No. 14-577

IN THE

Supreme Court of the United States

CARPENTER CO. *et al.*,

Petitioners,

v.

ACE FOAM, INC., *et al.*, individually and on behalf of all others similarly situated,

and

GREG BEASTROM, *et al.*, individually and on behalf of all others similarly situated,

Respondents.

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

BRIEF OF THE DOW CHEMICAL COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The petition in this case presents two significant questions of class action procedure that arise frequently in complex antitrust cases and that have hopelessly divided the lower courts. *Amicus curiae*, The Dow Chemical Company, is directly affected by the second of these issues—*i.e.*, the use of statistical models that purport to calculate aggregate class damages by extrapolating from estimated "average" overcharges. As petitioners correctly note, the decision in *In re Urethane Antitrust Litig.*, 768 F.3d 1245 (10th Cir. 2014), is one of the cases reflecting the division in the circuits over the propriety of this shortcut to measuring damages. In *Urethane*, the Tenth Circuit upheld use of an aggregate damages model to sustain a trebled-damages judgment in excess of $1 billion against Dow. While Dow intends to file its own petition for certiorari seeking review of the Tenth Circuit's decision on this and other grounds, its experience as one of the few defendants to litigate an antitrust class action through trial and appeal vividly illustrates the ways in which use of aggregate damages models abridge the rights of defendants to assert their statutory defenses to individual claims, in violation of due process principles and the Rules Enabling Act. Dow submits this brief as *amicus curiae* in support of petitioners to ensure that this Court's consideration of the second

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[1] Pursuant to Rule 37.6, no counsel for any party authored this brief, in whole or in part, and no counsel for a party or party made a monetary contribution to fund the preparation or submission of this brief. No entity or person, aside from the *amicus curiae* and its counsel, made any monetary contribution for the preparation or submission of this brief. Pursuant to Rule 37.(a), counsel for the parties received timely notice and consented to this filing.

question presented is informed by that highly relevant, and profoundly unfair, experience.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a much-needed opportunity for the Court to address a disturbing trend in the application of Rule 23(b)(3): use of "shortcuts" to shoehorn complex antitrust suits into the class action damages mechanism. In this case, the lower court upheld use of one such shortcut to justify class certification—class damages models that calculate aggregate damages by extrapolating from a sample to calculate an estimated "average" overcharge. As petitioners have explained, the courts of appeal are divided on the propriety of using such class models. That division alone fully justifies review by this Court.

Dow will not repeat petitioners' discussion of the circuit split, and instead will provide the broader context in which the second question presented arises. In cases like this one and Dow's in the Tenth Circuit, where purchasers engage in individualized negotiations over price, the issues that can be proved using evidence that is common for the whole class (*i.e.*, the existence of an antitrust violation) do not predominate over issues that can only be proven on an individualized basis (*i.e.*, whether each plaintiff suffered antitrust injury and the amount of each plaintiff's damages). The shortcuts of presuming class-wide injury and calculating class-wide damages based on the assumption that all class members paid an "average" overcharge have been used to transform issues requiring individualized proof into ones that plaintiffs assert can be resolved in "one stroke" with *common* evidence. *Wal-Mart Stores, Inc.* v. *Dukes*,

131 S. Ct. 2541, 2551 (2011). Without these gimmicks, it would plainly be impossible to find that common issues predominate.

Use of these shortcuts is now so prevalent that district courts describe them as "routine" and "widespread." Their prevalence, however, is the product of a self-perpetuating echo chamber. District court decisions accepting these bases for class certification are cited in treatises and then other district court cases, leading to further citations—largely without appellate supervision, because review of certification orders under Rule 23(f) is so uncommon, and certification orders themselves frequently compel defendants to settle in order to avoid the specter of being the "last one standing" with joint and several liability and treble damages as a potential sanction.

These "routine" practices are plainly inconsistent with the original understanding and intent of Rule 23(b)(3). Shortcuts to facilitate certification are the product of a judicial mindset that every alleged antitrust wrong with potentially broad impact must be redressed through a class action damages remedy, no matter how complex—and ill-suited to class treatment—the underlying facts may be. But the 1966 Advisory Committee notes explaining the role of Rule 23(b)(3) make clear that certification of private antitrust damages actions is not appropriate in all cases. While a number of courts adhered to this intent in the 1970s, a treatise published in 2002 accurately stated that the Rule 23(b)(3) predominance requirement "has been met with relative ease by the great majority of antitrust class action plaintiffs." 6 A. Conte & H. Newberg, *Newberg on Class Actions* § 18:25, at 83 (4th ed. 2002). And an oft-quoted (but misunderstood) dictum in *Amchem*

Products, Inc. v. *Windsor*, 521 U.S. 591 (1997), has helped fuel this trend.

Use of shortcuts to facilitate predominance findings in complex antitrust cases is not only inconsistent with the intent behind Rule 23(b)(3), it inescapably abridges defendants' rights. The fact of certification by itself effectively prevents defendants from asserting their right, under the Clayton Act, to challenge an individual plaintiff's proof of antitrust impact and damages. Neither the Rules Enabling Act nor due process principles permit this deprivation, which now occurs routinely in antitrust class actions.

The Court should grant the petition to put an end to these impermissible shortcuts and restore Rule 23(b)(3) to its intended role.

I. USE OF THE KIND OF "SHORTCUTS" THAT ENABLED CLASS TREATMENT OF THIS COMPLEX CASE IS PREVALENT.

To prevail in a private antitrust damages action, plaintiffs must prove a (1) violation, (2) injury (referred to as antitrust impact), and (3) damages.[2] To prove the latter two elements, plaintiffs must establish that they in fact paid supra-competitive prices as a result of the antitrust violation and show the extent to which the prices they paid exceeded competitive prices. Given these requirements,

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[2] *See Alabama* v. *Blue Bird Body Co.,* 573 F.2d 309, 317 (5th Cir. 1978); *see also Windham* v. *Am. Brands, Inc.*, 565 F.2d 59, 65 (4th Cir. 1977) (en banc) ("a mere finding of violation does not result in liability"); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008) ("liability . . . requires showing that class members were injured"); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3rd Cir. 2009) ("to prevail on the merits, every class member must prove at least some antitrust impact").

certification of a class under Rule 23(b)(3) can be appropriate in consumer class actions that involve alleged price-fixing of standardized products with uniform, non-negotiable prices. In such cases, common questions predominate because proof that the conspiracy raised the price will establish the same injury, and provide a uniform baseline for calculating damages, for everyone who purchased the product during the conspiracy.

In this case, however, class members bought different products at varying prices established through individual negotiations. See Pet. at 2, 6. This critical fact should foreclose showings of antitrust injury and damages in "one stroke" with *common* evidence. *Wal-Mart*, 131 S. Ct. at 2551. As the leading antitrust treatise explains, "[w]hen transaction prices are negotiated," "proof of antitrust injury is bound to be individualized." P. Areeda & H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* § 398(c), at n.21 (2014). The necessity of conducting inquiries into negotiations by thousands of buyers to determine whether, and to what extent, each was injured makes it impossible to find that common issues predominate. See *Robinson* v. *Tex. Auto. Dealers Ass'n*, 387 F.3d 416, 424 (5th Cir. 2004).

The district court, however, allowed plaintiffs to use the "shortcut" of having an expert design aggregate damages models to obtain class certification. Petitioners explain that these models purport to derive an "average overcharge rate" from a sample, then apply that rate to all transactions. Pet. at 10. Petitioners identify the kinds of manipulations and distortions that readily infect models of this sort, such as the expert's decision to deem all sales to a particular customer as affected by the alleged

conspiracy, even if the model finds an overcharge as to only $1 out of $1 million in total sales. *Id.* at 9. But even if the models were perfect, which they cannot be, the methodology still "'assumes that the anticompetitive effect of the alleged price-fixing conspiracy *is the same for all customers*.'" *Id.* at 10-11 (emphasis added). That assumption is utterly implausible given the inevitable differences in bargaining power among purchasers in markets as large and diverse as the ones at issue here.

Use of such shortcuts to gloss over market realities and facilitate class adjudication of complex cases is, unfortunately, all too common. As Dow will explain in greater detail when it files its own petition, the Tenth Circuit blessed similar techniques in *Urethane*. Plaintiffs there are a class of some 2,400 industrial purchasers of polyurethane chemicals who alleged that defendants conspired to issue coordinated price increase announcements, then tried to make them "stick." The Tenth Circuit recognized that these "[b]uyers negotiate[d] individually with manufacturers regarding price," and that the price increase announcements "did not always result in actual price increases" because "buyers sometimes avoided price hikes by negotiating with the supplier." 768 F.3d at 1250. The Tenth Circuit nevertheless affirmed the district court's use of two shortcuts necessary to satisfy Rule 23(b)(3)'s predominance requirement.

First, the district court relied on a presumption that price-fixing causes "class-wide impact even when prices are individually negotiated" when there is "evidence that the conspiracy artificially inflated the

baseline for price negotiations." *Id.* at 1254.[3] Second, it relied on a damages model that relied on sampling and an "average" overcharge. Indeed, in *Urethane*, plaintiffs' expert found no overcharge on 10% of the transactions he sampled, which represented only 25% of the class. Yet in extrapolating from these data, he assumed that *every* transaction involved an average overcharge. Thus, plaintiffs' expert deemed 75% of class members to have been overcharged in an average amount without regard to whether they actually paid any overcharge or one that was less than the average in the sample.

The appellate decisions in *Urethane* and this case are simply the tip of the iceberg in terms of judicial acceptance of such contrivances to preclude defendants from being able to prove that individual plaintiffs either were not injured or were not injured as much as whatever "average" number an expert puts forward. Aggregate class damages are "*widely used* in antitrust, securities and other class actions," and have been touted by courts and class action treatises as having "obvious case management advantages." *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 525 (S.D.N.Y. 1996) (emphasis added) (citing 4 H. Newberg & A. Conte, *Newberg on Class Actions* § 18:53 (3d ed. 1992), 2 H. Newberg & A. Conte, *Newberg on Class Actions* § 10:05 (3d ed. 1992), and various cases). Similarly, a presumption of class-wide harm has been adopted in a "*litany* of antitrust price-fixing cases," where courts have

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[3] In the decision that gives rise to this petition, the district court also relied on this presumption. Pet. App. 77a-78a ("It stands to reason, then, that if because of an antitrust conspiracy a seller and buyer's *jumping-off point* for negotiations is higher than market forces would otherwise determine, that buyer suffers injury.") (emphasis added).

"rejected the argument that diverse purchasing practices prevent a showing of common impact." *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393, 410 (S.D. Ohio 2007) (emphasis added). As a result of these practices, "for at least two decades courts have routinely certified classes in antitrust cases in which direct purchasers seek damages—perhaps more regularly than in any other field of substantive law." J. Davis & E. Cramer, *Antitrust Class Certification and The Politics of Procedure*, 17 G. Mason L. Rev. 969, 983-84 (2010).

Because interlocutory review of such decisions is rare,[4] and because class certification decisions frequently force defendants to settle, see *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978); Advisory Committee's 1998 Note on subd. (f) of Fed. R. Civ. P.. 23, few of these district court decisions are reviewed by the courts of appeals. At the same time, they are often cited in other cases and in treatises, thereby creating a self-perpetuating "consensus" in support of these shortcuts.[5] As we explain next, this

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[4] *E.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 254 (D.C. Cir. 2013) (interlocutory review is "'disfavored as disruptive, time-consuming and expensive'"); *Sumitomo Copper Litig.* v. *Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 140 (2d Cir. 2011) ("the standards of Rule 23(f) will rarely be met"); *Chamberlan* v. *Ford Motor Co.*, 402 F.3d 952, 955 (9th Cir. 2005) ("Rule 23(f) review should be a rare occurrence"); 2 J. McLaughlin, *McLaughlin on Class Actions: Law and Practice* § 7:2, at 319 (10th ed. 2013) (noting that, while Rule 23(f) standards vary somewhat, all circuits agree that "review of class certification decisions should not be routine").

[5] For example, one treatise cites 21 district court cases—and *no* court of appeals decisions—for the proposition that a "allegation of a price-fixing conspiracy is sufficient to establish predominance." 6 *Newberg*, *supra*, § 18:28 at 102-07 n.1.

"consensus" is plainly inconsistent with the intent of those who wrote and adopted Rule 23(b)(3).

II. RULE 23(b)(3) WAS NEVER INTENDED TO BE USED IN COMPLEX ANTITRUST CASES LIKE THIS ONE.

Although Rule 23(b)(3) was an "'adventuresome' innovation" that was "[f]ramed for situations in which 'class-action treatment is not as clearly called for' as it is in" subsections (b)(1) and (b)(2), *Amchem*, 521 U.S. at 614-15, it was not designed to assure that every alleged wrong with wide impact could be redressed through a damages class action. To the contrary, the Rule was intended to "achieve economies of time, effort, and expense, . . . *without sacrificing procedural fairness or bringing about other undesirable results.*" Advisory Committee's 1966 Note on subd. (b)(3) of Fed. R. Civ. P. 23 (emphasis added). Accordingly, the drafters made clear that "[p]rivate damage claims by numerous individuals arising out of concerted antitrust violations may *or may not* involve predominating common questions" warranting certification under subsection (b)(3). *Id.* (emphasis added).

Not long after Rule 23(b)(3) was promulgated, however, some district courts "sought to finesse the real problems of massive class litigation by resorting to innovations." M. Handler, *Twenty-Fourth Annual Antitrust Review*, 72 Colum. L. Rev. 1, 35 (1972). In his influential article on this trend, Professor Milton Handler[6] condemned "fluid class" recoveries and "like

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[6] Milton Handler was President Franklin Roosevelt's chief advisor on antitrust issues, a professor at Columbia Law School for 45 years, and a partner in the law firm of Kaye, Scholer, Fierman, Hays & Handler, where he specialized in antitrust law. His annual lectures, over 25 years, to the New York Bar

judicial innovations" in strong—and prescient—terms. *Id.* at 40. He noted that, through the use of "statistical techniques to arrive at an estimate of aggregate injury," the "hard question of how much, if anything, each particular class member may recover is thereby made to appear a relatively insignificant matter that can be disposed of at a later time . . . . Some individuals, of course, will receive pure windfall recoveries," but these "inequities" are "viewed as justifiable as a means of avoiding the greater evil of allowing the defendants to retain some portion of their 'illegal profits.'" *Id.* at 36-37.

Professor Handler condemned such practices as "'rough justice'" that improperly used Rule 23 "as a predicate for a new, substantive antitrust remedy." *Id.* Under the Clayton Act, he noted, "the only person who may recover damages is one who has been 'injured in *his* business or property by reason of' a violation," and recovery is "limited to 'threefold the damages *by him* sustained." *Id.* at 37 (quoting 15 U.S.C. § 15(a) (first emphasis added)). The statute thus "does not permit any person to recover damages not sustained *by him*," *id.* (emphasis added), and judicial innovations cannot be used to "depriv[e] the defendants of their right to challenge *each* individual's proof of damage," *id.* at 39 (emphasis added). "More often," Professor Handler explained, "the fact and quantum of injury will depend on the time, place, and manner in which a given class member made his purchases," and there is "no lawful manner by which 'fluid classes' or like judicial innovations may be utilized to circumvent the vexing

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Association on the developments in antitrust law were a "virtual must" for the antitrust bar and were reprinted and cited by antitrust scholars and courts alike. *See* S. Fuld, *Professor Milton Handler*, 73 Colum. L. Rev. 401, 407-08 (1973).

problems of massive class suits" that involve such factual complexities. *Id.* at 40.

For a time, his article helped check the growth of "judicial innovations" in the use of Rule 23(b)(3). The Second Circuit rejected "fluid classes" in *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156 (1974). The Fourth Circuit quoted Professor Handler's article at length in upholding denial of class certification in a massive antitrust action, affirming a district court's refusal to rely on "[g]eneralized or class-wide proof of damages." *Windham* v. *American Brands, Inc.*, 565 F.2d 59, 66 (4th Cir. 1977). In *Alabama* v. *Blue Bird Body Co.*, the Fifth Circuit cited *Windham* in reversing a class certification ruling in which the district court assumed that proof "that artificially high price levels prevailed in the [relevant] market as a result of the conspiracy alleged . . . will constitute proof of the fact of injury to the class of purchasers." 573 F.2d 320, 326-28 (5th Cir. 1978). And in *In re Hotel Telephone Charges*, the Ninth Circuit reversed class certification, noting that "allowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights under the antitrust statutes." 500 F.2d 86, 90 (9th Cir. 1974).

In the intervening years, however, many other courts have embraced the types of "innovations" that Professor Handler criticized. Indeed, a class action treatise has candidly acknowledged that, even though the 1966 Advisory Committee called for "a case-by-case analysis" of class certification in antitrust cases, the predominance requirement "has been met with relative ease by the great majority of antitrust class action plaintiffs." 6 *Newberg*, *supra*, § 18:25, at 83. As

noted, this trend is attributable, in large part, to repeated citations of district court decisions, most of which were never subject to appellate review.[7] But dicta in *Amchem* has also contributed to the phenomenon.

In addressing certification of a settlement class in a mass tort action, this Court stated that "[p]redominance is a test readily met in certain cases alleging . . . violations of the antitrust laws." 521 U.S. at 625. The sentence is accurate, and does *not* say that predominance is "readily met in certain cases *such as* those alleging violations of the antitrust laws." It means, as the Advisory Committee stated, that class treatment "may or may not be" appropriate in private antitrust cases—*i.e.*, it may be appropriate in "certain cases alleging [antitrust violations]," and not in other cases involving such allegations. But, significantly, many lower courts have misunderstood the sentence.

In *Urethane*, for example, the Tenth Circuit quoted the *Amchem* sentence to support the proposition that "courts have regarded the existence of a [price-fixing] conspiracy as the overriding issue even when the market involves diversity in products, marketing, and prices." 768 F.3d at 1255. In *In re Scrap Metal Antitrust Litigation*, 527 F.3d 517 (6th Cir. 2008), the Sixth Circuit cited the sentence in rejecting the argument that individualized damages issues predominated in that case, and in explaining why it has "never required a precise mathematical

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[7] Ironically, in one instance where a court of appeals *reversed* a district court's ruling that "proof of artificially high price levels would constitute proof of injury to class members," *see Blue Bird Body*, 573 F.2d at 328, a treatise continues to cite the district court decision as good law on this point. *See* 6 *Newberg*, *supra*, § 18:26, at 88 n.5.

calculation of damages before deeming a class worthy of certification." *Id.* at 536. District court decisions reflect similar misreadings. See, *e.g.*, *In re Microcrystalline Cellulose Antitrust Litig.*, 218 F.R.D. 79, 85 (E.D. Pa. 2003) ("the *Amchem* Court noted that predominance is readily met in most antitrust cases"); *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 484-85 (W.D. Pa. 1999) (quoting *Amchem* sentence at the outset of an analysis explaining why questions concerning "the existence, implementation and effect of" an alleged conspiracy satisfied the predominance test and the existence of "diverse products, markets and pricing" did not preclude certification).

In short, the application of Rule 23(b)(3) in this and many other complex antitrust cases is plainly inconsistent with the intent behind the Rule. This case thus presents a much-needed opportunity for this Court to correct this common mistake. And, as we explain next, that misapplication deprives defendants of substantive rights—in just the ways that Professor Handler predicted, and that the Rules Enabling Act and due process principles forbid.

III. SHORTCUTS USED TO FACILITATE CLASS CERTIFICATION IMPERMISSIBLY DEPRIVE DEFENDANTS OF THEIR SUBSTANTIVE RIGHTS.

As noted, to prevail under the Clayton Act, a private plaintiff must prove not only an antitrust violation, but also injury "in *his* business or property" and "the damages *by him* sustained." 15 U.S.C. § 15(a) (emphases added). Thus, in a case brought under the Clayton Act, a defendant's "statutory defenses to individual claims," *Wal-Mart*, 131 S. Ct. at 2561, include the right to challenge each individual plaintiff's proof of injury and "each individual's proof

of damage," Handler, *supra*, at 39. Using the shortcut of aggregate damages, however, strips defendants of their statutory defenses to individual claims. This is because the very fact of certification prevents the assertion of those defenses.

Prior to certification, defendants can seek discovery from named plaintiffs to show that they suffered no harm or injuries because, for example, they bargained away allegedly collusive price hikes or switched to alternative suppliers. But defendants cannot seek discovery on this issue from the hundreds or thousands of absent class members. Under the tests the lower courts apply, a "defendant seeking discovery from absent class members bears the burden of demonstrating that the discovery concerns common, rather than individualized, issues." 3 *Newberg*, *supra*, § 9:16 (collecting cases). Discovery of *individualized* evidence bearing on the fact and amount of injury that unnamed plaintiffs suffered is thus not permitted, as it does not concern *common* issues.

After a sprawling class is certified, defendants cannot litigate their impact/liability defenses to individual claims. First, as just noted, they cannot conduct the discovery necessary to support such defenses. And any effort to mount those defenses at trial would be inconsistent with—indeed, in defiance of—the class certification order itself. Such an order requires issues to be determined on a class-wide basis, through common evidence that resolves "claims in one stroke." *Wal-Mart*, 131 S. Ct. at 2551. Accordingly, defendants cannot introduce the individualized (and voluminous) evidence needed to show that they are not liable to numerous individual class members who suffered no injury, or to challenge each individual's proof of damage. Such showings

would not address or resolve liability issues on a class-wide basis, and efforts to submit such evidence would defeat the very purpose of certification—*i.e.*, promoting "efficiency and economy." *Am. Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 553 (1974).

Accordingly, as a 2010 law review article co-authored by an antitrust class action practitioner explains, "the reality is that" antitrust class action trials "*rarely, if ever*" address "common impact," and instead, "focus almost entirely on whether defendants violated the antitrust laws and, if so, what the *total damages* are." J. Davis & E. Cramer, *supra*, at 973 (emphasis added). Use of aggregate damages, moreover, "eliminat[es] the need for proof of individual damages at trial." *Id.* at 998. Thus, a verdict form used in one of the rare class action antitrust cases that actually went to trial simply required the jury to enter a lump sum amount "by which you find the plaintiff class was damaged."[8]

In short, in cases where prices are individually negotiated and class members can bargain away all or most of an allegedly collusive price increase, use of aggregate damages based on extrapolation from an estimated average overcharge inescapably deprives defendants of their "statutory defenses to individual claims." *Wal-Mart*, 131 S. Ct. at 2561. Once the class is certified, defendants simply cannot, as a practical matter, "challenge each individual's proof of damage." Handler, *supra*, at 39. Instead, they are forced into a "battle of experts" in which they can only attack the methodology underlying plaintiffs' aggregate damages model.

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[8] *See* Verdict Form at 7, *In re Scrap Metal Anitrust Litig.*, No. 1:02cv0844 (N.D. Ohio) (Dkt. 636).

This alteration of substantive rights violates the Rules Enabling Act, which provides that the rules of procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). It also violates basic due process principles. *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) ("'Due process requires that there be an opportunity to present every available defense.'"). And relying on such damages models to justify a finding of predominance is tantamount to certifying a class on the impermissible "premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *Wal-Mart*, 131 S. Ct. 2561.

While many lower courts tout the "obvious case management advantages" of aggregate damages models, *NASDAQ Market-Makers*, 169 F.R.D. at 525, most have failed to grapple at all with the abridgment of defendants' rights that these shortcuts entail. Instead, they simply assume that defendants' rights are protected by their ability to challenge the damages models themselves. That assumption, however, is both wrong and legally irrelevant.

First, given the restricted standards of review that govern the admission of expert evidence, class certification rulings, and jury decisions, defendants are generally loathe to risk literally *billions* of dollars in liability on their right to demonstrate to the satisfaction of a lay jury, through cross-examination, the flaws in "multivariate regression" analyses submitted by a highly credentialed professional witness. In *Urethane*, the plaintiffs' expert calculated damages for most class members using an extrapolation technique that assumed that *every* transaction involved an average overcharge, even though his own modeling and other evidence showed that this assumption was incorrect. In light of this

blatant flaw, the Tenth Circuit concluded that the expert's testimony was not evidence of antitrust impact, yet it concluded that the same flaw did not undermine the jury's damages award. As a practical matter, therefore, use of aggregate damages models to justify class certification effectively precludes the assertion of defenses to individual claims at trial. Indeed, in many cases it may effectively preclude the trial itself, by bringing enormous pressure on defendants to settle.

Second, and more fundamentally, even when a defendant is not dissuaded from trying a case, use of such models still strips them of defenses to individual claims. It is no answer to assert (or to assume) that the ability to attack the methodology of an *aggregate* damages model is an appropriate substitute for the right to contest an *individual's* proof of damages. Substituting a judge-made remedy for the statutory remedy still "modif[ies]" a defendant's substantive rights, which the Rules Enabling Act prohibits.

In cases involving price-fixing of standardized products with uniform, non-negotiable prices (such as most consumer class actions), all persons who purchase the product will suffer the same injury and the same amount of damage. In such cases, defendants can contest the existence of the conspiracy, the fact of purchase, and the determination of the competitive price that would have existed in the absence of the conspiracy, but they have no additional right to dispute the extent of any purchaser's damages: proof of purchase during the period of the conspiracy is proof of the amount of damages. Thus, use of an aggregate damages model in these particular types of cases does not deprive defendants of their substantive rights.

But that is not true in cases such as this one, *Urethane* and many others, where individual class members could bargain away some or all of the allegedly collusive price hike. As the Seventh Circuit has explained, where the degree of injury necessarily varies among plaintiffs, use of aggregate damages based on estimated averages is impermissible. In *Espenscheid* v. *DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013), the court rejected use of an aggregate damages calculation in a class action minimum wage case, noting that, even if a sample of 42 of the class members in that case was "representative,"

> this would not enable the damages of any members of the class other than the 42 to be calculated. To extrapolate from the experience of the 42 to that of the 2341 [other class members] would require that all 2341 have done roughly the same amount of work, including the same amount of overtime work, and had been paid the same wage.

Id. at 774. Because there was no such uniformity in that case, extrapolations based on samples, even representative ones, would inevitably "confer a windfall" on some class members. *Id.* The same is true here.

Indeed, the rights-abridging nature of shortcuts like aggregate damages models is so clear that some commentators have tried to justify the practice by arguing that it is entirely appropriate for federal courts to "adapt[] federal antitrust law to the class context." J. Davis & E. Cramer, *supra*, at 997. These authors claim that this Court altered substantive antitrust law by generally limiting recovery of damages to direct purchasers and providing for tolling of the statute of limitations for absent class members when a class action is filed. *Id.* at 997-98

(citing *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977) and *American Pipe*). From this premise, they reason that it is equally permissible for courts to alter the antitrust laws through use of shortcuts, such as aggregate damages models. But the decisions in *American Pipe* and *Illinois Brick* rested on the Court's determination of congressional intent in circumstances where that intent was ambiguous. See *Am. Pipe*, 414 U.S. at 558 & n.29 (concluding that tolling was "consonant with the legislative scheme" and citing legislative history indicating the limitations provision of the antitrust laws was procedural, not substantive); *Ill. Brick*, 431 U.S. at 736-37, 746 (relying on principles of *stare decisis*, a presumption of congressional intent, in concluding that "until there are clear directions from Congress to the contrary, . . . the legislative purpose in creating a group of ""private attorneys general"" to enforce the antitrust laws . . . is better served by" limiting recovery to direct purchasers) (citations omitted).

Here, there is no ambiguity as to Congress's intent: it expressly stated that the rules of procedure, including Rule 23(b)(3), "shall not abridge, enlarge or modify *any* substantive right." 28 U.S.C. § 2072(b) (emphasis added). Because, as shown above, use of aggregate damages indisputably alters defendants' substantive rights in cases where prices are individually negotiated, this Court should grant the petition in this case and stop the widespread and routine use of this pernicious practice.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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