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

REPLY BRIEF

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REPLY BRIEF

The petition should be granted. Respondents' Opposition offers virtually no defense of the merits of the Tenth Circuit's decision. Instead, respondents abandon the Tenth Circuit's actual reasoning, offer fig-leaf distinctions to disguise its inconsistencies with precedents from this Court and other circuits, and fall back on groundless waiver arguments.

Respondents claim the "trial confirmed that common issues and common evidence *in fact* overwhelmingly predominated." Opp.1–2. But this is only because class certification *precluded* Dow from showing with individualized evidence that individual class members suffered no harm. And class certification itself was possible only by *presuming* class-wide injury in the face of extensive evidence that class members often negotiated away price increases. The Tenth Circuit had to invoke the presumption because, contrary to respondents' misleading claim, the evidence at trial did *not* prove that all class members were injured. Use of that presumption creates a circuit split, violates the Rules Enabling Act and due process, and raises an important issue that is properly presented here.

The Court should also review the Tenth Circuit's ruling on damages. Respondents do not—because they cannot—show that class certification and damages awards based on averages from a sample are consistent with the law in other circuits or this Court's condemnation of "Trial by Formula" in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011), or with *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013).

I. THE COURT SHOULD DETERMINE THE PROPRIETY OF PRESUMING CLASS-WIDE INJURY IN ANTITRUST CASES WHERE PRICES ARE NEGOTIATED.

1. Although price-fixing is per se illegal, Opp.1, 3, a presumption of injury where prices are negotiated has no basis in economics or the antitrust laws, see Pet.14 (citing authorities); Professor Murphy Amicus Br.3–10. Here, as in *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 235 (1993), the undisputed evidence shows "that during the period in question, list prices were not the actual prices paid by consumers." It is therefore "unreasonable to draw conclusions" about "supracompetitive pricing from data that reflect only list prices." *Id.* at 236.

Respondents do not contend otherwise. Instead, they wrongly pretend the presumption played no role in this case, and that the circuits are not divided about its propriety. Contrary to respondents' claim, however, the Tenth Circuit did not say "'there is evidence' *of class-wide impact*." Opp.15 (emphasis omitted and added). It said "there is evidence that the conspiracy artificially inflated the *baseline for price negotiations*." Pet.App.13a (emphasis added). Evidence of an inflated baseline was simply the basis for invoking the presumption, not evidence that rendered the presumption irrelevant.

Attempting to show that all class members were harmed, respondents tout their statistical evidence. Opp.6–7, 16–17. But the Tenth Circuit disavowed reliance on McClave's extrapolations as evidence of class-wide *impact*, Pet.App.18a, and both McClave and Solow's trial testimony about impact was based on those extrapolations, Pet.25. Respondents also cite various types of non-statistical evidence, Opp.15–16,

but they cited this evidence below merely to support invocation of the presumption, see Pet.23–24 & n.5, because this evidence showed only that price hikes *sometimes* succeeded, see Pet.App.37a n.22. In the section of the opinion that respondents cite, the Tenth Circuit relied on this evidence to reject Dow's claim that the conspiracy was never implemented. *Id.* 31a–32a, 36a–37a. The lower court did not—and could not—cite this evidence to show that *every* class member was injured.

This case, therefore, involves more than the "theoretical possibility" that Dow could "'pick[] off the occasional class member here or there through individualized rebuttal.'" Opp.18 (quoting *Halliburton* v. *Erica P. John Fund*, 134 S. Ct. 2398 (2014)). Faced with extensive evidence of successful price negotiations and the limitations of respondents' evidence, the Tenth Circuit had no choice but to presume harm to sustain class certification. Pet.App.13a. In doing so, it created a circuit conflict that respondents' purported distinctions cannot disguise.

Respondents stress that *Alabama* v. *Blue Bird Body Co.*, 573 F.2d 309 (5th Cir. 1978), involved specialized, non-homogenous products. Opp.23. But the district court here found that systems products are "heterogeneous, non-commodit[ies]". Pet.App.106a. More importantly, the Fifth Circuit emphasized that a finding of predominance required evidence of "uniformity in the quality *and price* of" the product. 573 F.2d at 327–28 (emphasis added). That some urethane products might be deemed "commodities" is thus irrelevant; the legally critical fact is that respondents could not establish that all class members paid inflated prices because the

nature of the market enabled buyers to negotiate successfully.

Respondents claim *Robinson* v. *Texas Automobile Dealers Ass'n*, 387 F.3d 416 (5th Cir. 2004), involved "unusual facts." Opp.22. But the dispositive fact was that buyers "haggl[ed]" over price, 387 F.3d at 423—just as respondents did here. And the "assumption" the Fifth Circuit rejected—that increasing the initial price "artificially increases the final purchase price for every consumer," *id.*—is the same presumption the lower courts adopted here.

Respondents say *Blades* v. *Monsanto*, 400 F.3d 562 (8th Cir. 2005), is different because the conspiracy there "targeted only some of the roughly 250 kinds of non-commodity seed varieties," whereas here the conspiracy reached all urethane products. Opp.24–25. But the Eighth Circuit found merely that list price premiums varied due to cheating by cartel members—*i.e.*, the "presence of negligible and zero list premiums indicates that … *performance* [of the price-fixing agreement] was not across the board." 400 F.3d at 573–74 (emphasis added). The same is true here: respondents likewise claimed that price competition reflected "'cheating.'" Pet.10. In *Blades*, the Eighth Circuit ruled that lack of price uniformity due to cheating prevented plaintiffs from establishing predominance, 400 F.3d at 574; the Tenth Circuit, by contrast, relied on a presumption of harm to find predominance notwithstanding lack of uniform prices due to "cheating."

Finally, in *In re Nexium Antitrust Litigation*, 777 F.3d 9 (1st Cir. 2015), the First Circuit *reaffirmed* that an increase in the starting point of negotiations does not establish class-wide injury. *Nexium* endorsed the concerns raised in *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 522

F.3d 6 (1st Cir. 2008), about presuming class-wide harm, explaining that, even if the *New Motor Vehicle* respondents "showed that defendants' anti-competitive conduct increased the vehicle *list* price in the United States, respondents did not have evidence showing that the list price was actually paid by the class members." 777 F.3d at 24. The *Nexium* court stressed that a class should not be certified absent "'some means of determining that each member of the class *was in fact injured*," and that "[t]here was *no basis* for concluding that the [*New Motor Vehicles*] plaintiffs"—who relied on the same presumption endorsed in this case—"could separate the injured from the uninjured at the liability stage." *Id.* (emphases added).[1]

2. Review is also warranted because presuming class-wide harm violates the requirements of Rule 23, the Rules Enabling Act, and due process.

Respondents try to shift blame to Dow, asserting that Dow gave up its right to assert individual defenses by failing to seek individualized discovery on injury and gambling on an all-or-nothing class-wide verdict. Opp.20–21. This is nonsense. Dow fought class certification at every turn—opposing it initially, seeking interlocutory review, and moving for decertification before trial. Having been rebuffed each

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[1] The First Circuit cited the decision below in addressing a different argument not advanced here—*i.e.*, the defendants' "mere hope that there is a 'likelihood of there being a substantial number of" uninjured class members. *See* 777 F.3d at 30. Here, Dow did not rely on an expert's opinion to theorize that there might be uninjured purchasers, *id.* at 26; instead, as the Tenth Circuit acknowledged, Pet.App.4a, Dow offered concrete evidence that many class members actually avoided price increases.

time, its *only choice* was to litigate impact on a class-wide basis at trial.

In this case—as in all class actions—the class certification order limited individualized discovery of harm (or proof of the absence of harm). Respondents nowhere refute the hornbook rule that a defendant cannot "propound discovery on each class member's individualized issues, [as] such discovery would frustrate the rationale behind Rule 23[]." 3 W.B. Rubenstein, *Newberg on Class Actions* §9:16 (5th ed. 2013).

Contrary to respondents' bald assertion, moreover, Dow did *not* have "the right to challenge every element of every plaintiff's claim" at the class trial. Opp.20 n.4. In an individual suit, Dow could show that a plaintiff suffered no harm because it negotiated away price increases. Litigating individualized defenses to the claims of hundreds of class members is impossible given the rules limiting discovery and the time limitations of a trial. Thus, using a presumption of class-wide harm to justify class certification inescapably deprived Dow of its "defenses to *individual* claims," *Wal-Mart Stores*, 131 S. Ct. at 2561 (emphasis added), thereby violating the Rules Enabling Act's command that procedural rules "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. §2072(b), and the due process requirement "that there be an opportunity to present every available defense," *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972).

By contrast, recognizing the impropriety of presuming class-wide harm where prices are negotiated requires no "radical reinterpretation of Rule 23." Opp.25. Respondents incorrectly claim this Court has stated that all price-fixing cases are "uniquely well-suited for class treatment." *Id.* 1. But

in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591, 625 (1997), the Court stated that predominance is "readily met in *certain*" antitrust cases (emphasis added). And as the First, Fifth, and Eighth Circuits (as well as the leading antitrust treatise) have all recognized, cases in which prices vary because of customer negotiations are not among these cases. Denying class treatment in cases where prices are negotiated will not preclude it in cases where prices are not subject to negotiation.

Nor is there any basis to respondents' hyperbolic "immunity" claims.[2] Opp.26. The class here includes companies able to bring their own treble-damages actions. Some have already opted out to do so, Pet.23 n.4, and tolling of the statute of limitations would allow others to do the same if the class is decertified. That price-fixing conspiracies are punishable by criminal penalties, Opp.26 n.7, even without proof of impact, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940), further confirms that antitrust wrongdoing will not be immunized if the predominance requirements of Rule 23 are enforced in cases involving price negotiations.[3]

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[2] Respondents' waiver claim also is baseless. Opp.26. Dow argued on appeal that class certification cannot be based on the presumption of class-wide injury. The Tenth Circuit rejected that argument on the merits. Pet.App.12a–16a. The Tenth Circuit's waiver ruling pertains to Dow's objection to averaging (the second question presented), but is no bar to review even there. *Infra* pp.9–11.

[3] The Department of Justice investigated the price-fixing allegations here but brought no charges. AA2046.

II. THE COURT SHOULD REVIEW THE TENTH CIRCUIT'S DAMAGES DECISION.

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

1. Contrary to respondents' claims, Opp.32, the Tenth Circuit's approach to damages cannot be squared with the law in other circuits, which does not permit class-wide damages to be determined by applying the average injury observed in a sample. Nor can it be squared with *Wal-Mart*'s condemnation of "Trial by Formula." 131 S. Ct. at 2561.

Neither *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), nor *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974), can be distinguished as involving "'fluid recoveries.'" Opp.32–33. *McLaughlin* rejected class certification where damages would be based "on an estimate of the average loss for each plaintiff," 522 F.2d at 231. *In re Hotel Telephone Chargmuemes* rejected damages based on the hotel's surcharge regardless of whether individual class members actually paid it. 500 F.2d at 89–90. Here, the Tenth Circuit upheld extrapolations that applied an estimated average overcharge percentage to each transaction without regard to whether the purchaser negotiated a price that avoided some or all of the overcharge. Pet.8–10.

The existence of individualized price negotiations here also means that *Broussard* v. *Meineke Discount Muffler Shops*, 155 F.3d 331 (4th Cir. 1998), cannot be distinguished as involving "*individualized* 'lost profit' claims." Opp.33–34 (emphasis added). And *Espenscheid* v. *DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013), did not rest on the "unique" "methodological deficiencies" of the sample. Opp.34.

The Seventh Circuit emphasized that even if the sample were "representative," it still could not be used to calculate the damages of thousands of class members with varying degrees of injury. 705 F.3d at 774.[4]

These decisions barring extrapolation based on averages are clearly correct. Respondents echo the Tenth Circuit's claim that *Wal-Mart* only prohibits extrapolation "as a substitute for a trial on class-wide *liability*." Opp.31 (emphasis added). But this Court condemned use of averages "to arrive at the entire class recovery—without further individualized proceedings"—because such an approach abridges the defendant's right to defend individual claims. *Wal-Mart*, 131 S. Ct. at 2561. Respondents do not address this language or explain why the Rules Enabling Act and due process do not apply to damage calculations.

Nor can they dispute the importance of this question. Three other petitions—each with substantial amicus support—seek clarification on the scope of *Wal-Mart*'s prohibition on "Trial by Formula." See *Tyson Foods, Inc.* v. *Bouaphakeo,* No. 14-1146 (filed Mar. 19, 2015); *Jimenez* v. *Allstate Ins. Co.*, No. 14-910 (filed Jan. 27, 2015); *Wal-Mart Stores, Inc.* v. *Braun*, No. 14-1123 (filed Mar. 13, 2015).

2. Rather than defend the substance of the Tenth Circuit's approval of averaging and extrapolation, respondents seek to avoid review by raising two alleged vehicle problems: invited error and waiver. Opp.29–31. Neither has merit.

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[4] The other Seventh Circuit cases respondents cite, Opp.34, are inapposite. *In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599 (7th Cir. 2014), did not involve either extrapolation or averaging. *BCS Servs., Inc.* v. *Heartwood 88, LLC*, 637 F.3d 750 (7th Cir. 2011), was not a class action.

Dow did not "*affirmatively invit[e]*" the jury to decide whether McClave's extrapolations proved class-wide damages. Opp.29. *Comcast* expressly held that defendants' failure to challenge the admissibility of McClave's testimony did not preclude them from arguing "that the evidence failed 'to show that the case is susceptible to awarding damages on a class-wide basis.'" 133 S. Ct. at 1431 n.4. And whether McClave's statistical analysis is legally sufficient to support class certification is a question for the court, not "a question of fact" for the jury. *Id.* at 1434 n.5.

Respondents also claim that Dow "waived" its objection to extrapolation and averaging by raising it too late, Opp.30, but they nowhere refute Dow's showing, Pet.30, that this was a legally invalid use of Rule 23 to abridge defendants' rights (and expand respondents'). Respondents had to satisfy Rule 23 at every stage of the litigation, including "'at trial,'" *Wal-Mart*, 131 S. Ct. at 2552 n.6, and Rule 23 allows decertification any time "before final judgment," Fed.R.Civ.P. 23(c)(1)(C). A defendant's failure to seek decertification well before trial cannot shield an erroneous refusal to decertify the class post-trial where the trial evidence demonstrates that decertification was "the proper course." *Stastny* v. *S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 276 (4th Cir. 1980).

The trial record demonstrates that damages for 75% of the class were "proved" with extrapolations that applied an average "overcharge" to every transaction without any individualized inquiry into whether the purchaser actually paid that "overcharge." See AA0880; AA1419–28. Dow argued before, during, and after trial that such extrapolations are legally insufficient to support class certification or a billion-dollar class-wide judgment.

Pet.7–8, 11, 30. Both lower courts rejected that argument. There is no bar to this Court's review.

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

Because McClave sought to measure the impact of a price-fixing conspiracy *and* an allocation conspiracy that respondents never proved, Pet.32, their damages case was not "'consistent with [their] liability case,'" *Comcast*, 133 S. Ct. at 1433. The Tenth Circuit violated *Comcast* by upholding class certification in the face of this flaw.[5]

Respondents attempt to distinguish *Comcast* by noting that here the jury "considered all the evidence, including Dow's cross examination of McClave, and found that the model was reliable." Opp.35; see also *id*. 36. But even if a verdict slashing McClave's damages by more than 50% could establish the models' "reliability," the jury's finding is irrelevant. Whether a model measures the "damages attributable" to plaintiff's liability theory is a *legal* question for *the court*, not a question of fact for the jury. *Comcast*, 133 S. Ct. at 1433 n.5. That McClave's models satisfied *Daubert*, Opp.35, is equally irrelevant: a model can be admissible and still insufficient to support class certification. *Comcast*, 133 S. Ct. at 1431 n.4.

Nor does it matter that McClave "controlled" for variables like input costs and demand. Opp.35–36. In *Comcast*, the Court accepted that McClave may have accurately measured the aggregate damages

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[5] This objection is "properly presented." Opp.34. The district court *rejected* respondents' argument that it was untimely, Pet.App.61a, Dow renewed that objection on appeal, and the Tenth Circuit addressed it on the merits, *id.* 18a–24a.

resulting from the multiple antitrust theories alleged. 133 S. Ct. at 1434. But the fundamental flaw, there as here, is that respondents were unable to prove all of their antitrust claims and there is thus no way to tie the damages McClave calculated with "the particular antitrust injury on which [the defendant's] liability … is premised." *Id*. at 1433.

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The six amicus briefs filed in support of this Petition attest to the concern that lower courts are flouting recent pronouncements of this Court when approving class certification. A massive class-wide judgment was obtained here with shortcuts that lifted plaintiffs' burden of proof and cut off defendants' due process right to defend against individual treble damages claims. This Court's immediate intervention is necessary.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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