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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Counsel of Record
CATHERINE M.A. CARROLL
ERIC MAHR
KENNETH H. MERBER
ALBINAS J. PRIZGINTAS
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

Counsel for Petitioners

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

PAUL H. FRIEDMAN
DECHERT LLP
1900 K Street, NW
Washington, DC 20006

CAROLYN M. HAZARD
BRIAN P. SAVAGE
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104

Counsel for Petitioner Dean Foods Company

STEVEN R. KUNEY
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, DC 20005

W. TODD MILLER
BAKER & MILLER PLLC
2401 Pennsylvania Ave., NW
Suite 300
Washington, DC 20037

Counsel for Petitioner Dairy Farmers of America, Inc.

CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement in the petition remains accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 14-110

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Four circuits have held, contrary to the decision below, that an antitrust plaintiff opposing summary judgment must produce evidence of a causal connection between the challenged conduct and any injury. Pet. 20-21. Respondents do not cite those decisions, much less attempt to reconcile them with the Sixth Circuit's decision here. Respondents also do not dispute that courts frequently take the wrong approach to summary judgment more generally, which poses negative consequences for litigants across a range of industries and legal contexts. This Court's intervention is necessary, as it was in *Twombly* and *Comcast*, to reinforce the gatekeeping function of the summary judgment stand-

ard and resolve division regarding the application of that standard to the element of causation.

Respondents seek, unsuccessfully, to manufacture confusion over what the record here showed and what the Sixth Circuit held. But ultimately they rest on the merits, claiming that the decision below accords with this Court's antitrust precedent. If respondents were right, review would still be necessary, given the division in the circuits. In any event, respondents are wrong. Antitrust law does not excuse plaintiffs opposing summary judgment from their burden to submit evidence of causation.

ARGUMENT

I. COURTS DISAGREE WHETHER PLAINTIFFS MUST PRODUCE EVIDENCE OF CAUSATION AT SUMMARY JUDGMENT

The petition showed (at 18-22) that some courts permit a presumption of causation at summary judgment, while others require evidence of a causal link between the challenged conduct and any injury. Respondents' only answer is to quibble over whether courts in the former group use the word "presumption"; respondents ignore the latter group.

A. Some Courts Permit Claims To Proceed Without Evidence Of Causation

1. Semantics aside, the parties agree about what the Sixth Circuit held: Evidence of conspiracy and the "tendency" of a conspiracy to cause harm, combined with a model purporting to identify a price increase unattributed to market forces, suffice to defeat summary judgment on causation (Opp. 17)—unless it is shown that the model "'necessarily' measured only the effects

of" other unchallenged conduct (Opp. 10). In petitioners' view, this reasoning is most accurately described as a "presumption"; even respondents analogize it (at 16 n.6) to *res ipsa loquitur*—a legal presumption. But however labeled, the decision presents the question whether a defendant is entitled to summary judgment when the plaintiff's evidence shows only an alleged injury that might have been caused by the challenged conduct but might also have resulted from other causes—here, an unchallenged merger or other lawful conduct. The Sixth Circuit held that in such circumstances, summary judgment should be denied unless the defendant shows that the alleged injury was "necessarily … due to legal causes." Pet. App. 36a.

Respondents seek (at 18-22) to obscure that holding by complicating the facts, but the record here is clear. Apart from their supposed evidence of conspiracy, respondents relied solely on Professor Cotterill's analysis to show injury caused by that conspiracy. Pet. App. 48a; Appellants' C.A. Br. 22. Cotterill compared actual prices to prices that "prevailed prior to the conduct period," which he defined to coincide with the merger. R.1086-1 ¶ 9 & n.3. He controlled only for supply-and-demand factors and "assum[ed] no other ownership or operation changes" between the pre- and post-merger periods. *Id.* ¶ 118; *see id.* ¶¶ 9, 145. And he acknowledged his model did not distinguish between coordinated and unilateral conduct. R.1086-2, at 259:4-8; *see id.* at 260:3-7. Cotterill thus did not determine whether the price impact unattributed to market forces resulted from the challenged conspiracy, the unchallenged merger, or other lawful conduct. Pet. 8-10. The Sixth Circuit let respondents' claim proceed to trial anyway because petitioners had not negated causation. Pet. App. 36a-37a.

Respondents' efforts to muddy the waters fail. Respondents emphasize the Sixth Circuit's observation that Cotterill's model was "intended to analyze" whether petitioners' allegedly collusive conduct "'resulted in elevated prices'" and that "*if* [Cotterill's model] did so," it would supply evidence of causation. Opp. 19 (emphasis added). Even if true, that is irrelevant. Pet. 24 n.15. What matters is whether Cotterill answered that question. The record makes clear he did not, and neither respondents nor the Sixth Circuit contend otherwise. Opp. 21-22; Pet. App. 35a-37a.

Whether Cotterill "captured the effect of every available supply and demand factor" (Opp. 19) is also irrelevant. Cotterill defined the but-for world as if the merger never happened. R.1086-1 ¶¶ 9, 118. Consequently, any price effects he observed were as likely to have resulted from the merger as from the alleged conspiracy. Pet. 8-9. Controlling for market factors unrelated to the merger does not cure that defect.[1]

Respondents also say that Cotterill "computed damages for the dismissed monopolization counts independently of the damages amounts for the conspiracy count that is still at issue." Opp. 21. All that means is that Cotterill calculated the amount of damages sepa-

[1] Noting that petitioners have "denied that the merger raised milk prices," respondents dismiss (at 8 n.3) the merger as a "purely hypothetical alternative cause." No court below credited this assertion, for good reason. Petitioners have denied that the merger raised prices because their own expert showed—after correcting for several flaws in Cotterill's model—that no price increase unattributed to market forces in fact occurred. *See, e.g.*, R.1094-1, at 49-52, 54-57. That issue, however, is irrelevant here. The question is whether—assuming prices did increase more than market forces can explain, as Cotterill says—Cotterill attributed that impact to the alleged conspiracy rather than the merger or other unchallenged, unilateral conduct. He admitted he did not. Pet. 8-10.

rately, based on the volume of sales associated with each claim. Respondents concede (at 20-21) he used the same model to do so. For each scenario, Cotterill simply assumed that any price change his model did not attribute to supply-and-demand factors must have arisen from some anticompetitive conduct. R.1086-1 ¶¶ 110, 153, 156-158; Pet. 10.

This case thus comes to the Court on a clean and undisputed record and holding below. Respondents concede (at 21-22) that Cotterill's model "cannot explain *why*" a price increase indicative of less-intense competition occurred. Their claim nonetheless survived summary judgment because (1) they produced evidence of conspiracy and a price increase their expert did not attribute to market forces and (2) there was no showing that the price increase "necessarily" resulted from legal causes. Pet. App. 36a-37a.

2. Other circuits have followed a similar approach. Pet. 19-20, 21-22 & n.14. Though respondents again debate terminology (at 23-25), it is common ground what these courts held.

The Second Circuit in *In re Publication Paper Antitrust Litigation*, 690 F.3d 51, 66 (2012), stated that "if an act is deemed wrongful because it is believed significantly to increase the risk of a particular injury, we are entitled … to presume that such an injury, if it occurred, was caused by the act." Applying that standard, the court "presumed" a "causal link" between price increases and the alleged price-fixing agreement. *Id.* at 67. Because defendants did not "conclusively rebut[]" that presumed causal link, they were not entitled to summary judgment. *Id.*

Similarly, respondents acknowledge the Seventh Circuit's holding in the RICO context that "it is

enough" for causation purposes "to show that the plaintiff 'suffered the sort of injury that would be the expected consequence of the defendant's wrongful conduct.'" Opp. 23-24 (quoting *BCS Servs.* v. *Heartwood 88*, 637 F.3d 750, 758 (2011)). Under that holding, producing evidence of the alleged misconduct excuses the need to produce evidence of causation. The Second Circuit relied on that holding in adopting its "presum[ption]." *Publication Paper*, 690 F.3d at 66-67.

As respondents concede (at 24-25), the First Circuit, also in the RICO context, and the Ninth Circuit, applying the Fair Housing Act, adopted the same rule. *See In re Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d 60, 68 (1st Cir. 2013); *Pacific Shores Props.* v. *City of Newport Beach*, 730 F.3d 1142, 1168 (9th Cir. 2013), *petition for cert. filed*, 83 U.S.L.W. 3090 (U.S. July 17, 2014) (No. 14-56).[2]

B. Other Courts Reject A Presumption Of Causation

The petition discussed four circuits that require antitrust plaintiffs to submit evidence of a causal link between the alleged injury and misconduct. Pet. 20-21 & n.12. Respondents do not mention those decisions and do not deny that they conflict with the decision below.

Instead, respondents claim (at 15-16) that courts agree a jury can find a causal link "when performance of the act increases the chances that the injury will also occur." But the circuits respondents ignore have rejected this, holding that a plaintiff opposing summary judgment cannot rely solely on the "tendency" (Opp.

---

[2] Respondents cite (at 24) a companion case to *Neurontin*; but there, too, the First Circuit applied the same rule. *See In re Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d 21, 45 (2013).

16) of a violation to cause injury. In *Deaktor* v. *Fox Grocery*, 475 F.2d 1112, 1116, 1117 (1973), the Third Circuit affirmed a directed verdict for the defendants where—"[e]ven assuming" the defendants "engaged in price-fixing and tie-in sales"—the plaintiffs' expert "assigned no specific cause for [their] financial losses." As that court later explained, "[e]ven if a defendant's acts are shown to … violat[e]" the antitrust laws, "a plaintiff may not recover unless a nexus to its own injury is also demonstrated." *Sound Ship Bldg.* v. *Bethlehem Steel*, 533 F.2d 96, 98 (3d Cir. 1976). And Rule 56 requires the plaintiff to produce evidence of that nexus at summary judgment. *Id.* at 99-100.

The other circuits cited in the petition apply the same principle. Pet. 20-21 & n.12; *see also, e.g.*, *Allegheny Pepsi-Cola Bottling* v. *Mid-Atlantic Coca-Cola Bottling*, 690 F.2d 411, 415 (4th Cir. 1982) ("even assuming" defendant's conduct affected plaintiff's profits, plaintiff "failed to show what part, if any, of the [impact] was attributable to" defendant's conduct); *Ameriinet, Inc.* v. *Xerox Corp.*, 972 F.2d 1483, 1495 (8th Cir. 1992) (affirming summary judgment for defendant despite "tendency" of defendant's conduct to cause injury, where evidence suggested decline in plaintiff's business "was caused at least partly by, if not substantially or mainly by, other factors than [defendant's] alleged antitrust violations").

C. The Division Reflects Broader Disagreement About Summary Judgment

Respondents do not dispute that courts frequently invoke an incorrect understanding of summary judgment. Respondents concede (at 29), for example, that some courts "improper[ly]" regard summary judgment as "disfavored." Indeed, application of the summary

judgment standard remains "sketchy, incomplete, or less-than-rigorous, at best." Mullenix, *The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little*, 43 Loy. U. Chi. L.J. 561, 568 (2012); *see* Pet. 15-17. The Eighth Circuit thus recently found it necessary to address this "[s]urprising[]" conflict, rejecting the "perpetuated dicta that district courts should rarely enter summary judgment in antitrust cases." *In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728, 732 n.3, 733 n.4 (2014).

This is no mere academic concern. A lax approach to summary judgment undermines the procedure's gatekeeping function, burdening both litigants and the judiciary. As petitioners and amici have shown, these consequences go beyond the antitrust context and affect litigants across a broad range of industries. Pet. 28-31; A4A Amicus Br. 12-20; NAM Amicus Br. 11-17.

The Sixth Circuit's decision illustrates the problem. The court invoked its "'reluctan[ce] to use summary judgment dispositions in antitrust actions'" (Pet. App. 6a) and framed the requirements applicable at summary judgment in terms of sufficiency of the pleadings (Pet. App. 33a). The court then ignored Cotterill's failure to "[a]nswer[]" the only relevant question—whether the challenged conduct affected prices—and found it sufficient, where "[respondents] must benefit from all reasonable inferences," that he was merely "charged" with doing so. Pet. App. 35a-36a. The court thus permitted a factually unsupported claim to proceed to trial, despite the "attendant unwarranted consumption of public and private resources" this Court has sought to prevent. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 327 (1986).

Respondents ignore these burdens, noting that courts sometimes grant summary judgment even after invoking an improper understanding of the procedure. Opp. 28-31. But whether courts sometimes grant summary judgment "notwithstanding [their] reluctance to take such action," *Rudolph Int'l*, v. *Realys*, 482 F.3d 1195, 1199 (9th Cir. 2007), is beside the point. What matters is that courts often approach this "integral part of the Federal Rules" from the wrong side. *Celotex*, 477 U.S. at 327.

Erroneous statements of the procedure's importance thus cannot be dismissed as "harmless dicta." Opp. 12. This Court recognized in its trilogy of summary judgment cases, as it did in cases addressing pleading and class-certification standards, that a standard cannot be applied properly when approached with the wrong perspective. As the Court did in those cases, it should grant review here to clarify and model the proper approach.

II. RESPONDENTS' ARGUMENT ON THE MERITS, AT BEST, UNDERSCORES THE NEED FOR REVIEW

Respondents resort to arguing that the Sixth Circuit was correct as a matter of antitrust law because this Court's precedent endorses a rule of causation akin to *res ipsa loquitur*. Opp. 15-16 & n.6. That doctrine applies in certain tort contexts where an accident ordinarily would not occur absent negligence. *Res ipsa* thus operates as a "'legal presumption,'" *Sweeney* v. *Erving*, 228 U.S. 233, 240 (1913), "allow[ing] a trier of fact to draw an inference … when evidence of causation is lacking," *Maroules* v. *Jumbo, Inc.*, 452 F.3d 639, 644 (7th Cir. 2006). According to respondents (at 15-16), this principle supports a finding of causation in anti-

trust cases whenever "performance of the act increases the chances that the injury will also occur."

If respondents were right, it would only confirm the need for review, because several courts have rejected this approach. *Supra* pp. 6-7. In any event, respondents are wrong. *Res ipsa* is not a doctrine of antitrust causation. Plaintiffs must "show more than a conspiracy in violation of the antitrust laws; they must show an injury to them *resulting from* the illegal conduct." *Matsushita Elec. Indus.* v. *Zenith Radio*, 475 U.S. 574, 586 (1986) (emphasis added). A defendant should therefore prevail at summary judgment—even "assum[ing] that the alleged conduct occurred and violated the antitrust laws"—if the plaintiff has not produced sufficient evidence of causation. IIA Areeda & Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 338, at 97 (3d ed. 2007).

That showing is necessary because causation is a separate element of an antitrust claim. A plaintiff seeking damages must demonstrate injury caused "by reason of" the defendant's anticompetitive conduct. 15 U.S.C. § 15(a); *see Zenith Radio* v. *Hazeltine Research*, 395 U.S. 100, 114 n.9, 126-127 (1969). Simply assuming that a causal link exists—even when injury might as easily be attributable to causes other than the challenged conduct—would pose the precise risk of false inferences that this Court has repeatedly warned about because of their tendency to "chill the very conduct the antitrust laws are designed to protect," *Matsushita*, 475 U.S. at 594; *see Bell Atlantic* v. *Twombly*, 550 U.S. 544, 553 (2007); *Verizon Commc'ns* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398, 414 (2004).

In *Zenith*, this Court accordingly confirmed that even where evidence of conspiracy exists and the alleged injury is of the type one would expect the conspiracy to cause, plaintiffs must produce some direct or circumstantial evidence of causation. In that case, the lower courts found a conspiracy in each of three markets, and this Court did not disturb those findings. 395 U.S. at 105, 113 n.8, 132 n.26. Moreover, Zenith claimed the same injury—lost profits due to diminished market share—for each market. *Id.* at 106 n.1, 116 n.11. Yet Zenith's claims did not uniformly succeed. As to one market, the Court found causation because Zenith produced "evidence" of a causal link between the conspiracy and the lost market share. *Id.* at 122.[3] But Zenith's claims failed as to the other two markets because Zenith had not presented evidence sufficient to support a finding that its injury was caused by the conspiracy rather than other possible explanations. *Id.* at 125-129.

In so holding, the Court relied on *Bigelow* v. *RKO Radio Pictures*, which emphasized—contrary to respondents' unbounded reading—that plaintiffs must establish an injury "not shown to be attributable to other causes." 327 U.S. 251, 264 (1946); *see Zenith*, 395 U.S. at 124. While plaintiffs "need not exhaust all possible alternative sources of injury," they must show that the illegality is "a material cause of the injury." *Zenith*, 395 U.S. at 114 n.9. Where the injury "[i]s attributable to … other factors independent of" the chal-

[3] Zenith established that it was ready and able to sell in that market, 395 U.S. at 118-119; that the defendants prevented it from doing so, *id.*; and that absent the defendants' activities Zenith would have "secur[ed] a share of the market comparable to that which it enjoyed in the United States, and which its business proficiency, demonstrated in the United States, dictated it should have obtained," *id.* at 124-125.

lenged misconduct, a plaintiff "would not have met [that] burden." *Id.* at 126-127.

Respondents' evidence thus fails because any price impact could have been attributable to the unchallenged merger or petitioners' other lawful, unilateral conduct. *See supra* pp. 3-5. This Court should grant review to confirm that under Rule 56, it was respondents' burden to show the causal link; it was not petitioners' burden to "*negate*" it. *Celotex*, 477 U.S. at 319. As this Court held in *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1435 (2013)—which respondents almost entirely ignore—an expert's model must "bridge the differences" between a general price impact and an impact "attributable to the [challenged conduct]." Simply presuming such a link in the face of other possible explanations is impermissible—whether at class certification (*Comcast*) or at trial (*Zenith*). It should follow that no presumption should apply at summary judgment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Counsel of Record
CATHERINE M.A. CARROLL
ERIC MAHR
KENNETH H. MERBER
ALBINAS J. PRIZGINTAS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

Counsel for Petitioners

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

OCTOBER 2014