No. 14-110

In the Supreme Court of the United States

DEAN FOODS COMPANY, *ET AL.*,

Petitioners,

v.

FOOD LION, LLC, *ET AL.*,

Respondents.

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

BRIEF OF *AMICI CURIAE* AIR TRANSPORT ASSOCIATION OF AMERICA, INC., AMERICAN TRUCKING ASSOCIATIONS, INC., AND THE BUSINESS ROUNDTABLE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Air Transport Association of America, Inc., d.b.a. Airlines for America ("A4A"), is the trade organization of the principal U.S. airlines, which together with their affiliates transport more than ninety per cent of U.S. airline passenger and cargo traffic. Its members are Alaska Airlines, Inc.; American Airlines, Inc.; Atlas Air, Inc.; Delta Air Lines, Inc.; Federal Express Corporation; Hawaiian Airlines, Inc.; JetBlue Airways Corp.; Southwest Airlines Co.; United Continental Holdings, Inc.; United Parcel Service Co.; US Airways, Inc.; and Air Canada, which is an associate member.

The mission of A4A is to foster a business and regulatory environment that ensures safe and secure air transportation while permitting U.S. airlines to flourish, thus stimulating economic growth locally, nationally, and internationally. As part of that mission, A4A seeks to identify, highlight, and challenge laws and government policies that impose inappropriate burdens or unfairly impinge on the free operation of the marketplace for the services of its members. Throughout its seventy-eight year history, A4A has been actively involved in the development of the law applicable to commercial air transportation by advocating common industry positions on policy and

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2(a), counsel of record for all parties received timely notice of *amici*'s intent to file this brief. All parties have consented to the filing of the brief.

legal issues of importance to its members. A4A regularly participates as *amicus curiae* before this Court and other courts. Because proper application of the rules governing the award of summary judgment is essential to limit wasteful and burdensome litigation, A4A and its members have a strong interest in the resolution of this case. Indeed, in the last two years alone, the members of A4A have been named as defendants in 37 class action lawsuits in federal court, as well as in numerous other complex cases, including antitrust cases and patent suits.

American Trucking Associations, Inc. ("ATA") is a nonprofit corporation incorporated under the laws of the District of Columbia, with its principal place of business in Arlington, Virginia. ATA is the national trade association of the trucking industry. It has approximately 2,000 direct motor carrier members and, in cooperation with state trucking associations and affiliated national trucking conferences, ATA represents tens of thousands of motor carriers. ATA was created to promote and protect the interests of the trucking industry, which consists of every type and geographical scope of motor carrier operation in the United States, including for-hire carriers, private carriers, leasing companies, and others. ATA regularly advocates the trucking industry's position before this and other courts. Like A4A, ATA and its members have a compelling interest in the use of summary judgment rules that will facilitate the speedy and inexpensive resolution of litigation.

The Business Roundtable ("BRT") is an association of chief executive officers of leading U.S. companies that together have $7.4 trillion in annual revenues and more than 16 million employees. The BRT's member companies comprise more than a third of the

total value of the U.S. stock market and pay more than $200 billion in dividends to shareholders. The BRT was founded on the belief that businesses should play an active and effective role in the formation of public policy, and should participate in litigation as *amici curiae* where important business interests are at stake.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners demonstrate that the circuits are in conflict on whether an antitrust plaintiff must produce evidence of loss causation to defeat a motion for summary judgment; that the Sixth Circuit's decision in this case exacerbated that conflict by holding that causation may be *presumed* at the summary judgment stage; and that the decision below on this point is wrong. We do not repeat that demonstration here. Instead, we address the significance of the issue presented and the compelling practical reasons for the Court to grant review.

This Court last comprehensively addressed the standards governing summary judgment almost thirty years ago, when it emphasized the central role that summary judgment plays in screening out nonmeritorious cases prior to trial. As the Court then explained, the summary judgment process has become a principal tool for preventing "factually insufficient claims or defenses" from "going to trial with the attendant unwarranted consumption of public and private resources." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 327 (1986). Accordingly, the Court continued:

> Rule 56 must be construed with due regard not only for the rights of persons asserting

> claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Ibid.

Three decades later, however, there is a need for the Court to revisit this issue. Courts of appeals exhibit continuing confusion over the rules governing the summary judgment process; departures from the standard announced by this Court are imposing enormous and unwarranted costs on litigants and the judicial system; and the approach taken by decisions like the one below in this case have the perverse effect of encouraging abusive, nuisance litigation. In particular:

First, there is considerable confusion in the courts of appeals on the standard governing motions for summary judgment. Although some courts properly recognize that summary judgment rules apply equivalently to all cases, others—like the Sixth Circuit—have held that the procedure is disfavored in antitrust and other discrete categories of cases. Some of these courts, again including the Sixth Circuit, also hold that causation may be presumed at the summary judgment stage. These aberrant rules have a real and harmful effect on the disposition of cases, precluding the dismissal of actions where the plaintiff has offered only speculative or ambiguous evidence.

Second, failure to dismiss meritless litigation pretrial has a range of baleful practical consequenc-

es. The enormous expense and business disruption involved in trying complex cases (antitrust suits in particular), and the possibility of enormous and unpredictable jury awards (trebled under the antitrust laws), force defendants to settle virtually all such cases prior to trial. That reality, in turn, motivates plaintiffs to bring additional strike suits, in hopes of obtaining coerced settlements. It also encourages forum shopping, as the plaintiffs' attorneys who initiate national class actions seek out those courts that will allow their claims to survive until trial. The summary judgment procedure, designed to encourage the just, speedy, and inexpensive resolution of all claims, was intended to prevent this sort of result.

ARGUMENT

A. Some Courts Of Appeals Continue To Disfavor Summary Judgment In Antitrust And Other Complex Cases.

1. At the outset, the decision below in this case is an example of the continuing confusion in the lower courts about the application of the governing summary judgment standard. That standard *should* be clear: As this Court held in *Celotex*, "the plain language of Rule 56(c) *mandates* the entry of summary judgment * * * against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." 477 U.S. at 322 (emphasis added). In that decision, and in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986), this Court dispelled the old notion that summary judgment is "disfavored" or inappropriate *per se* for certain classes of

cases. *Celotex*, 477 U.S. at 327. Many courts of appeals accordingly have recognized that "summary judgment is not disfavored and is designed for every action." *Briscoe* v. *Cnty. of St. Louis*, 690 F.3d 1004, 1011 n.2 (8th Cir. 2012) (internal quotation marks omitted); accord, *e.g., Stearns Airport Equip. Co.* v. *FMC Corp.*, 170 F.3d 518, 521 (5th Cir. 1999) ("We no longer maintain that summary judgment is especially disfavored in categories of cases.").[2]

Some courts of appeals, however, persist in viewing summary judgment as improper or disfavored in certain categories of cases, including negligence actions, copyright cases, discrimination claims, and any case involving questions of motive or intent. See, *e.g.*, *Torres* v. *City of Madera*, 648 F.3d 1119, 1125 (9th Cir. 2011) (summary judgment "in excessive force cases should be granted sparingly") (internal quotation marks omitted); *Jones* v. *Blige*, 558 F.3d 485, 490 (6th Cir. 2009) ("In copyright infringement cases, 'summary judgment, particularly in favor of a defendant, is a practice to be used sparingly'"); *Go Med. Indus. Pty, Ltd.* v. *C.R. Bard, Inc.*, 250 F.3d 763 (tbl.), 2000 WL 1056063, at *7 (Fed. Cir. 2000) ("[S]ummary judgment should be used sparingly when motive and intent play leading roles."); *Tavoloni* v. *Mount Sinai Med. Ctr.*, 198 F.3d 235

[2] Numerous courts have applied this understanding in antitrust cases. See, *e.g.*, *Thompson Everett, Inc.* v. *Nat'l Cable Adver., L.P.*, 57 F.3d 1317, 1322 (4th Cir. 1995) (Rule 56 should "be applied to antitrust cases no differently from how it is applied to other cases"); *Race Tires Am., Inc.* v. *Hoosier Racing Tire Corp.*, 614 F.3d 57, 73 (3d Cir. 2010) (same).

(tbl.), 1999 WL 972656, at *1 (2d Cir. 1999) ("[S]ummary judgment should be used sparingly in ERISA actions."), *Camacho* v. *Du Sung Corp.*, 121 F.3d 1315, 1317 (9th Cir. 1997) ("summary judgment in a negligence action is generally disfavored"); *Cooper* v. *Conn. Pub. Defenders Office*, 280 F. App'x 24, 24 (2d Cir. 2008) ("in discrimination cases where state of mind is at issue, we affirm a grant of summary judgment in favor of an employer sparingly") (internal quotation marks omitted). Of particular relevance here, and despite this Court's clear directive to the contrary in *Matsushita*, the Sixth and Ninth Circuits still place a heavy thumb on the scales against the grant of summary judgment in antitrust cases.[3]

2. As an initial matter, both the Sixth and Ninth Circuits continue to rely on this Court's decision in *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), to disfavor the grant of summary judgment in the antitrust context because, in such cases, "motive and intent are important." *Int'l Healthcare Mgm't* v. *Haw. Coal. for Health*, 332 F.3d 600, 604 (9th Cir. 2003) (internal quotation marks omitted); see *Movie 1 & 2* v. *United Artists Commc'ns, Inc.*, 909 F.2d 1245, 1248 (9th Cir. 1990) (same) (quoting *Poller*, 368 U.S. at 473); see also

[3] See also, *e.g.*, *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 66-67 (2d Cir. 2012), cert. denied sub nom. *Stora Enso N. Am.* v. *Parliament Paper, Inc.*, 133 S. Ct. 940 (2013); *Cont'l Trend Res., Inc.* v. *OXY USA Inc.*, 44 F.3d 1465, 1480 (10th Cir. 1995) ("summary judgment in antitrust cases is generally disfavored"), judgm't vacated, 517 U.S. 1216 (1996).

Smith Wholesale Co. v. *R.J. Reynolds Tobacco Co.*, 477 F.3d 854, 862 (6th Cir. 2007) ("In this circuit, motions for summary judgment are disfavored in antitrust litigation.") (relying on *Expert Masonry, Inc.* v. *Boone Cnty.*, 440 F.3d 336, 341 (6th Cir. 2006) (relying, in turn, on *Smith* v. *N. Mich. Hosps., Inc.*, 703 F.2d 942, 947 (6th Cir. 1983) ("Both the Supreme Court and this Circuit have expressed a clear reluctance to dispose of antitrust litigation on motions for summary judgment. *E.g.*, *Poller*")).

But this Court has warned against just that approach: "We do not understand *Poller* * * * to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment * * * without offering any concrete evidence from which a reasonable juror could return a verdict in his favor." *Anderson*, 477 U.S. at 256. Indeed, as other courts have noted, "because of the unusual entanglement of legal and factual issues frequently presented in antitrust cases, the task of sorting them out may be *particularly* well-suited for Rule 56 utilization." *Thompson Everett, Inc.* v. *Nat'l Cable Adver., L.P.*, 57 F.3d 1317, 1322 (4th Cir. 1995) (emphasis added). These courts have properly recognized that "the very nature of antitrust litigation encourages summary disposition of such cases when permissible." *Collins* v. *Associated Pathologists, Ltd.*, 844 F.2d 473, 475 (7th Cir. 1988). The holding below, which reaffirmed that the Sixth Circuit is "'generally reluctant to use summary judgment dispositions in antitrust actions'" (Pet. App. 6a), cannot be reconciled with this understanding.

3. As this case demonstrates, the Sixth Circuit also has stacked the deck against summary judgment by relieving plaintiffs of their obligation to offer

facts establishing the existence of each element essential to their case. It is fundamental that antitrust plaintiffs "must show more than a conspiracy in violation of the antitrust laws; they must show an injury * * * *resulting from* the illegal conduct." *Matsushita*, 475 U.S. at 586 (emphasis added). But as petitioners demonstrate, in this case the Sixth Circuit rejected summary judgment even though plaintiffs offered no evidence at all that the conspiracy they allege—as opposed to petitioners' recent merger or other legal conduct—actually produced the price rise that plaintiffs complain about. See Pet. 12-14, 18-19, 24. The court of appeals thought it enough that the conspiracy *could have* been responsible for the price increase, or was *consistent* with a price increase. See Pet. App. 36a-37a. But such a showing is insufficient to defeat summary judgment; absent "'significant probative evidence'" (*Anderson*, 477 U.S. at 249), a plaintiff opposing summary judgment may not rest on evidence that is merely "plausible" or "ambiguous." *Matsushita*, 475 U.S. at 597 n.21.

And a plaintiff's failure in a case like this one to offer real proof of causation is hardly an academic or theoretical omission: it is frequently the case that a defendant's asserted unlawful conduct, even if improper, was *not* the cause of the plaintiff's injury. In this case itself, plaintiffs' sole evidence of causation, an expert report, "could not distinguish between * * * any unlawful concerted action" and "the effects of lawful, unilateral conduct." Pet. 10; see Pet. App. 50a-51a. That sort of ambiguity is not at all unusual in antitrust cases. See, *e.g.*, *Concord Boat Corp.* v. *Brunswick Corp.*, 207 F.3d 1039, 1060 (8th Cir. 2000) (plaintiffs "failed to account for 'numerous intervening economic and market factors which . . . may have

been the actual cause of the plaintiffs' injuries'"); *Nat'l Ass'n of Review Appraisers & Mortg. Underwriters, Inc.* v. *Appraisal Found.*, 64 F.3d 1130, 1135 (8th Cir. 1995) (summary judgment affirmed where defendants' allegedly anticompetitive conduct was not a material cause of plaintiff's injury); *Greater Rockford Energy & Tech. Corp.* v. *Shell Oil Co.*, 998 F.2d 391, 402 (7th Cir. 1993) (summary judgment affirmed where "as a matter of law, plaintiffs have failed to show with a fair degree of certainty that the antitrust violation was a material and substantial factor causing their alleged injuries"); *Abcor Corp.* v. *AM Int'l, Inc.*, 916 F.2d 924, 931 (4th Cir. 1990) (affirming grant of summary judgment because "[w]hile [plaintiff's] profit margin may have declined, the plaintiffs have failed to show a causal link to anticompetitive activity[;]" other factors "may also have reduced [plaintiff's] profit margin").

This is true as well in many other areas of the law, where a claim will not survive absent a sufficient showing that the alleged wrongdoing caused the plaintiff's injury. For example, this Court has held in the securities-fraud context that where a plaintiff fails to show that his or her loss was caused by defendant's misconduct—as opposed to some other intervening or alternative cause—the case must be dismissed. *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 342 (2005). See also *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557-558 (2007) (in *Dura*, the Court "explained that something beyond the mere possibility of loss causation must be alleged"). This requirement is necessary precisely because, in such a context (as in this case), the plaintiff's injury may well have resulted from an intervening cause and not the defendant's allegedly wrongful acts; as Judge

Calabresi put it, that a plaintiff was induced to purchase securities by fraudulent statements "does not suffice to show loss causation when the whole market collapses." *Moore* v. *PaineWebber, Inc.*, 189 F.3d 165, 177 (2d Cir. 1999) (Calabresi, J., concurring).[4] This rule applies fully at the summary judgment stage. See, *e.g.*, *McCabe* v. *Ernst & Young, LLP*, 494 F.3d 418, 436 (3d Cir. 2007) (affirming summary judgment where there was an intervening cause and no evidence that defendant's wrongful conduct in failing to register certain shares was a substantial factor in plaintiffs' financial injury); *Gold* v. *Ford Motor Co.*, 937 F. Supp. 2d 526 (D. Del. 2013) ("Plaintiff failed to allege[] loss causation [because] * * * 'the NYSE's actions constitute an intervening cause that disrupted the chain of causation necessary for [plaintiff] to adequately plead loss causation.'"), aff'd, 2014 WL 3974080 (3d Cir. Aug. 15, 2014).

The Court emphasized in *Celotex* that "[s]ummary judgment procedure is properly regarded

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[4] Courts have required a similar showing in products liability cases. See, *e.g.*, *Thom* v. *Bristol-Myers Squibb Co.*, 353 F.3d 848, 856 (10th Cir. 2003) (finding, in summary judgment context, that courts may not presume manufacturer's failure to warn to be the cause of plaintiff's injury where there is an intervening cause such as the physician's failure to read the product's warning label); *Harris* v. *McNeil Pharm.*, 2000 WL 33339657, at *3 n.3 (D.N.D. Sept. 5, 2000) (finding, on summary judgment motion, "[t]he presumption that had an adequate warning been given it would have been read and heeded is rebutted by [the physician's] testimony that he did not read the warning") (citation omitted).

not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" 477 U.S. at 327 (quoting Fed. R. Civ. P. 1). Those courts, like the Sixth Circuit, that expressly "disfavor[]" the grant of summary judgment in antitrust or other particular categories of case (*Smith Wholesale Co.*, 477 F.3d at 862) have departed from that principle—and confused the proper application of a fundamental procedural rule.

B. Disfavoring Summary Judgment In Antitrust Cases Encourages Baseless Litigation And Has A Deleterious Effect On Antitrust Law As A Whole.

Misapplication of the summary judgment standard, as occurred in this case, is a matter of great practical importance. We have noted this Court's observation that the summary judgment process has become a principal means of preventing "factually insufficient claims or defenses" from "going to trial with the attendant unwarranted consumption of public and private resources." *Celotex*, 477 U.S. at 327. Against this background, an undue reluctance to grant summary judgment will encourage baseless litigation, burden litigants and the courts, and facilitate forum shopping. These practical concerns, no less than the confusion in the lower courts about the governing standard, make corrective action by this Court essential.

1. Perhaps most obviously, a defective summary judgment standard carries with it "the potential for nuisance or 'strike' suits" and "the danger of vexatious litigation." *Blue Chip Stamps* v. *Manor Drug*

Stores, 421 U.S. 723, 740 (1975). As the Court famously observed of securities litigation in *Blue Chip Stamps*, "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment. The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit." *Ibid*. To the extent that non-meritorious litigation "permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value, * * * it is a social cost rather than a benefit." *Id*. at 741.

Experience has borne out the correctness of these observations, confirming that failure of the mechanisms designed to screen out baseless litigation at an early stage both encourages strike suits and imposes unwarranted (and often enormous) costs on litigants—leading, in turn, to coerced settlements. Thus, extensive research conducted both prior to and after enactment of the Private Securities Litigation Reform Act of 1995 showed that the direct costs of litigation, the lost productivity and business disruption caused by that litigation, and the prospect of enormous and unpredictable jury awards, meant that essentially *all* securities-fraud class actions settled prior to trial. See Adam C. Pritchard & Hillary Sale, *What Counts as Fraud? An Empirical Study of Motions to Dismiss Under the Private Securities Litigation Reform Act* 4 (Univ. of Mich. John M. Olin Center for Law & Economics, Working Paper No. 03–

011, 2003); Bernard S. Black et al., *Outside Director Liability* 34 (Univ. of Mich. John M. Olin Program for Law & Economics, Working Paper No. 250, 2003) (finding only one securities case that proceeded to trial).

Indeed, so powerful are these practical considerations that the costs and risks of litigation made the merits of securities suits largely *irrelevant* to the decision to settle. See Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 516–517 (1991).[5] Instead, the best predictors of whether suit would be brought and the size of the ultimate settlement were declines in stock price and the amount of the defendant's insurance coverage. *Id.* at 550. The hearings that preceded the enactment of the PSLRA were replete with testimony and studies supporting the proposition that securities suits commonly followed a drop of 10 percent or more in a security's price and that most suits were settled within the boundaries of the applicable insurance policy.[6]

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[5] See also Patrick M. Garry et al., *The Irrationality of Shareholder Class Action Lawsuits: A Proposal for Reform*, 49 S.D. L. REV. 275, 287 n.98 (2004) (citing additional studies); James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. PA. L. REV. 903, 979–980 (1996) (evaluating proxies for merit of pre-PSLRA securities fraud class actions arising out of IPOs, such as underwriter quality and insider sales, and concluding that "most securities-fraud class actions are, in fact, frivolous).

[6] See, *e.g.*, *Private Litigation Under the Federal Securities Laws: Hearings Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous., & Urban Affairs* ("*1993 Senate*

2. What the Court said and researchers found regarding securities litigation is, if anything, even more true of antitrust lawsuits. The Court has noted that antitrust litigation is "a sprawling, costly, and hugely time-consuming undertaking." *Twombly*, 550 U.S. at 560 n.6. The Court has warned that the burdens imposed by the discovery process make it important, if possible, to dismiss baseless suits at the complaint stage (see, *e.g.*, *id.* at 558); those same considerations militate in favor of rules that allow summary judgment to pretermit unnecessary antitrust trials, which "have long been criticized for their inordinate length, cost, and complexity." *United Air Lines, Inc.* v. *Civil Aeronautics Bd.*, 766 F.2d 1107, 1121 (7th Cir. 1985); see also *In re Cotton Yarn Anti-*

Hearings"), 103d Cong., 1st Sess. 10, 12 (1993) (statement of Edward R. McCraken, President and CEO of Silicon Graphics, Inc.); see also *Staff Report on Private Securities Litigation: Hearing Before the Subcomm. on Sec. of. the S. Comm. on Banking, Hous., and Urban Affairs*, 103d Cong., 2d Sess. 190 n.37 (1994) (discussing technology industry representatives' reports that strike suits would be filed whenever stock price decreased 10% or more). Numerous SEC Chairmen and Commissioners echoed these concerns. See *Securities Litigation Reform Proposals: Hearings on S. 240, S. 667, and H.R. 1058 Before the Subcomm. on Securities of the S. Comm. on Banking, Housing, and Urban Affairs* ("*Reform Act Senate Hearings*"), 104th Cong., 1st Sess. 229 (1995) (then-Chairman Arthur Levitt); *id.* at 239 (former Acting Chairman Charles C. Cox); *id.* at 49–50 (former Commissioner J. Carter Beese, Jr.); S. Rep. No. 104–98, at 21 (1995) (noting testimony of former Chairman David S. Ruder); *id.* at 16 (noting testimony of former Chairman Richard C. Breeden); David J. Bershad et al., *Introduction to Securities Class Actions: Abuses and Remedies* 1 (1994) (*Introduction* by John Shad).

trust Litig., 505 F.3d 274, 288 (4th Cir. 2007) ("Antitrust is a complex area of the law, and antitrust trials * * * can be long and involved."). Such trials can run for months—even years—and may involve tens of thousands of factual allegations.[7]

These cases are extraordinarily expensive for defendants to litigate. See Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* 105 (2005) (litigating a rule of reason case is "one of the most costly procedures in antitrust practice"). At the same time, the sums ultimately at stake in antitrust cases are often staggering; the availability of treble

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[7] See, *e.g.*, *Brooke Grp. Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 218 (1993) (115-day trial); *White & White, Inc.* v. *Am. Hosp. Supply Corp.*, 786 F.2d 728, 732 (6th Cir. 1986) (litigation "consumed 80 trial days, requiring 43 witnesses, produced 800 exhibits, [and] generated almost 15,000 pages of transcript"); *In re Int'l Bus. Machs. Corp.*, 687 F.2d 591 (2d Cir. 1982) (government stipulated to dismissal of case after liability trial ran nearly seven years); *Juneau Square Corp.* v. *First Wis. Nat'l Bank*, 475 F. Supp. 451, 465 (E.D. Wis. 1979) (parties allotted three months for trial due to "the complexity of the case and the great quantity of evidence to be presented"); *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 585 F.2d 821, 824 (7th Cir. 1978) (four-month trial); *SCM Corp.* v. *Xerox Corp.*, 463 F. Supp. 983, 986 (D. Conn. 1978) (trial ran for fourteen months and included some 30,000 factual allegations); see also Federal Judicial Center, 2003–2004 District Court Case-Weighting Study 5 tbl. 1 (2005) (antitrust trials among five lengthiest of over 40 categories of cases); cf. *Weit* v. *Cont'l Ill. Nat'l Bank & Trust Co.*, 641 F.2d 457, 464 (7th Cir. 1981) ("[A]nti-trust actions [are] especially protracted, and difficult for jury consideration.").

damages under the Clayton Act multiplies the risk of liability at trial, with monetary penalties sometimes running into the hundreds of millions of dollars—or more. See, *e.g.*, Bloomberg, *Visa, MasterCard $5.7 Billion Swipe Fee Accord Approved* (Dec. 14, 2013) (Visa, MasterCard and a group of other large financial firms settle a massive anti-trust suit brought by retailers for $5.7 billion). As a result, these suits "afford[] a special temptation for the institution of vexatious litigation" and coerced settlements. *Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 822 F.2d 656, 659 n.4 (7th Cir. 1987) (internal quotation marks omitted).

Here, too, the empirical data confirm the common-sense observation that the monetary exposure typical in an antitrust trial often forces defendants to settle otherwise unmeritorious cases. See, *e.g.*, *Antitrust Damage Allocation: Hearings Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 97th Cong. 8,246 (1981/1982) (statement of Hubert L. Will, Senior U.S. District Court Judge for the Northern District of Illinois) ("[R]oughly 89 percent of antitrust cases—are settled."); Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 813 (1987) ("88.2% of the antitrust cases surveyed settled."); Monograph Task Force, *Minority Report on Contribution, in Contribution and Claim Reduction in Antitrust Litigation*, 1986 A.B.A. SEC. ANTITRUST 64, 67 ("Whatever criticism fairly may be made of the liabilities imposed by the antitrust laws or of the coercive nature of class actions, the undeniable fact remains that 95 percent of all major antitrust litigation today is resolved by settlement.").

Moreover, settlements from antitrust cases

make up a disproportionate share of class-action settlements generally. According to one recent study, over half of funds from settlements reached in class action lawsuits nationwide between 2010 and 2013 were related to antitrust cases. See NERA Economic Consulting, *Consumer Class Action Settlements: 2010 – 2013 Settlements Increasing, With a Focus on Privacy* 7, Ex. 6 (July 22, 2014).

Against this background, "[t]he ultimate determination, after trial, that an antitrust claim is unfounded, may come too late to guard against the evils that occur along the way." *Valley Liquors,* 822 F.2d at 659 n.4 (internal quotation marks omitted). And this means that a "basic deficiency [in the plaintiff's case] should … be exposed at the point of minimum expenditure of time and money by the parties and the court." *Twombly*, 550 U.S. at 558 (internal quotation marks omitted).

3. There also are additional considerations that make the availability of an effective summary judgment screen especially important in the antitrust context. Even beyond the impact of nuisance litigation on individual defendants, "wasteful trials and * * * lengthy litigation * * * may have a chilling effect on pro-competitive market forces." *Tops Mkts., Inc.* v. *Quality Mkts., Inc.*, 142 F.3d 90, 95 (2d Cir. 1998). As this "Court has emphasized, * * * summary judgment may be especially appropriate in an antitrust case because of the chill antitrust litigation can have on legitimate price competition." *Ind. Grocery, Inc.* v. *Super Valu Stores, Inc.*, 864 F.2d 1409, 1412 (7th Cir. 1989); cf. *Matsushita*, 475 U.S. at 598 (rejecting notion that summary judgment in antitrust context would encourage anti-competitive behavior

and reinstating summary judgment below). Summary judgment thus "serves a vital function in the area of antitrust law." *Tops Mkts.*, 142 F.3d at 95; see also *Race Tires Am., Inc.* v. *Hoosier Racing Tire Corp.*, 614 F.3d 57, 73 (3d Cir. 2010) ("The entry of summary judgment in favor of an antitrust defendant may actually be required in order to prevent lengthy and drawn-out litigation, which may have a chilling effect on competitive market forces.").

Moreover, the use of different summary judgment standards in different circuits leads to inevitable forum shopping by plaintiffs, who will seek to file suit in whatever court is most likely to allow their case to escape pretrial resolution. Antitrust actions are typically brought as nationwide class action lawsuits. *Antitrust Damage Allocation: Hearings Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 97th Cong. 8,246 (1981/1982), at 19 (statement of Stephen D. Susman). "Skilled plaintiffs' lawyers armed with a potent first mover advantage can pick the circuits most favorable to their position. It follows therefore that those circuits * * * which set the bar too low will attract numerous cases." Richard A. Epstein, Bell Atlantic *v.* Twombly*: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 95 (2007); see also Hovenkamp, *supra*, at 134-135.

As a result, absent intervention by this Court, circuits like the Sixth and Ninth will wield disproportionate influence over an area of law where national uniformity is particularly important. Epstein, 25 WASH. U. J.L. & POL'Y at 95; see also Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Circuit Conflicts*, 56 U. PITT. L.

REV. 693, 715, 729 (1995) (noting antitrust conflicts will encourage forum shopping). This unfortunate dynamic has consequences that "undermine the effectiveness of the antitrust laws" as a whole. Epstein, 25 WASH. U. J.L. & POL'Y at 95. For this reason as well, further review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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