffs' case for certification." *Id*. at 252-53.

In a pre-*Comcast* decision, *Blades* v. *Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005), the Eighth Circuit held that "plaintiffs need to demonstrate that common issues prevail as to the existence of a conspiracy *and* the fact of injury." (emphasis added).

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

On the other side of the issue, the Fifth, Sixth, Seventh, and Ninth Circuits – and now in this case the Tenth Circuit – have either affirmatively rejected, sought to distinguish, or simply not heeded *Comcast's* holding regarding the need to be vigilant about guarding against individualized damages issues overwhelming common questions and vitiating predominance. These courts, in direct conflict with post-*Comcast* decisions from the Tenth Circuit and the D.C. Circuit, dismiss or minimize the existence of individual damages issues as irrelevant to (or of minimal impact on) the predominance analysis, despite this Court's holding in *Comcast*, that such questions can preclude a "predominance" finding. *See* 133 S. Ct. at 1433.

In *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.,* 722 F.3d 838 (6th Cir. 2013), *cert. denied,* 134 S. Ct. 1277 (2014) the Sixth Circuit followed the *Comcast dissent's* assertion that "'individual damages calculations do not preclude class certification under Rule 23(b)(3)'" and in "'the mine run of cases, it remains the

'black letter rule' that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members.'" 722 F.3d at 860–61 (quoting *Comcast,* 133 S. Ct. at 1437 (Ginsburg & Breyer, JJ., dissenting)). The Sixth Circuit went so far as to hold that, "no matter how individualized the issue of damages may be, determination of damages may be reserved for individual treatment with the question of liability tried as a class action," a position that it said held true even when some consumers might have no injury at all. *Id.* at 853–55.

In *Butler v. Sears, Roebuck & Co.,* 727 F.3d 796 (7th Cir. 2013), *cert. denied,* 134 S. Ct. 1277 (2014) the Seventh Circuit in a product liability case held that "[i]f the issues of liability are genuinely common issues," individualized damages issues do not preclude a finding of predominance, 727 F.3d at 801–02, directly contradicting *Comcast.*[9]

Similarly, the Ninth Circuit in *Leyva v. Medline Industries Inc.,* 716 F.3d 510 (9th Cir. 2013),held

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[9] The *Butler* court attributed this Court's remand to "the emphasis that the majority opinion places on the requirement of predominance and on its having to be satisfied by proof presented at the class certification stage rather than deferred to later stages in the litigation," rather than a substantive concern about questionable damages models or links between theories of liability and the damages models. 727 F.3d at 800.

that "damage calculations alone cannot defeat certification" and that "[t]he amount of damages is *invariably an individual question and does not defeat class action treatment*." *Id*. at 513–14 (emphasis added; internal quotation marks and citations omitted). It misunderstood *Comcast* as holding only that "plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." *Id*. at 514. In *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167-68 (9th Cir. 2014) the Ninth Circuit recently reiterated that its "circuit precedent" (citing *Leyva*) prohibited the denial of class certification because of individualized damages issues.

The Fifth Circuit in *In re Deepwater Horizon,* 739 F.3d 790 (5th Cir. 2014), *cert. denied* No. 14-123 (Dec. 10, 2014) affirmed certification of a settlement class for those damaged by an oil spill in the Gulf of Mexico. BP challenged the proposed settlement on the grounds that the claims from thousands of plaintiffs in the Gulf region were too disparate to meet Rule 23(a)(2)'s commonality requirement. The Fifth Circuit rejected the argument by BP and those who had objected to the class action settlement that the decision in *Comcast* precludes certification under Rule 23(b)(3) in any case where the class members' damages are not susceptible to a formula for classwide measurement, holding that the proper focus of the analysis was the defendant's conduct, and that "even an instance of injurious conduct" satisfies Rule 23, "even when the damages are

diverse." 739 F.3d 790 at 810-11. The *Deepwater Horizon* court cited with approval *Butler*, *Whirlpool* and *Leyva*.

These circuits have plainly deviated from this Court's teaching in *Comcast*.

In addition, 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. But under the antitrust laws, proof of individual injury is a prerequisite to establishing liability, not just a question of damages. " *Atl. Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 344 (1990).

Furthermore, the use of extrapolation violates defendants' due process rights right "to litigate its statutory defenses to individual claims," *Wal-Mart*, 131 S. Ct. at 2561,and to show that it was not liable to individual plaintiffs who suffered no injury because they did not pay increased prices. By presuming class-wide injury, the lower courts in this case denied Dow of that right because class adjudication precludes litigation focused on thousands of class members and prevented Dow from litigating its defense to individual damage claims, a key element of antitrust liability.

The relevance of individualized damages to Rule 23(b)(3)'s predominance requirement is critical; it is a key threshold question in cases in which

certification of a damages class is sought. *Comcast* should have resolved this issue, but several courts of appeals and district courts have declined to follow it. The Court should grant review and make clear what it held in *Comcast*: if plaintiffs fail to present a viable method of calculating damages on a classwide basis, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class," precluding certification. 133 S. Ct. at 1433.

CONCLUSION

For the foregoing reasons, *amici curiae* urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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