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 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 FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

RULES

REPLY BRIEF FOR PETITIONERS

The courts of appeals are intractably conflicted over whether the standing requirements of Article III apply to all members of a certified class, and over the impact of individualized damages issues on Rule 23(b)(3)'s predominance requirement after *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013). As a result, the class action device continues to be used to trample basic constitutional limits, including Article III's standing requirements and the due process rights of defendants and absent class members alike. The Court should act now to resolve these important conflicts.

This case—which likely presents the largest class ever certified and approved by a federal appellate court—is the ideal vehicle for resolving these conflicts. This Court has reviewed interlocutory class certification rulings after Rule 23(f) expanded appellate review of such orders, *see, e.g.*, *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), just as it has granted petitions from denials of appellate review in other contexts, *see, e.g.*, *Dart Cherokee Basin Operating Co.* v. *Owens*, No. 13-719, Slip op. (Dec. 15, 2014); *Standard Fire Ins. Co.* v. *Knowles*, 133 S. Ct. 1345 (2013).

As the six *amici* supporting Petitioners have urged, and in light of the tremendous settlement pressure created by the impending March 31, 2015 trial, the Court should grant review now.

I. THE CONFLICT OVER WHETHER ALL ABSENT CLASS MEMBERS MUST HAVE ARTICLE III STANDING IS MATURE AND ENTRENCHED.

Defendants have consistently maintained that all absent class members must have Article III standing. *See, e.g.*, A4382 (arguing in district court that Plaintiffs "must also show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy" (quoting *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013)); A4377. The Sixth Circuit expressly addressed the issue. Pet. App. 5a (holding district court did not abuse its discretion regarding standing of absent class members). Where an issue "was addressed by the court below," it is properly preserved for review. *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 469–70 (2000). Plaintiffs' cries of waiver are therefore baseless.

Plaintiffs deny the entrenched circuit split over whether all class members must have Article III standing. Direct Purchaser Plaintiffs ("DPP") Opp. 20–21; Indirect Purchaser Plaintiffs ("IPP") Opp. 13. But federal courts and litigants alike have recognized the mature conflict on this issue. *See, e.g.*, *In re Deepwater Horizon*, 739 F.3d 790, 798–802 (5th Cir.), *cert denied*, 83 U.S.L.W. 3095 (Dec. 8, 2014); Petition for Writ of Certiorari, *BP Exploration & Prod. Inc.* v. *Lake Eugenie Land & Dev., Inc.*, No. 14-123 (2014), at 15–22; Petition for Writ of Certiorari, *Sears, Roebuck & Co.* v. *Butler*, No. 13-430 (2013), at

28–29; Petition for Writ of Certiorari, *Whirlpool Corp.* v. *Glazer*, No. 13-431 (2013), at 30–32.*

Plaintiffs pretend that the Fifth Circuit in *Deepwater Horizon* actually recognized "harmony between the circuits." IPP Opp. 19. Not so. Rather, it noted a "roughly even split of circuit authority" over absent class member standing, but was spared the task of choosing between the two lines of authority because it found that "both the named plaintiffs and absent class members . . . c[ould] allege causation and injury in accordance with Article III." *Deepwater Horizon*, 739 F.3d at 801–02. The court's conclusion that class members could satisfy both standards does not collapse the two standards into one.

Plaintiffs' other attempts to run from the conflict similarly fail.

First, Plaintiffs argue that no court has rejected the "all or nearly all" standard "in favor of an 'all' standard." DPP Opp. 21; IPP Opp. 15. But that is precisely what the Second, Eighth, and Ninth Circuits have done by holding that "no class may be certified that contains members lacking Article III standing." *Denney* v. *Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006); *Halvorson* v. *Auto-Owners Ins. Co.*, 718 F.3d 773, 779 (8th Cir. 2013); *Mazza* v. *Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012).

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* Although the Court declined to resolve this conflict in *BP Exploration*, No. 14-123, because this petition involves what is likely the largest liability class ever upheld by a federal court of appeals, rather than a settlement class, it presents more pronounced constitutional concerns.

Second, Plaintiffs argue that, even assuming a split of authority, the Court should deny review because the district court's decision purportedly complies with the most stringent branch of the split. DPP Opp. 21. This is demonstrably false: the district court expressly embraced the Seventh Circuit's holding in *Kohen* v. *Pacific Investment Management Co.*, 571 F.3d 672 (7th Cir. 2009), that "as long as *one* member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied." *Id.* at 677 (emphasis added); *see also* ALF & IADC Br. 16. The classes contain *countless* uninjured members because the Direct Purchasers regularly did not experience a price change following a price increase announcement, and even where they did, any resulting price increase was not invariably passed on to the Indirect Purchasers. Pet. 8–10; A914–15; A884–96; A1185–86.

Third, Plaintiffs' claim that they need not "prove at the class-certification stage that all class members suffered injury," DPP Opp. 19; IPP Opp. 5, 15, is a straw man: Defendants do not suggest that Article III standing for all class members must be *proven* at class certification. Rather, plaintiffs must satisfy Rule 23 by showing that the requirements of Article III—like the other elements of their underlying claims—can be proven on a classwide basis at trial. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). And where, as here, it is clear at the certification stage that Plaintiffs' proposed class includes countless uninjured members who otherwise would be precluded from seeking relief in federal court, and who cannot be identified without unmanageable individualized inquiries, the class cannot be certified.

See Amchem Prods., Inc. v. *Windsor*, 521 U.S. 591, 612–13 (1997); *Denney*, 443 F.3d at 264; *see also* Chamber & NAM Br. 7.

The record is clear that Plaintiffs have failed to demonstrate any common method by which they could prove absent class member standing. Pet. 8–10, 21–22. The Direct Purchasers' expert, Dr. Leitzinger, did not even attempt to establish a method of proving injury for each class member. Instead, he invented a highly misleading measure of (supposed) impact upon a percentage of *sales*, whereby a $1 impact on a $1 million sales account would yield "90% class impact" even if there was zero impact on the remaining thousand $100 sales accounts. *See id.* at 8–9.

The Indirect Purchasers rely on abstract "economic theory," including the "law of one price," to obscure the millions of individualized inquiries necessary to determine whether increased foam prices were passed on to particular class members. IPP Opp. 21 n.12. Their expert, Dr. Lamb, opined that antitrust impact was susceptible to common proof because *all* indirect purchasers suffered an antitrust impact based on the invalid assumption that, in a perfectly competitive distribution chain, every wholesaler and retailer would invariably pass on the price increases set by the alleged conspiracy. Pet. 9. This assumption is divorced from the realities of the actual marketplace. Indeed, this Court has squarely rejected the exact theoretical approach embraced by Dr. Lamb and the district court to establish that alleged price increases were uniformly passed on through distribution chains. *Compare Ill. Brick Co.* v. *Illinois*, 431 U.S. 720, 741–43 & n.25 (1977) (discussing

and rejecting the "array of simplifying assumptions," including perfectly competitive markets, that permit use of the "economic theorems" of tax incidence to devise a "precise formula" for the impact of an overcharge in a distribution chain), *with* Pet. App. 132a (accepting Dr. Lamb's over-simplified pass-through analysis).

II. THE COURTS OF APPEALS ARE CONFLICTED OVER THE IMPACT OF DAMAGES ISSUES ON RULE 23(B)(3)'S PREDOMINANCE REQUIREMENT POST-*COMCAST*.

1. Plaintiffs concede that *Comcast* held individualized damages issues can defeat Rule 23(b)(3)'s predominance requirement. IPP Opp. 23. Yet even though four circuits have flatly rejected or ignored that holding, Pet. 24–26, Plaintiffs attempt to dodge the conflict on the grounds that the circuits all agree "a district court must review the specific facts before it determines whether common questions predominate." DPP Opp. 24. This is beside the point. The conflict is not over whether courts must analyze the facts—they obviously must—but rather whether as part of that rigorous analysis courts must conclude that predominance is not satisfied where individualized damages issues will "inevitably overwhelm questions common to the class." *Comcast*, 133 S. Ct. at 1433.

In direct contravention of *Comcast*, the Fifth, Sixth, Seventh, and Ninth Circuits have erroneously held that individual damages issues alone *cannot* preclude class certification—even where they predominate. *See, e.g.*, *Leyva* v. *Medline Indus. Inc.*, 716 F.3d 510, 513–14 (9th Cir. 2013); Pet. 24–26. The

D.C. and Tenth Circuits, on the other hand, have properly recognized that under *Comcast*, the predominance of individualized damages issues *can* preclude certification. *Rail Freight*, 725 F.3d at 253; *Wallace B. Roderick Revocable Living Trust* v. *XTO Energy, Inc.*, 725 F.3d 1213, 1220 (10th Cir. 2013). Even the district court here acknowledged this clear conflict. Pet. App. 39a.

Plaintiffs attempt to cast the D.C. Circuit's decision in *Rail Freight* as nothing more than a post-*Comcast* remand order. DPP Opp. 23–24. But the D.C. Circuit expressly adopted a view of *Comcast* that cannot be reconciled with the decisions of the Fifth, Sixth, Seventh, and Ninth Circuits. *Rail Freight*, 725 F.3d at 253 (unequivocally holding "[n]o damages model, no predominance, no class certification").

Plaintiffs' efforts to harmonize the Tenth Circuit's decision in *XTO Energy*, with the decisions of the Fifth, Sixth, Seventh, and Ninth Circuits are similarly unavailing. IPP Opp. 24. The Tenth Circuit expressly recognized that "predominance may be destroyed" if "material differences in damages determinations will require individualized inquiries." *XTO Energy*, 725 F.3d at 1220. This ruling squarely conflicts with decisions of the Fifth, Sixth, Seventh, and Ninth Circuits, which hold that individual "damages calculations alone cannot defeat certification." *Leyva*, 716 F.3d at 513–14 (quotation marks omitted); *see* Pet. 24–26.

2. Plaintiffs also insist there is no conflict regarding their reliance on aggregate damages models. DPP Opp. 25–27; IPP Opp. 26–27. But there plainly

is: the Second, Fourth, and Ninth Circuits have rejected aggregate damages models that calculate only "average" injury in violation of due process and the Rules Enabling Act. *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008); *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 342–44 (4th Cir. 1998); *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974). The Sixth and Tenth Circuits, however, have sanctioned such models even though they alter the substantive law and preclude challenges to individual claims for relief. *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 533 (6th Cir. 2008); *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1269 (10th Cir. 2014); *see also* Dow Br. 13–19.

Plaintiffs argue that the Second and Fourth Circuits have recently approved aggregate damages models, but the unpublished, non-precedential decisions they cite have not overruled *McLaughlin* or *Broussard*. *See* DPP Opp. 26; IPP Opp. 27. In *Hickory Securities Ltd.* v. *Republic of Argentina*, 493 F. App'x 156 (2d Cir. 2012), the Second Circuit expressly applied *McLaughlin*'s holding that "aggregate calculations that result in inflated damage figures that do 'not accurately reflect the number of plaintiffs actually injured' and 'bear[ ] little or no relationship to the amount of economic harm actually caused by defendants' violate the Rules Enabling Act." *Id.* at 159–60 & n.2 (quoting *McLaughlin*, 552 F.3d at 229, 231) (alteration in original). And *Stillmock* v. *Weis Markets, Inc.*, 385 F. App'x 267 (4th Cir. 2010), turned on the availability of statutory damages, which made damages calculations "simple and straightforward." *Id.* at 273. Nothing in *Stillmock* undermines *Broussard*'s holding that reliance on

"abstract analysis of 'averages'" to obscure differences among class members as a method of "class-wide proof of damages was impermissible." *Broussard*, 155 F.3d at 343.

Similarly, Plaintiffs' cramped reading of *McLaughlin*, *Broussard*, and *In re Hotel Telephone Charges*, IPP Opp. 27, disregards their broader holdings that plaintiffs' reliance on aggregate damages models "significantly alter[] substantive rights" in violation of the Rules Enabling Act. *In re Hotel Tel. Charges*, 500 F.2d at 90; *see also McLaughlin*, 522 F.3d at 232 (emphasizing "serious due process concerns" when "the right of defendants to challenge the allegations of individual plaintiffs is lost").

Plaintiffs also rely on *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957). IPP Opp. 28. But *La Buy* did not address, let alone approve of, aggregate damages models. To the contrary, this Court has squarely rejected maneuvers that strip defendants of their right to present every available defense. *See Dukes*, 131 S. Ct. at 2561; *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972).

Plaintiffs' other authorities are similarly unavailing, and reflect their desire to return to an era of class action practice unconstrained by this Court's decisions in *Dukes* and *Comcast*. *See* IPP Opp. 28. Plaintiffs' troubling reliance on *Hilao* v. *Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996)—which endorsed the very "Trial by Formula" shortcut unanimously overruled in *Dukes*—proves the point. *See Dukes*, 131 S. Ct. at 2550, 2561.

Plaintiffs also insist that their damages models "do[] not engage in the 'averaging' that Petitioners claim to be improper." DPP Opp. 26. This claim misrepresents the record and contradicts Plaintiffs' own concessions. Pet. 28, 32. In any event, Plaintiffs again admit that, at best, their experts' classwide approximation of damages may categorically "understate[]" damages. DPP Opp. 26. This raises grave due process concerns not only for Defendants, but also for absent class members, whose interests are impermissibly sacrificed by Plaintiffs' counsel merely to obtain class certification. *See Dukes*, 131 S. Ct. at 2559; *see also* Chamber & NAM Br. 5; Dow Br. 13–18.

III. THE PETITION WARRANTS IMMEDIATE REVIEW.

Plaintiffs concede this Court's jurisdiction to review the denial of a petition for permission to appeal, as they must after *Dart*. DPP Opp. 14 n.8. Plaintiffs nonetheless assert that the Court should deny review here—and presumably in *any* class action involving denial of a Rule 23(f) petition—simply because the district court's certification order is interlocutory. There is no basis for Plaintiffs' proposed *per se* rule against review in this procedural posture.

Plaintiffs' attempt to distinguish *Dart* and *Standard Fire* because they involved Class Action Fairness Act ("CAFA") remand orders is unpersuasive. IPP Opp. 9–10; DPP Opp. 10. As in *Dart* and *Standard Fire*, the district court's order could effectively end federal court proceedings; class certification creates tremendous pressure to settle given the unbearable risk of being the last party standing and severally liable for the full $9 billion in damages

Plaintiffs seek. *See AT&T Mobility LLC* v. *Conception*, 131 S. Ct. 1740, 1752 (2011); DRI Br. 6; ALF & IADC Br. 7. If Defendants succumb to this settlement pressure, the promise of the Court's review of the important questions presented in the petition will remain illusory. Denying review at this critical juncture thus would directly contravene the purpose of Rule 23(f), which allows appellate review of class certification decisions *before* trial precisely to avoid this improper pressure to settle. *See* DRI Br. 7–8.

Moreover, the petition does not present any of the procedural challenges that concerned some members of the Court in *Dart*. *See* DRI Br. 13–14. Unlike the summary order in *Dart*, which left the Court to speculate regarding the basis for the Tenth Circuit's decision, the Sixth Circuit articulated its reasoning for denying Defendants' Rule 23(f) petition—namely, that the district court did not abuse its discretion in granting class certification because its ruling was not "questionable" in any respect. Pet. App. 10a–11a. Because the Sixth Circuit *expressly* based its denial of Defendants' petition on its review of the merits of the district court's ruling, Defendants have not "put the merits cart before the permission-to-appeal horse" (DPP Opp. 14)—the issues are bound together, just as in *Dart*, and thus "do not pose genuinely discrete questions." *Dart*, Slip op. 13.

Finally, Plaintiffs' reliance on the Advisory Committee's reference to the courts of appeals' "unfettered discretion" over Rule 23(f) petitions is unavailing. IPP Opp. 1. "[I]t is the Rule itself, not the Advisory Committee's description of it, that governs." *Dukes*, 131 S. Ct. at 2559. Nothing in the text of Rule 23(f) gives the courts of appeals "unfettered dis-

cretion" that can never be abused. Rather, as always, a court of appeals' discretion "is not rudderless" and is abused where, as here, the decision is based "'on an erroneous view of the law.'" *Dart*, Slip op. 8–9 (citation omitted).

Plaintiffs' proposed *per se* rule against review of any Rule 23(f) petition denial would permit the courts of appeals to insulate their decisions from this Court's scrutiny simply by labeling what is effectively an affirmance of a district court's certification ruling as a denial of a Rule 23(f) petition. This approach would vest the courts of appeals with unbounded discretion over the review of class certification decisions, undermine the purpose of Rule 23(f), and impermissibly erode this Court's supervisory authority. There is no reason to limit this Court's review of such decisions, and every reason to grant review of this unconstitutional and unprecedented certification order.

CONCLUSION

The petition for a writ of certiorari should be granted.

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