No. 14-110

IN THE

Supreme Court of the United States

DEAN FOODS COMPANY, DAIRY FARMERS OF AMERICA, INC., AND NATIONAL DAIRY HOLDINGS, LP,

Petitioners,

v.

FOOD LION LLC AND FIDEL BRETO, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

RICHARD L. WYATT, JR.
Counsel of Record
TODD M. STENERSON
NEIL K. GILMAN
HUNTON & WILLIAMS LLP
2200 Pennsylvania Ave., NW
Washington, DC 20037
(202) 955-1500
rwyatt@hunton.com

R. LAURENCE MACON
AKIN GUMP STRAUSS HAUER & FELD LLP
300 Convent Street, Suite 1500
San Antonio, TX 78205
(210) 281-7000

GORDON BALL
7001 Old Kent Drive
Knoxville, TN 37919
(865) 525-7028

Counsel for Respondents

255060

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether, in antitrust or other cases in which the plaintiff must prove causation in fact as an element of the claim, a plaintiff must produce evidence of causation to defeat a motion for summary judgment, or whether a court may instead presume causation at summary judgment and permit the case to proceed to trial based on that presumption.

LIST OF PARTIES

The parties to the proceedings before the United States Court of Appeals for the Sixth Circuit were Petitioners Dean Food Company, Dairy Farmers of America, Inc., and National Dairy Holdings, L.P. and Respondents Food Lion, LLC and Fidel Breto d/b/a Family Foods.

CORPORATE DISCLOSURE STATEMENT

Food Lion, LLC is a subsidiary of Delhaize America, LLC. Delhaize America, LLC is a subsidiary of Delhaize US Holding, Inc. Delhaize US Holding, Inc. is a subsidiary of Delhaize Group SA. There are no publicly-held corporations that own 10% or more of the stock of Food Lion, LLC, Delhaize America, LLC, Delhaize US Holding, Inc., or Delhaize Group.

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Page

Cited Authorities

Page

Page

Statutes and Rules

Other Authorities

PRELIMINARY STATEMENT

Respondents ask this Court to determine whether a court may presume causation at the summary judgment stage of litigation. But that question is not presented by the judgment below. The Sixth Circuit did not presume causation, as Petitioners suggest. Instead, it repeatedly stated that Respondents must actually prove causation, and it applied the well-established summary judgment standard to Respondents' evidence, concluding that the evidence of a conspiracy (which was unchallenged on appeal)—when combined with an expert regression model showing price increases not attributable to other causes—was sufficient to create a genuine issue of material fact as to causation.

Petitioners thus complain about nothing more than the fact-bound application of well-settled law. As in many antitrust cases, Respondents offered a comprehensive regression model that incorporated all relevant factors. The model showed that some part of the elevated prices could not be attributed to factors other than decreased competition between Petitioners. That evidence is sufficient to support a jury finding under this Court's decisions in *Bigelow, Continental Ore,* and *Zenith* (and countless courts of appeal decisions). The Sixth Circuit correctly recognized that Petitioners' challenges to the regression model did not support summary judgment.

Petitioners' desperate attempt to manufacture a circuit split fails. The cases Petitioners cite do not allow for the "presumption" of causation as they claim. Rather, like the Sixth Circuit here, those courts apply the established summary judgment standard to the facts to determine

whether, giving all reasonable inferences to the plaintiff, a jury could find in plaintiff's favor. Because there is no circuit split, and because answering the Question Presented by Petitioners will have no impact on the result of this case, the Petition should be denied.

INTRODUCTION

This case involves a claim under Section 1 of the Sherman Act that two dairy foods companies, Dean Foods Company ("Dean") and National Dairy Holdings ("NDH"), along with NDH's parent, Dairy Farmers of America ("DFA"), conspired to lessen competition for sales of bottled milk to grocery retailers and other wholesale purchasers of milk in the southeastern United States. The conspiracy began in 2002, immediately after a merger in late 2001 between Dean and Suiza Foods Corporation ("Suiza"), who were, at the time, the two largest dairy processors in the Southeast. The District Court twice held that plaintiffs' evidence of that conspiracy presents a triable issue of fact. But the court nevertheless granted summary judgment because it thought that Plaintiffs' expert economist's regression analysis of bottled milk prices showed, in part, the impact of the merger and thus did not provide evidence of antitrust injury. The Sixth Circuit reversed, holding *inter alia*, that the District Court's finding that Plaintiffs' expert had measured the effects of the merger was wrong, and that the injury that Plaintiffs allege is antitrust injury because it is "precisely the kind of injury" that the Sherman Act was designed to prevent.

A. Factual Background

Beginning in 1998, Suiza, a small dairy company, entered into a strategic relationship with Dairy Farmers of America ("DFA"), a large dairy farmer cooperative that supplied raw milk to Suiza's bottling plants. DFA helped to finance Suiza's expansion by transferring milk bottling plants it owned to Suiza, and by helping to finance Suiza's acquisition of additional bottling plants. In return, DFA received a large equity stake in Suiza, and the right to supply the Suiza plants with raw milk produced by its dairy farmer members. By 2001, Suiza had grown to 67 bottling plants.

In early 2001, Suiza agreed to acquire Dean Foods, one of the largest dairy processors in the United States. Dean and Suiza recognized that because they were the largest milk bottlers in the Southeast, they would have to sell several bottling plants to obtain merger approval from the United States Department of Justice. Suiza and DFA thus created an entirely new company, NDH, which would be majority owned and controlled by DFA. To make NDH appear to be a strong competitor, DFA provided $200 million in financing so that NDH could purchase 17 bottling plants in the Northeast and Midwest. Dean and Suiza assured the DOJ that NDH would use those plants, plus additional plants to be divested from Dean and Suiza, to be a vigorous competitor to the merged entity which retained the Dean name. Based on those assurances, as well as on econometric analyses of the expected competition between bottling plants owned by NDH and those of the merged entity, DOJ approved the merger.

But the promised "vigorous competition" between Dean and NDH never materialized. Instead, beginning immediately after the merger Dean and NDH (the latter controlled by DFA) implemented their conspiracy to lessen competition for sales of bottled milk. The record evidence of that conspiracy includes the following:

- Dean, DFA and NDH representatives attended a meeting a few days before the divestitures were finalized, at which all agreed that several of the plants were not viable and should be closed. NDH later admitted that it had willingly accepted "second best" plants as part of the divestiture, and that it had actually budgeted for closing costs at several of the divested plants even before taking possession of them.

- When NDH management wanted to close one of those plants because it was losing money, the company's lawyers told them that it had to continue operating the plant at a loss because it was "too soon" after the merger to close it.

- When a competing bottler later attempted to buy the plant that NDH was waiting to close, DFA blocked the sale; instead, NDH demolished the plant and handed over key equipment and customer lists to Dean.

- An NDH executive told a colleague that he had been instructed not to compete for Dean's customers (and that he was later demoted because he had actually attempted to win some of Dean's customers).

- Senior Dean and DFA executives discussed the need for "plant rationalization," which involved "taking some strategic plants out of the system," *i.e.*, reducing capacity, which would "allow folks to be more aggressive on pricing to retailers," *i.e.*, raise prices to wholesale customers like Food Lion.

- DFA repeatedly crippled NDH's ability to be a strong competitor, including forced asset sales and blocking NDH from acquiring other bottling plants that would have made them a stronger competitor. When Food Lion invited NDH to bid on its business, NDH never even responded.

Based on this, and other evidence, the District Court twice held that plaintiffs had shown sufficient evidence of the existence of a conspiracy to lessen competition for the sale of bottled milk such that summary judgment was not appropriate. App. 43a & 79a.

B. Procedural Background

In 2008 Food Lion, a regional supermarket company, along with Fidel Breto, the former owner of a small retail convenience store, filed an amended complaint against Petitioners (and two others) alleging five counts under Sections 1 and 2 of the Sherman Act for unreasonable restraint of trade and monopolization or attempted monopolization. 15 U.S.C. §§ 1 & 2. Only Count 1 of that complaint, a Section 1 claim, is still at issue.[1]

1. Respondents did not appeal the district court's summary judgment orders dismissing Counts II (a Section 1 claim alleging that Respondents and two other parties had conspired

1. Professor Cotterill's Expert Report

As part of their proof that Petitioner's conspiracy not to compete for bottled milk sales to retail sellers caused injury to Food Lion and Breto, Respondents offered the expert testimony of Professor Ronald Cotterill, a Professor of Agriculture and Resource Economics at the University of Connecticut. To analyze the validity of Respondents' alleged conspiracy claim and measure its impact, Cotterill used a multiple regression model that captured the nature of competition between milk processors. The model was based on the well-accepted theory that the presence of an additional firm selling bottled milk would result in lower prices for customers buying bottled milk. R.1086-2 ¶ 130.

Cotterill assembled a data set from millions of actual sales transaction prices, computing volume-weighted prices for each month and zip code in the relevant market over a seven-year period, encompassing the time before and during the alleged conspiracy. *Id.* To capture the geographic nature of competition, Cotterill used competition variables to measure the intensity of price competition between various milk bottling plants. To filter out the effects of changes in the normal supply and demand factors on milk prices, Cotterill included regression variables to account for changes in input costs (such as the cost of raw milk, energy, labor, and capital), as well as for other factors affecting prices. *Id.* ¶ 139.

---

to manipulate raw milk prices), III & IV, (Section 2 claims alleging that Dean had monopolized or attempted to monopolize the processed milk market) and V (a Section 2 conspiracy to monopolize claim). *See also* Pet. at 6, n.2.

Consistent with Respondents' claim that Petitioners milk bottling plants were competing less vigorously, Cotterill found that price competition during the conspiracy period was less intense than it had been before the conspiracy. Cotterill's regression showed that although milk prices had increased by 43% over the course of the conspiracy period, most of that change was due to normal changes in supply and demand factors. R.1086-1 ¶ 150, fig. 17. But a portion of the overall increase, approximately 7.9%, was explained by a lessened intensity of competition during the conspiracy. *Id.* ¶ 158, fig. 21. Petitioners' own experts disputed Cotterill's results, but never claimed that he had failed to include any relevant factor affecting the cost of milk, or that his regression measured the impact of the Dean-Suiza merger.

2. District Court Proceedings

Petitioners filed two summary judgment motions. The first, filed while discovery was still ongoing, argued that Petitioners were entitled to summary judgment on the conspiracy to lessen competition claim because the evidence showed purportedly intense competition between Dean and NDH, and that there was no evidence of a conspiracy. R.462. The district court rejected Petitioners' argument and summary judgment was denied as to Count I. App. 79a. Petitioners asked the court to reconsider, arguing that "special rules . . . apply to summary judgment motions in antitrust conspiracy cases," and that the court had "failed to properly apply" those rules when it concluded that Respondents' evidence of the existence of a conspiracy was sufficient to get to the jury on that issue. R.953 at 3-5. The court again rejected Petitioners' argument, holding that the inferences "which could be

drawn by a reasonable jury" from the available evidence are sufficient to show "the existence of genuine issues of material fact with respect to the conspiracy claim." App. 43a.[2]

Petitioners also filed a supplemental summary judgment motion, this time arguing that Respondents had not established antitrust injury. R.1027. Petitioners' supplemental motion claimed that "Cotterill's primary damage model *expressly* measures the impact of the Dean-Suiza merger" and that, as a result, Respondents' evidence "does not create any genuine issue of material fact on the question of antitrust injury." *Id.* at 7-8 (emphasis added).[3]

Shortly thereafter, Petitioners also filed a *Daubert* motion to exclude Cotterill's expert opinions. R.1084. In support of that motion, Petitioners argued, *inter alia*,

---

2. The court also stated that if Petitioners' view of the correct summary judgment standard prevailed "no antitrust case would ever reach the jury." App. 42a.

3. It is important to note that Petitioners have always denied that the merger raised milk prices, and that no party or expert in this case has ever claimed that the merger resulted, even in part, in higher prices. In fact, before the merger, Petitioners claimed just the opposite, telling the Justice Department that competition would be intense and that prices would decline. In their supplemental summary judgment motion, despite arguing that Cotterill's model "expressly" measured the impact of the merger, Petitioners added a footnote saying that they do not "*concede* that the Dean-Suiza merger had any adverse effect on prices." R.1027 at 8, n.7 (emphasis added). Petitioners' motion, thus, was premised on a purely hypothetical alternative cause that no one believes actually exists and which Petitioners do not intend to prove at trial.

that Cotterill had measured the effect of the merger, the lawfulness of which was not being challenged in this case. R.1086 at 5-8. The Magistrate Judge denied the motion, concluding that "[a]lthough Cotterill began his analysis as of the time of the Dean/Suiza merger, what he ultimately purported to measure was the result of the subsequent anticompetitive actions" that began immediately after the merger. R.1187 at 2.

The district court, however, found that "the price increases [Cotterill] identifies as injury to the Plaintiffs in this case are related, if not totally, then at least in part, to the merger." App. 50a. As a result, the district court concluded that "Professor Cotterill's analysis does not create a material issue of fact on the question of whether the price increases were 'by reason of' an illegal conspiracy," and that "Plaintiffs do not allege an injury of the kind which the antitrust laws are designed to prevent." *Id.* 51a. Accordingly, the court granted Petitioners' motion and dismissed Count I because "Plaintiffs cannot establish antitrust injury." *Id.*

3. The Court of Appeals' Decision

The court of appeals reversed. It stated that "the parties do not contest the first required element" of an antitrust claim, the existence of a conspiracy. App. 7a. The court then turned to the injury element, the only issue raised in this Petition. Contrary to Petitioners' claim that the Sixth Circuit "presumed" causation, the court repeatedly stated that Respondents must prove that the illegal conduct caused harm. *See id.* ("the plaintiff must also establish that the illegal conspiracy caused injury to the plaintiff"); 9a (listing elements of plaintiff's *prima facie*

case as including "that the restraint was the proximate cause of the plaintiff's antitrust injury"); and 31a-32a ("antitrust plaintiffs must still prove that the restraint at issue caused them to suffer an antitrust injury"). The court then addressed the heart of the dispute—whether Cotterill's model "necessarily" measured only the effects of the merger. Just as the Magistrate Judge held, the Sixth Circuit concluded that Cotterill's model attempted to measure damages caused by the alleged anticompetitive conduct, and not solely price increases caused by the merger (which Petitioners claim did not raise prices).

The court explained that "three conclusions," if accepted by a jury, are sufficient to prove that Petitioners' conduct caused antitrust injury. Those conclusions were that "Plaintiffs purchased processed milk from the Defendants," that Respondents "were charged 7.9% more for milk than an econometric analysis could justify," and that "the district court found that evidence indicated that Dean Foods and NDH, due to the influence of DFA, conspired to avoid competing vigorously." App. 37a (holding that "[t]his is precisely the kind of injury that the Sherman Act was designed to prevent").

REASONS FOR DENYING THE PETITION

This case does not merit review. The decision below is fully in accord with long-established precedent for proving causation in antitrust cases that has been repeatedly, and plainly, stated by the Court, including in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969). The evidence that the court of appeals found to be sufficient to prove causation in this case, if

credited by a jury, is the same type of causation evidence on which the Court relied in *Bigelow* and *Zenith* to affirm judgments for plaintiffs.

Moreover, the Petition does not raise any disputed issue of law for the Court to decide. Petitioners and Respondents both agree that under the Court's precedents, causation can be proven via circumstantial evidence. *See* Pet. at 27. The disagreement here is only whether the court of appeals properly *applied* that principle to the evidence in this case. Nor is there any dispute about whether courts may presume causation. The court below did not claim that it was doing so; indeed the court repeatedly said it was doing just the opposite, and that Respondents must actually prove that the conspiracy was the proximate cause of their injury.

Petitioners argued below that Respondents' expert evidence linking higher prices to the claimed conspiracy to compete less vigorously does not provide sufficient circumstantial evidence of causation. That argument depended upon gross factual mischaracterizations of Respondents' expert evidence that are repeated in their Petition. Having failed to convince the court below that they are right as a matter of law (such that Petitioners are entitled to summary judgment), Petitioners now claim that the court excused Respondents from coming forward with *any* evidence of causation. Far from presuming causation, the court below merely held that it is up to the jury to decide, based on exactly the same type of evidence that was available in *Bigelow* and *Zenith*, whether Respondents' proof is sufficient to prove causation. Petitioners thus are attempting to manufacture a legal issue for the Court's review out of a factual dispute over the sufficiency of Respondents' causation evidence.

For the same reason, the court of appeals' decision raises no novel issue concerning the standard for, or its application of, summary judgment. Neither Petitioners nor their *amici* make any effort to show that the statement of the court below (or by any other court) that summary judgment is disfavored in certain types of antitrust cases, even if an incorrect statement of the law, in any way influenced its actual holding. Because the statement appeared only as part of the boilerplate description of the summary judgment standard and was never repeated in the court's analysis of the evidence, any possible misstatement was at most the sort of harmless dicta that the Court has repeatedly indicated does not merit review.

I. THE SIXTH CIRCUIT FOLLOWED THIS COURT'S PRECEDENTS IN *BIGELOW* AND *ZENITH* IN DECIDING THAT RESPONDENTS PRESENTED SUFFICIENT EVIDENCE OF CAUSATION TO GET TO A JURY

Petitioners argue that the courts of appeals "are divided" on whether a plaintiff must produce evidence of causation at summary judgment, and that contrary to this Court's precedents the court below allowed the case to go to trial "without any evidence of a causal link" between Petitioners' conduct and respondents' harm. Pet. at 18-28. Petitioners are wrong on both counts, but regardless of any differences among the circuits (which in fact do not exist) the decision below was completely in accord with long-established precedents from this Court.

A. The Court Explained Sixty-Eight Years Ago How Antitrust Plaintiffs May Prove Causation and Has Repeatedly Reiterated that Standard

In *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), the Court "followed a well-settled principle" to explain how a plaintiff may prove causation in an antitrust case:

> [I]n the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts *had caused* damage to the plaintiffs.

Id. at 264 (emphasis added). *Bigelow* thus makes clear that three elements are sufficient to establish causation: 1) wrongful conduct; 2) the tendency of such conduct to cause injury, and 3) evidence of a change in prices or profits not attributable to other causes.[4]

4. There were two issues in *Bigelow*, including whether the evidence was sufficient to "establish the fact of damage" as well as whether the evidence was too uncertain to provide an "accurate measure of the amount of the damage." 327 U.S. at 263. The language quoted above goes to the former. As to the latter issue, the Court allowed a relaxed standard of proof for measuring the amount of damages in cases "where the defendant by his own wrong has prevented a more precise computation . . ." *Id.* at 264. The relaxed standard of proof applies only to the quantum of damages and not to the fact of damages. *See J. Truett Payne Co.*

The Court reaffirmed the *Bigelow* rule in *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962). The Court first explained that the court of appeals had correctly acknowledged the basic principle that

> where the plaintiff proves a loss, and a violation by defendant of the antitrust laws of such a nature as to be likely to cause that type of loss, there are cases which say that the jury, as the trier of the facts, must be permitted to draw from this circumstantial evidence the inference that the necessary causal relation exists.

370 U.S. at 697 (citing *Bigelow*). Nevertheless, despite also acknowledging that plaintiffs had shown "the type of consequence that would reasonably be expected to flow from" the claimed antitrust violations, the court of appeals had failed to review the evidence in the light most favorable to the non-moving party and had "erred in holding that there was insufficient evidence to support a finding that the respondents' conduct in fact caused injury to Continental's business." *Id.* at 697-98. In reversing, the Court explained that although not all the evidence pointed in one direction and that different inferences might reasonably be drawn, it was for the jury to make that determination because the Court's "review of the record discloses sufficient evidence for a jury to infer the necessary causal connection between respondents' antitrust violations and petitioners' injury." *Id.* at 700-01.

---

v. Chrysler Motors Co., 451 U.S. 557, 567 n.5 (1981) (noting that "if the damage is certain, the fact that its extent is uncertain does not prevent a recovery") quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 566 (1931). The question here is causation. Respondents do not seek to apply the relaxed approach that applies to the question of damages.

In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969) the Court again held that an appellate court had "failed to adhere to the teachings of *Bigelow*." The Court explained that "Zenith's burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage." *Id*. at 114 n.9. The Court held that the evidence "although by no means conclusive, was sufficient to sustain the inference that Zenith had in fact been injured to some extent" by respondents' refusal to license their patents in Canada, and that that conduct had "interfered with and made more difficult the distribution of Zenith products." *Id.* at 114 & 118. The Court explained that:

> the injury alleged by Zenith was *precisely the type of los*s that the claimed violations of the antitrust laws would be *likely* to cause. The trial court was entitled to infer from this circumstantial evidence that the necessary causal relation between the pool's conduct and claimed damage existed.

Id. at 125 (emphasis added).

The language in *Bigelow* concerning the "tendency" of wrongful conduct to cause injury, and in *Continental Ore* about "the type of consequence that would reasonably be expected" is a crucial element in the causal chain that connects the illegal conduct with the observed injury. Borrowing a concept from tort law, antitrust courts conclude that a jury can find that an act and an injury are causally linked when performance of the act

increases the chances that the injury will also occur.[5] *Bigelow*, *Continental Ore* and *Zenith*, and their tort law antecedents, thus rely on the idea that the known tendency of an act to cause injury is an integral part of the causal analysis.[6] Petitioners favorably cite both *Zenith* and *Bigelow* for the proposition that causation can be inferred from circumstantial evidence, Pet. at 27, but they never acknowledge exactly what that means, or show how Respondent's evidence falls short of the evidence that was sufficient in both *Bigelow* and *Zenith* to find such a causal link through circumstantial evidence.[7]

---

5. *See* John E. Lopatka, *Antitrust Injury and Causation*, in III ABA Section of Antitrust Law, *Issues in Competition Law and Policy*, 2299, 2325-26 (2008). This Court has long held that "antitrust violations are essentially 'tortious acts'." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 547 (1983), citing *Bigelow.*

6. *Bigelow*, 327 U.S. at 264, cited *Hetzel v. Baltimore & Ohio R.R. Co.*, 169 U.S. 26, 38 (1898), a tort case, which explained that a

> plaintiff is not bound to show to a certainty that excludes the possibility of a doubt that the loss to him resulted from the action of the defendant . . . and yet there might be a reasonable certainty founded upon inferences legitimately and properly deducible from the evidence that the plaintiff's loss was not only in fact occasioned by the defendant's [conduct], but that such loss was the natural and proximate result of such violation.

The court of appeals in *Continental Ore* described *Bigelow* as establishing "a rule much akin to the doctrine of *res ipsa loquitur*." *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 289 F.2d 86, 90 (9th Cir. 1961).

7. Petitioners correctly point out that the *Zenith* Court reversed the damages award in two of the three markets at issue

B. Respondents' Causation Evidence is Fully Consistent with this Court's Established Precedent

The court below did not "presume" causation. Rather, the court simply found that Respondents had produced sufficient evidence such that a jury could reasonably determine, based on the conspiracy, the tendency of such a conspiracy to cause harm, and evidence of a price increase not attributable to normal competitive factors that the antitrust violation caused Respondents' injuries. Petitioners concede that Respondents have sufficient proof to allow a jury to decide whether the alleged conspiracy occurred. Pet. at 7 (acknowledging that the district court found that respondents' evidence was sufficient to allow a jury to determine whether the alleged conspiracy occurred). And Respondents do not contest that such a conspiracy—an agreement between sellers of bottled milk to lessen competition—has a known tendency to cause higher prices and this is consumer injury.

Petitioners attack only the third element of Respondents' causation evidence—evidence of higher prices not attributable to other causes—and they do so by factual misstatements and gross misrepresentations about the evidence of higher prices produced by Cotterill's regression analysis. To be clear, Respondents do not rely merely on higher prices, but, rather, on Professor

---

(England and Australia) because the plaintiff's injury resulted from other factors. Pet. at 28. But they are silent about the Court's analysis of causation in the third market, Canada. With respect to that market, the Court affirmed the damages award based *solely* on the conduct, its tendency to cause injury, and the loss of market share. 395 U.S. at 114-125.

Cotterill's regression that shows, consistent with *Bigelow*, the portion of the higher prices that cannot be attributed to any other cause. *See In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 660 (7th Cir. 2002) (Posner, J.) (reversing grant of summary judgment to defendants where plaintiffs "presented some admissible evidence that higher prices during the period of the alleged conspiracy cannot be fully explained by causes consistent with active competition").

Respondents produced evidence of higher prices not attributable to any cause other than the reduced competition that is alleged to have been the object of Petitioners' conspiracy. Cotterill's model demonstrates that "Plaintiffs were charged 7.9% more for milk than an econometric analysis could justify." App. 37a. Given the evidence that petitioners had "conspired to avoid competing vigorously," Respondents' evidence is sufficient to show a causal connection between Petitioners' conduct and Respondents' injury. *Id.* (concluding that "when competition is limited pursuant to an agreement and customers are punished through higher prices, the injury clearly results from anticompetitive conduct"). Far from "presuming" causation, the lower court's analysis is a faithful application of *Bigelow* and *Zenith*.

C. Petitioners' Argument Rests on Numerous Incorrect Factual Statements About Respondents' Causation Evidence

Petitioners make several incorrect claims about the price evidence produced through Cotterill's regression, as well as about the court of appeals' review of that evidence. First, Petitioners claim that "the court of appeals did not

disagree with the district court's finding that the price impact Cotterill observed could just as easily reflect the unchallenged merger." Pet. at 18. This is wrong. The appellate court expressly noted that Cotterill's model was intended to analyze whether petitioners' ***collusive conduct*** "resulted in elevated prices" and that if it did so, it would produce "the precise sort of injury and causation [evidence] that is required." App. 35a-36a.

Second, Petitioners say that Cotterill's econometric regression model was "the sole evidence" that Respondents submitted on causation. Pet. at 18-19. Wrong again. The model itself provided evidence of higher prices (and the degree to which those higher prices were not attributable to other causes), but that price evidence was combined with other evidence to form the totality of the causation evidence. *See* R.1086-1 ¶ 9 (Cotterill's opinion concluding that milk prices were "substantially higher as a direct consequence of Defendants' anticompetitive conduct"). As explained by this Court in *Bigelow* and other cases, evidence of the conspiracy not to compete, and the tendency of such conspiracies to cause higher prices, must be included with the evidence of higher prices in analyzing causation.

Third, Petitioners say that "Cotterill did not investigate or show what caused the higher prices he observed," and that as a result Respondents have produced no evidence of causation. Pet. at 24. That too is demonstrably false. Professor Cotterill's analysis used a multiple regression technique that captured the effect of every available supply and demand factor on the price of milk. Petitioners' own expert was unable to identify any specific variable that Cotterill had failed to account

for. Cotterill's regression analysis also measured the intensity of competition between milk plants to capture how the location and proximity of competing bottling plants affected prices. Cotterill's analysis showed that milk prices increased by 43% over the period of the alleged conspiracy, but recognized that much of that increase was attributable to normal supply and demand factors (such as an increase in the cost of raw milk).

Cotterill analyzed what, if any, portion of the increased prices was attributable to the decrease in competition between Petitioners, and his regression determined that 7.9% was attributable to this factor. Cotterill's analysis thus produced evidence of a change in prices "not shown to be attributable to other causes," *see Bigelow*, 327 U.S. at 264, and is for that reason distinguishable from those cases where the analysis was insufficient to prove a causal link to an antitrust violation. *See Blue Cross and Blue Shield United of Wisc. v. Marshfield Clinic*, 152 F.3d 588, 593 (7th Cir. 1998) (Posner, J.) ("Statistical studies that fail to correct for salient factors, not attributable to the defendant's misconduct, that may have caused the harm of which the plaintiff is complaining do not provide a rational basis for a judgment"). Thus, the assertion that Cotterill did not investigate what caused the higher prices he observed is plainly incorrect.

Fourth, Petitioners say that Cotterill's model is not consistent with *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), because it reflects alternative theories of liability based on other claims (Respondents' monopolization counts) that were dismissed and are no longer part of the case. Pet. at 25-26. Petitioners' argument is again wrong. It is true that Cotterill used the model to compute

damages for both the conspiracy and monopolization counts before the latter were dismissed. But Cotterill computed damages for the dismissed monopolization counts independently of the damages amounts for the conspiracy count that is still at issue. *See* R.1086-1 ¶ 156 (explaining that separate regressions were used to ascertain damages based on "different categor[ies] of defendants' conduct").[8] As a result, Cotterill's model estimates higher prices attributable specifically to the remaining claim in the case, and is therefore fully consistent with *Comcast*. 133 S. Ct. at 1433.

Fifth, Petitioners say that Cotterill admitted that his model could not tell whether the observed price increases were the result of a conspiracy or defendants' unilateral (and lawful) decisions to lessen competition. Pet. at 24. Of course, the results of the regression model itself show only that 7.9% of the price increase is not attributable to other causes and is correlated with the reduced intensity of competition between milk bottling plants.[9] Cotterill's

8. This claim by Petitioners was also factually rejected by the Magistrate Judge in his *Daubert* ruling. R.1187 at 2.

9. The Federal Judicial Center's Reference Manual on Scientific Evidence explains that when "interpreting the results of a multiple regression analysis, it is important to distinguish between correlation and causality." Although "[a] correlation between two variables does not imply that one event causes the second," one may "infer that a causal relationship exists on the basis of an underlying causal theory that explains the relationship between the two variables." Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, 309-10, in Federal Judicial Center, *Reference Manual on Scientific Evidence* (3d ed. 2011). The underlying causal theory in this case is the conspiracy not to compete, which Petitioners wholly ignore.

point was only that the math by itself cannot explain *why* defendants' milk plants were competing less intensely, only that they *are* competing less vigorously. That is why the Court in *Bigelow*, and the court below, made clear that evidence of an actual antitrust violation that is known to cause higher prices (such as a conspiracy) is necessary. Indeed, the fundamental flaw in Petitioners' argument is their attempt to isolate the regression as the only causation evidence while wholly ignoring the role of the conspiracy evidence in the analysis.[10]

Petitioners say that the evidence shows "intense competition" and no evidence of a conspiracy, Pet. at 7, but this just demonstrates further that they are really claiming the absence of a conspiracy, not Cotterill's regression finding of higher prices due to reduced competition among milk bottling plants. Cotterill's model shows price increases that cannot be explained by other causes. The jury is therefore entitled to determine if a conspiracy existed (given the district court's unchallenged finding that sufficient evidence exists on that question to preclude summary judgment), and if so, whether it is reasonable to infer that the conspiracy (or something else) was the cause of the higher prices. *See Bigelow* and *Zenith*.

---

10. A leading treatise, cited favorably in *Comcast*, 133 S. Ct. at 1433, explains that the results produced by a properly specified econometric model, along with a sound economic theory explaining why one would expect the explanatory variable to have a causal effect, provides "evidence consistent with the existence of a causal relationship and an estimate of the magnitude of the effect." ABA Section of Antitrust Law, *Proving Antitrust Damages: Legal and Economic Issues* 131 (2d ed. 2010).

D. There is No Circuit Split About Whether Courts May "Presume" Causation, but Even if there Were, it would be Irrelevant Because the Court Below Did Not Do So

Because the court below correctly applied this Court's long-established precedent for establishing causation in an antitrust case, whether other courts have failed to do so is irrelevant. Accepting review *in this case* to correct errors from other cases would amount to little more than issuing an advisory opinion. In any event, Petitioners are simply wrong that the courts of appeal are divided on whether a plaintiff must produce evidence of causation at summary judgment.

Petitioners cite the Second Circuit's opinion in *In re Publication Paper Antitrust Litig.*, 690 F.3d 51 (2d Cir. 2012), as an example of a court that held that causation can be presumed. Pet. at 19-20. But in language that could have been taken straight from *Zenith*, the Second Circuit explained that because price fixing agreements are known to cause higher prices, evidence of the existence of a price fixing agreement, along with evidence of price increases following such an agreement, "constitutes strong evidence that the alleged agreement caused at least some element of the subsequent price increases." 690 F.3d at 67.

Likewise, Petitioners say that the Seventh Circuit adheres to the requirement that causation be shown in antitrust cases, but not always in other types of cases. Pet. at 21, citing *BCS Services, Inc. v. Heartwood 88, LLC*, 637 F.3d 750, 758 (7th Cir. 2011), which is a RICO case. But the relevant language from that case—that it is enough to show that the plaintiff "suffered the sort of injury that

would be the expected consequence of the defendant's wrongful conduct"—is virtually indistinguishable from the language used by this Court in *Zenith*, *i.e.*, that injury which is "precisely the type of loss that the claimed violation of the antitrust laws would be likely to cause" is sufficient "circumstantial evidence that the necessary causal relation" exists. 395 U.S. at 125.

Petitioners relegate to a footnote two other cases that supposedly represent instances of appellate courts excusing the need to prove causation in fact. Pet. at 22, n.14. For the first case, *In re Neurontin Marketing and Sales Practices Litig.*, 712 F.3d 60 (1st Cir. 2013), Petitioners cite to the court's quotation of the above language from the *BCS Services* case (essentially paraphrasing *Zenith*). They completely ignore, however, the court's cross-reference to its detailed discussion in a companion case decided the same day of the extensive trial record concerning the defendant's misleading publications and an expert's regression analysis that provided substantial evidence of but-for causation. 712 F.3d at 65, citing *In re Neurontin Marketing and Sales Practices Litig.*, 712 F.3d 21, 39-45 (1st Cir. 2013) ("*Kaiser*"). It is impossible to read the two opinions in conjunction and conclude that the court merely presumed causation. *See* 712 F.3d at 70 (vacating district court's ruling "in light of our holdings in *Kaiser* regarding RICO causation principles").

Petitioners also cite to the Ninth Circuit's quote from the *BCS Services* case for the same proposition that paraphrases *Zenith* in the only other case that they offer to show that some courts fail to require evidence of causation. Pet. at 22, n.14, *citing Pacific Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142 (9th Cir. 2013). But that case

involved a federal Fair Housing Act claim. The court noted that damages actions under that statute sound basically in tort, and then quoted the Restatement of Torts and similar authorities discussing how causation is proven in tort cases. 730 F.3d at 1168 (explaining that "[c]ausation is an intensely factual question that should typically be resolved by a jury" and that "making reasonable inferences about causation is one of the things that juries do best").

Petitioners' claimed evidence of a circuit split as to whether the lower courts require proof of causation to avoid summary judgment or merely presume its existence is completely without merit. The courts that supposedly "presume" causation actually follow this Court's teachings on how causation can be proven in various circumstances. In any event, as shown above, the court below did not presume causation and its holding is fully in accord with this Court's precedents. Thus, even if there were a circuit split, which there is not, Petitioners' argument would not change the outcome of this case.

II. THE SIXTH CIRCUIT DID NOT SHIFT ONTO PETITIONERS THE BURDEN OF DISPROVING RESPONDENTS' CAUSATION EVIDENCE

Faced with Petitioners' and Respondents' competing claims about what Cotterill's regression analysis shows, the court below held that the evidence of causation is not so one-sided that only Petitioners could prevail on that issue. The court was undoubtedly right about that for the reasons discussed above as to what Cotterill actually did and said about the results of his model. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986) (the essential inquiry at summary judgment is "whether the

evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law"). Seizing on the court's statement that Cotterill's use of a particular type of regression model "does not necessarily" mean that the price increases were due to legal causes, Petitioners argue that the appellate court improperly imposed on them the burden "to produce evidence negating causation." Pet. at 25. Petitioners' claim, however, misapprehends how summary judgment works.

A defendant without the burden of proof on an issue (like Petitioners in this case) may obtain summary judgment in "one of two ways" including by pointing out the absence of evidence to support an element of the plaintiff's case, or alternatively by showing that the evidence that plaintiff intends to rely on is, as a matter of law, insufficient to support that element. *See Salahuddin v. Goord*, 467 F.3d 263, 272-73 (2d Cir. 2006), *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) and Charles Alan Wright, et al., 10A *Federal Prac. & Proc.*, § 2727 (3d ed.). In either case, the "party seeking summary judgment always bears the initial responsibility" of identifying which portion of the record "demonstrate[s] the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. But having voluntarily taken on the effort to convince the court that its opponent's evidence is insufficient as a matter of law does not mean that the burden of proof has shifted whenever that argument fails. *See In re Publication Paper Antitrust Litig.*, 690 F.3d 51, 67 (2d Cir. 2012) (concluding that although defendant's argument "might well persuade a jury, we are not convinced that it so conclusively rebuts plaintiffs' strong evidence that the alleged agreement was both a material and but-for cause

of the price increases as to permit an award of summary judgment for defendants").

Petitioners argue that "because petitioners had not *disproved* that the observed higher prices were caused by the alleged conspiracy, the court in effect presumed it to be so." Pet. at 19. That is plainly wrong. The court held only that it could not conclude, as a matter of law, that Respondents' evidence was insufficient. Rather, the appellate court properly held that the evidence of causation proffered by Respondents creates a contested question that must be presented to a jury. *See* App. 36a (noting that at summary judgment plaintiffs get the benefit of all reasonable inferences).[11] Concluding that a party has produced enough evidence for a jury to decide a question (such that summary judgment should not have been granted on that issue) is a very far cry from the court presuming the answer to that question, or, as Petitioners claim, shifting the burden of proof. *Anderson*, 477 U.S. at 252 (the question is "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented"). The court of appeals, Respondents, and any natural reader of the court of appeals' opinion recognize that Respondents carry the burden of proving causation and must convince the jury at trial.

11. Notably, Petitioners do not seek the Court's review on the basis that the court of appeals was wrong in concluding that the evidence of causation is not so one-sided that they are entitled to a judgment as a matter of law.

III. DIFFERENCES IN HOW LOWER COURTS STATE THE STANDARD FOR SUMMARY JUDGMENT IN ANTITRUST CASES AMOUNT AT MOST TO HARMLESS DICTA THAT HAS NO EFFECT ON HOW CASES ARE DECIDED

There is also no need for the Court to grant review in this case to police the lower courts' application of the correct summary judgment standard. Petitioners cite eight antitrust cases to support their claim that courts are divided as to whether summary judgment is disfavored, Pet. at 16, n.7, but make no effort to show that the outcome in any of those cases was affected by the language used to describe the relevant legal standard. Petitioners begin by citing two antitrust cases in support of the proposition that "[s]ome circuits persist in the view that summary judgment is disfavored or should be used sparingly in antitrust . . . cases." *Id.* But *both* of those cases *affirmed* the district court's grant of summary judgment, thus belying the notion that courts are wrongly denying summary judgment on the basis that such relief is disfavored.

For example, although the court in *Smith Wholesale Co. v. R.J. Reynolds Tobacco Co.*, 477 F.3d 854, 862 (6th Cir. 2007) said that summary judgment is disfavored, it also explained that the rule does "not preclude the use of summary judgment in an antitrust case in which there clearly are no genuine issues of fact to try." The court then affirmed the grant of summary judgment dismissing the plaintiff's claim on the basis that it had failed to come forward with sufficient evidence to show that the alleged secondary-line price discrimination was the proximate cause of plaintiff's injury. *Id.* at 880. Likewise, in *Toscana*

v. Prof'l Golfers Ass'n, 258 F.3d 978, 982 (9th Cir. 2001), the court affirmed the district court's grant of summary judgment despite having stated that summary judgment is disfavored. *Id.* at 985 (affirming dismissal on the ground that plaintiffs had failed to come forward with any "evidence of an agreement for concerted action in restraint of trade"). These cases certainly do not indicate that the lower courts are routinely denying summary judgment based on an improper standard; instead they show that the standard is being properly applied where evidence is lacking.[12]

---

12. Petitioners' *amici* National Association of Manufacturers and International Dairy Foods Association rely principally on two district court cases to describe how the pressure to settle lawsuits is affected by an insufficient attentiveness to the proper summary judgment standard. The first case they cite, *Cason-Merenda v. Detroit Med. Ctr.*, 862 F. Supp. 2d 603 (E.D. Mich. 2012), actually *granted* summary judgment to *defendants* on one of the two counts, but denied it as to the other count only after a detailed, and exhaustive, recounting of the plaintiffs' evidence of a causal connection between the antitrust violation and the asserted injury. *See id.* at 641-48. The case hardly supports Petitioners claim that some courts have excused plaintiffs from producing causal evidence at the summary judgment stage. The other case, *In re Pressure Sensitive Labelstock Antitrust Litig.*, 356 F. Supp. 2d 484 (M.D. Pa. 2005), involved a motion to dismiss and has nothing to do with whether courts are properly applying the summary judgment standard. The *amici* say that the district court expressed reservations about dismissing that case on a Rule 12(b)(6) motion, but fail to acknowledge that that sentiment was expressed in a decision that pre-dated *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). After an amended complaint was filed the court then ruled differently with respect to one of the two defendants in a post-*Twombly* decision. *See In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 363 (M.D. Pa. 2008).

Petitioners point in contrast to six antitrust cases where the courts indicated that summary judgment is favored. But none of those cases appear to have been decided on that basis. In two of those six cases, the court actually *reversed* the grant of summary judgment notwithstanding the apparent view that summary judgment is a favored remedy. In the first case, *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.,* 386 F.3d 485, 495, 504-08 (2d Cir. 2004), the court found that the district court had erred in granting summary judgment dismissing the plaintiffs' monopoly and restraint of trade claims. Likewise, in *McGahee v. N. Propane Gas Co.*, 858 F.2d 1487, 1493 (11th Cir. 1988), the court cited *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), for the proposition that "summary judgment may be especially appropriate in an antitrust case," yet nevertheless reversed the district court's grant of summary judgment. *Id.* at 1507. In none of the other four antitrust cases cited by Petitioners (each of which affirmed a grant of summary judgment) did the court's statement of the standard appear to play any role in the outcome of the case.[13]

---

13. Petitioners' *amici* Air Transport Association of America, Inc., American Trucking Assoc., Inc. and The Business Roundtable have filed a brief that is long on rhetoric (see Br. at 7, claiming that "the Sixth and Ninth Circuits still place a heavy thumb on the scales against the grant of summary judgment," and 8, asserting that the Sixth Circuit has "stacked the deck against summary judgment"), but devoid of evidence of a wide-spread failure to apply properly the summary judgment standard. Notably, the brief fails to cite any antitrust case where a supposedly erroneous statement of the summary judgment standard made a difference. Two of the cited cases *affirmed* the district courts' grant of summary judgment. *See Int'l Healthcare Mgmt. v. Hawaii Coalition for Health*, 332 F.3d 600, 604 (9th Cir. 2003) (noting that although summary judgment is disfavored in certain kinds of antitrust

Scrutiny of the cases cited by Petitioners shows that there is little or no correlation between the lower courts' statement of whether summary judgment is favored or disfavored in antitrust cases and the likelihood of the court affirming or reversing a grant of summary judgment. Moreover, Petitioners fail to identify any antitrust case where a court relied on the principle that summary judgment is disfavored to deny such relief where the outcome might have been different had the court stated the standard differently.

More importantly, whatever the merits of Petitioners' claim that courts are divided on whether summary judgment is favored or disfavored, Petitioners make no showing that the judgment of the court below was affected by its description of the standard. Nor can they, as it is clear that the court's statement was nothing more than boilerplate. Indeed, the appellate court, in articulating the standard, stated that courts are "reluctant" to use summary judgment "due to the critical role that intent and motive have in antitrust claims and the difficulty of proving

---

cases where motive and intent are important, "[t]his is not such a case"), and *Cont'l Trend Res., Inc. v. Oxy USA, Inc.*, 44 F.3d 1465, 1482-83 (10th Cir. 1995) (affirming district court's grant of summary judgment). In the third case, *The Movie 1 & 2 v. United Artists Communications, Inc.*, 909 F.2d 1245 (9th Cir. 1990), the court's statement of disfavor appears to have played no role in its careful analysis of the plaintiff's evidence. These *amici* also cite three Sixth Circuit cases, one of which pre-dates the Court's *Celotex* trilogy (and thus could not have ignored the authority of those cases) and two others that affirmed the grant of summary judgment, again giving the lie to the notion that courts are improperly failing to grant summary judgment in appropriate antitrust cases.

conspiracy by means other than factual inference." App. 6a (citations and internal quotations omitted). But the issues of intent, motive and conspiracy were not even before the court. Indeed, Petitioners never even challenged the district court's denial of their summary judgment motion with respect to the conspiracy.

The court of appeals then addresses the question of causation 25 pages later in the opinion. There, the court reiterates the summary judgment standard, saying, "we review the district court's grant of summary judgment concerning the issue of antitrust injury *de novo*," but adding nothing about any reluctance to grant summary judgment. App. 33a. The court then states that "[a]ntitrust plaintiffs cannot survive motions for summary judgment without adequately alleging an antitrust injury. In addition to having to show injury-in-fact and proximate cause, antitrust plaintiffs must specifically establish 'antitrust injury.'" *Id.* (citations omitted). The court then engages in a straightforward summary judgment analysis that asks whether Respondents' evidence created a material issue of fact. The court's reasons for reversing are clear, and have nothing to do with any supposed "reluctance" to grant summary judgment.

The statement in the appellate court's opinion about reluctance to grant summary judgment is nothing more than a harmless remark. At most, it is "the kind of ill-considered dicta that [the Court is] inclined to ignore." *Kappos v. Hyatt*, 132 S. Ct. 1690, 1699 (2012). *See also Bunting v. Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, J. dissenting) ("We sit, after all, not to correct errors in dicta;") citing *California v. Rooney*, 483 U.S. 307, 311 (1987) (dismissing writ as improvidently granted) ("This

Court 'reviews judgments, not statements in opinions'."); *Camreta v. Greene*, 131 S. Ct. 2020, 2030 (2011) ("Our resources are not well spent superintending each word a lower court utters en route to a final judgment . . .").

CONCLUSION

For all the foregoing reasons, including that the court of appeals' judgment is completely in accord with long-established precedents of this Court, and that Petitioners have failed to show a circuit split as to either the proper application of the summary judgment standard, or whether a plaintiff must prove that a violation of the antitrust laws caused its injury, the Petition for a Writ of Certiorari to the Sixth Circuit should be denied.

Respectfully submitted,

RICHARD L. WYATT, JR.
Counsel of Record
TODD M. STENERSON
NEIL K. GILMAN
HUNTON & WILLIAMS LLP
2200 Pennsylvania Ave., NW
Washington, DC 20037
(202) 955-1500
rwyatt@hunton.com

R. LAURENCE MACON
AKIN GUMP STRAUSS HAUER & FELD LLP
300 Convent Street, Suite 1500
San Antonio, TX 78205
(210) 281-7000

GORDON BALL
7001 Old Kent Drive
Knoxville, TN 37919
(865) 525-7028

Counsel for Respondents

September 26, 2014