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

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The questions presented in the Petition are:

1. Whether the standing requirements of Article III apply to all members of a class certified under Rule 23; and

2. Whether certifying a class under Rule 23(b)(3) is improper where individualized damages issues predominate, and where plaintiffs rely exclusively on aggregate damages models that calculate damages purportedly incurred by the class as a whole, rather than by individual class members.

Amici curiae will address the second question only.

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amici curiae* state the following:

Atlantic Legal Foundation is a not for profit corporation incorporated under the laws of the Commonwealth of Pennsylvania. It has no corporate shareholders, parents, subsidiaries or affiliates.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

RULES

OTHER

INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm that provides effective legal advice, without fee, to parents, scientists, educators, and other individuals and trade associations. Atlantic Legal Foundation is guided by a basic but fundamental philosophy: Justice prevails only in the presence of reason and in the absence of prejudice. Atlantic Legal Foundation seeks to promote sound thinking in the resolution of legal disputes and the formulation of public policy. Among other things, the Atlantic Legal Foundation's mission is to advance the rule of law in courts and before administrative agencies by advocating limited and efficient government, free enterprise, individual liberty, school choice, and sound science.

Atlantic Legal Foundation's leadership includes distinguished legal scholars and practitioners from across the legal community. Atlantic Legal Foundation has an abiding interest in the application of sound principles of law to the use of the class action mechanism, and has appeared as

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[1] Pursuant to Rule 37.2(a), timely notice of intent to file this *amici* brief was provided to the parties, the parties have consented to the filing of this brief; Petitioner has lodged with the Court a "universal consent" on behalf of both parties.
Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

amicus curiae or counsel for *amicus curiae* in numerous cases before this Court, including, of relevance here, *Wal-Mart Stores, Inc. v. Dukes,* 131 S.Ct. 2541 (2011) and *Am. Express Co. v. Italian Colors Rest.,* 133 S.Ct. 2304 (2013).

The International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and the continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost. In support of these principles, the IADC has filed briefs in cases such as this, supporting careful application of class action standards.

Amici are concerned that the Sixth Circuit's decision deprives class action defendants and absent parties of due process and other protections. They believe that review by this Court is necessary to ensure compliance by all federal courts with the requirements of Rule 23 and this Court's jurisprudence.

INTRODUCTORY STATEMENT

The petition asks this Court to address an important and recurring question of class action

law on which the courts of appeals are divided: the relevance of individualized damages issues to the predominance requirement of Rule 23(b)(3) in light of *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

The underlying case is an antitrust multi-district litigation pending in the Northern District of Ohio, in which purchasers and users of polyurethane foam, a material used in many consumer products, allege a price-fixing conspiracy among manufacturers and suppliers of that foam. Plaintiffs contend that every price increase for various types of polyurethane foam announced by every Defendant to every customer during the eleven year class period was the result of a conspiracy among Defendants on pricing. App. 25a. Plaintiffs seek treble damages of more than $9 billion.

Plaintiffs sought certification under Rule 23(b)(3) of two damages classes that consisting of persons and entities who directly or indirectly purchased flexible foam or foam products from Defendants over a ten and one-half year period. App. 17a-18a. The "Direct Purchaser" class includes all persons or entities who purchased flexible foam directly from Defendants and their alleged co-conspirators during the class period for purchases "from or delivery into the United States." App. 15a-16a. The "Indirect Purchaser" class includes "individual consumers and 'authorized managing agents' for hotels and other entities" who purchased products containing De-

fendants' foam, other than for resale, in 29 states and the District of Columbia during the class period. *Id.* at 18a–19a. The two classes could collectively include tens or hundreds of millions of American individual consumers and businesses.

The district court concluded that the requirements of Rule 23 were satisfied and certified the two proposed classes – "direct purchasers" and "indirect purchasers."

Petitioners sought interlocutory review by the Sixth Circuit. The Sixth Circuit approved class certification because, in its view, "the district court ensured that each of the classes' models adhered to the theories of their cases, translating their legal theories of their harmful events to the economic impact of those events. Because the district court required the classes' damages models to reflect their theories of the case, it did not abuse its discretion or violate *Comcast*." App. 6a-7a.

Petitioners argue, *inter alia*, that the district court misapplied the standard for measuring damages, in violation of *Comcast* because "a model purporting to serve as evidence of damages in [a] class action must measure only those damages attributable to [the class liability] theory." *Comcast* at 1433.

Petitioners further claim that the damages model in this case is defective because its models purport to quantify the injury in fact to all class members resulting from the defendants' alleged collusive conduct, but also detecting injury where

none exists. If accurate, this critique would effectively block plaintiffs' argument for certification. Common questions of fact cannot predominate where there exists no reliable means of proving classwide injury in fact. When a case turns on individualized proof of injury, separate trials are required.

Petitioners make the case that Direct Purchasers' expert claimed his models "demonstrate[d] impact for customers who account for 99 percent of sales," App. 89a, but he did not attempt to demonstrate injury for each class member, or even the majority of class members. Petitioners add that the Direct Purchasers' model was not able to estimate any impact for nearly 23% of the purchasers in the sample and that for those purchases that Direct Purchasers' expert analyzed in his model, in over 65% of the purchases the calculations showed that the claimed impact of the alleged conspiracy was not statistically different from zero. Petition at 8-9.

Petitioners assert that Indirect Purchasers' expert, who opined that all indirect purchasers suffered an antitrust impact from the alleged conspiracy, relied on a flawed economic theory – the "law of one price" which posits that price increases are always passed on to indirect purchasers by wholesalers and retailers, no matter how convoluted the distribution chain or how atypical the market conditions in a given local retail market and that in fact, this presumption was unsupported by empirical evidence and

ignored the realities of complex distribution chains, *see id.* at 9. Petitioners point out that both of Plaintiffs' experts (for the Direct Purchaser class and for the Indirect Purchaser Class) for have written that "law of one price" is a theory that frequently doesn't hold when actual markets are concerned. Petition at 9-10.

SUMMARY OF ARGUMENT

Amici urge this Court to grant review because clear circuit splits exist on the proposed questions. We focus in this brief on the second question presented regarding damages and the "predominance" requirement. The Sixth Circuit, along with the Fifth, Seventh, and Ninth Circuits have held that individualized damages issues are not relevant to the predominance requirement of Rule 23(b)(3), in conflict with this Court's decision in *Comcast*. The Tenth Circuit and the District of Columbia Circuit have held that damages issues are relevant to the assessment of "predominance" at the class certification stage. It is important that the Court reaffirm that its teaching in *Comcast* and resolve this conflict on a fundamental issue that affects numerous and potentially enormous Rule 23(b)(3) class actions.

Amici believe that the district court, in its class certification opinion, and the Sixth Circuit, in its denial of review, did not correctly apply this Court's decision in *Comcast*.

The extraordinary amount of damages sought by Plaintiffs and certification of the classes in this

case – as in many other antitrust, as well as securities and Title VII class actions – virtually ensures that the merits of the case will not be litigated, regardless of the underlying merits of Plaintiffs' claims. *See, e.g., AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740, 1752 (2011) (class actions entail "the risk of 'in terrorem' settlements" because "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims"). If the class certification in this case is allowed to stand, it will serve as a template for other class action plaintiffs seeking to have massive antitrust and other cases certified as class actions and to thus coerce defendants to settle without ever trying the merits of the claims.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CIRCUIT SPLIT REGARDING THE EFFECT OF INDIVIDUALIZED DAMAGES ISSUES ON THE PREDOMINANCE REQUIREMENT OF RULE 23(b)(3).

Amici believe that there is a need to resolve the conflict among the courts of appeals concerning whether district courts can certify classes where individualized damage issues predominate. This conflict persists despite this Court's teaching in *Comcast Corp.* v. *Behrend,* 133 S. Ct. 1426, 1433 (2013) that individualized damages issues will "inevitably overwhelm" the common issues in large class action cases such as this one.

A party seeking to maintain a class action must be prepared to show that the numerosity, commonality, typicality, and adequacy-of-representation requirements of Rule 23(a) have been met, *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. —, 131 S.Ct. 2541, and must satisfy through evidentiary proof at least one of Rule 23(b)'s provisions. The same analytical principles govern certification under both Rule 23(a) and Rule 23(b). *Comcast* at 1428-29. In addition, class resolution must be "superior to other available methods for the fair and efficient adjudication of the

controversy." In adding "predominance" and "superiority" to the criteria for certification, the Advisory Committee sought to cover cases "in which a class action would achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness. . . ." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997), *citing* Adv. Comm. Notes, 28 U.S.C.App., p. 697. "Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a) and Congress added "procedural safeguards for (b)(3) class members beyond those provided for (b)(1) or (b)(2) class members (*e.g.,* an opportunity to opt out), and the court's duty to take a 'close look' at whether common questions predominate over individual ones." *Comcast* at 1432 (citations omitted).

Meeting the predominance requirement entails more than adducing common evidence that the defendants colluded to raise prices. The plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy. *See Amchem*, 521 U.S. at 6-24; *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244, 252 (D.C. Cir. 2013).[2]

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[2] Proof of damages is essential because a successful antitrust plaintiff must prove more than just the fact that collusive behavior occurred: "The antitrust injury requirement cannot be met by broad allegations of harm to the 'market' as an abstract entity. Although all antitrust

(continued...)

In *Comcast,* this Court held that an antitrust class action was "improperly certified under Rule 23(b)(3)" because plaintiffs' damages model fell "far short of establishing that damages [were] capable of measurement on a classwide basis" and thus the plaintiffs could not "show Rule 23(b)(3) predominance." 133 S. Ct. at 1432-33. Without an adequate damages model, certification was improper because "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Id*. at 1433.

A number of courts of appeal have correctly understood and applied *Comcast*'s mandate. The D.C. Circuit in *In re Rail Freight Fuel Surcharge Antitrust Litigation*, *supra*, recognized what this Court held in *Comcast* – that accurate damages expert's models are essential to an antitrust class action – and "No damages model, no predominance, no class certification." 725 F.3d at 253. "Common questions of fact cannot predominate where there exists no reliable means of proving classwide injury in fact." *Id*. at 252-53. Courts therefore must subject "statistical models that purport to show predominance" to a "hard look." *Id*. at 255. If defendant's critiques of a proposed damages model are correct, "that is not

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[2](...continued)
violations, under both the *per se* rule and rule-of-reason analysis, 'distort' the market, not every loss stemming from a violation counts as antitrust injury." *See Atl. Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 339 n. 8 (1990); *see also In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244, fn 5 (D.C. Cir. 2013).

just a merits issue," but instead "would shred the plaintiffs' case for certification." *Id*. at 252-53.

The Tenth Circuit in *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.,* 725 F.3d 1213 (10th Cir. 2013), also recognized that courts "should consider the extent to which material differences in damages determinations will require individualized inquiries" because "predominance may be destroyed" if such "individualized issues will overwhelm those questions common to the class." *Id*. at 1220.

On the other side of the issue, the Fifth, Sixth, Seventh, and Ninth Circuits have either affirmatively rejected, sought to distinguish, or simply not heeded *Comcast's* holding regarding the need to be vigilant about guarding against individualized damages issues overwhelming common questions and vitiating predominance. These courts, in direct conflict with post-*Comcast* decisions from the Tenth Circuit and the D.C. Circuit, dismiss the existence of individual damages issues as irrelevant to the predominance analysis, despite this Court's holding in *Comcast*, that such questions can preclude a "predominance" finding. *See* 133 S. Ct. at 1433.

In *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.,* 722 F.3d 838 (6th Cir. 2013), *cert. denied,* 134 S. Ct. 1277 (2014) the Sixth Circuit followed the *Comcast dissent's* assertion that "'individual damages calculations do not preclude class certification under Rule 23(b)(3)'"

and in "'the mine run of cases, it remains the 'black letter rule' that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members.'" 722 F.3d at 860–61 (quoting *Comcast,* 133 S. Ct. at 1437 (Ginsburg & Breyer, JJ., dissenting)). The Sixth Circuit went so far as to hold that, "no matter how individualized the issue of damages may be, determination of damages may be reserved for individual treatment with the question of liability tried as a class action," a position that it said held true even when some consumers might have no injury at all. *Id.* at 853–55.

In *Butler v. Sears, Roebuck & Co.,* 727 F.3d 796 (7th Cir. 2013), *cert. denied,* 134 S. Ct. 1277 (2014) the Seventh Circuit in a product liability case held that "[i]f the issues of liability are genuinely common issues," individualized damages issues do not preclude a finding of predominance, 727 F.3d at 801–02, directly contradicting *Comcast.*[3]

Similarly, the Ninth Circuit in *Leyva v. Medline Industries Inc.,* 716 F.3d 510 (9th Cir. 2013),held that "damage calculations alone cannot defeat certification" and that "[t]he amount of damages is

[3] The *Butler* court attributed this Court's remand to "the emphasis that the majority opinion places on the requirement of predominance and on its having to be satisfied by proof presented at the class certification stage rather than deferred to later stages in the litigation," rather than a substantive concern about questionable damages models or links between theories of liability and the damages models. 727 F.3d at 800.

invariably an individual question and does not defeat class action treatment." *Id*. at 513–14 (emphasis added; internal quotation marks and citations omitted). It misunderstood *Comcast* as holding only that "plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." *Id*. at 514. In *Jimenez v. Allstate Ins. Co.,* 765 F.3d 1161, 1167-68 (9th Cir. 2014) the Ninth Circuit recently reiterated that its "circuit precedent" (citing *Leyva*) prohibited the denial of class certification because of individualized damages issues.

The Fifth Circuit in *In re Deepwater Horizon,* 739 F.3d 790 (5th Cir.2014), *cert. denied* No. 14-123 (Dec. 10, 2014) affirmed certification of a settlement class for those harmed by an oil spill in the Gulf of Mexico. BP challenged the proposed settlement on the grounds that the claims from thousands of plaintiffs in the Gulf region were too disparate to meet Rule 23(a)(2)'s commonality requirement. The Fifth Circuit rejected the argument by BP and those who had objected to the class action settlement that the decision in *Comcast* precludes certification under Rule 23(b)(3) in any case where the class members' damages are not susceptible to a formula for classwide measurement, holding that the proper focus of the analysis was the defendant's conduct, and that "even an instance of injurious conduct" satisfies Rule 23, "even when the damages are diverse." 739 F.3d 790 at 810-11. The *Deepwater*

Horizon court cited with approval *Butler*, *Whirlpool* and *Leyva*.

These circuits have plainly rejected this Court's teaching in *Comcast*.

The relevance of individualized damages issues to Rule 23(b)(3)'s predominance requirement is critical; it is a key threshold question in cases in which certification of a damages class is sought. *Comcast* should have resolved this issue, but several courts of appeals have declined to follow it. The Court should grant review and make clear what it held in *Comcast*: if plaintiffs fail to present a viable method of calculating damages on a classwide basis, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class," precluding certification. 133 S. Ct. at 1433.

II. THERE IS AMPLE INTERNAL EVIDENCE THAT THE DISTRICT COURT DID NOT PROPERLY APPLY THE STANDARDS SET FORTH IN *COMCAST*

The district court's class certification opinion and order is lengthy and detailed, and appears to examine Plaintiffs' damages models – and Defendants' objections to them – thoroughly.

We cannot here undertake an exhaustive critique of the lengthy certification opinion, but several examples should suffice to show that the district court did not correctly evaluate Plaintiffs' damages models in light of *Comcast*.

The district court starts its appraisal of Plaintiffs' damage models and their experts' explanations by writing: "Direct Purchasers need only produce a method of proof capable of showing "some damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and *not the fact* of damage. . . .To show impact is susceptible of proof on a classwide basis, Direct Purchasers must show 'widespread impact,' or that all or nearly all class members suffered injury." App. 49a. So far, so good. But then the district court quotes at length from *Kohen v. Pac. Inv. Mgmt. Co.,* 571 F.3d 672, 677 (7th Cir. 2009) to the effect that a class that includes persons who have not been injured by the defendant's conduct can be certified and that

"indeed this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown" and that "Such a possibility or indeed inevitability does not preclude class certification. . . ." App. 48a-49a.[4]

We think this misapprehends the state of the law, certainly post-*Comcast*[5], and sets the stage for a cascade of errors in the district court's evaluation of Plaintiffs' models and their "statistical evidence of impact." App. 50a.

Moreover, as Petitioners point out, Direct Purchasers' expert did not attempt to demonstrate injury for each class member, or even the majority of class members; rather, he claimed his models "demonstrate[d] impact for customers who account for 99 percent of *sales."* App. 89a (emphasis added) and in fact, the expert's model was not able to estimate *any* impact for nearly 23% of the purchasers in his sample, and that for those purchases that Plaintiffs' expert analyzed in his

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[4] The district court correctly recited, but we believe did not apply, the standard that "the impact burden requires a method of proof, using evidence common to the class, that can establish *all or nearly all class members* incurred an antitrust overcharge of some amount." App. 66a (emphasis added, citation omitted). The "all or nearly all class members" formulation is used numerous times in the district court's class certification opinion.

[5] Compare this articulation with *Comcast*'s conclusion that "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Comcast* at 1433.

model over 65% of his calculations showed that the claimed impact of the alleged conspiracy was not statistically different from zero. Petition at 8 and App. 84a.[6]

Further doubt about the reliability of the district court's approach is sown by its discussion of the impact of long-term contracts on prices paid by some large members of the Direct Purchaser class, because the court credits the Plaintiffs' expert's statement that "if a customer had a contract in place which effectively insulated it from the effects of one or more price increase [letters] from a specific defendant, then presumably the data feeding into my regression would reflect that fact." App. 80a-81a. This suggests the speculative nature of Direct Purchasers' model.

The district court further acknowledged that Defendant's expert testified that the Direct Purchasers Plaintiffs' model produces results that make no economic sense, in part because the model uses averaging and "'averaging would 'award[ ] a positive damage amount' where negative coefficients were estimated and therefore "no antitrust impact existed" or where "impact coefficients were not estimable," but excused the fact that the damages model "'produces results that make no economic sense,'" by asserting that

[6] In the interest of brevity we discuss only the district court's treatment of Direct Purchaser Plaintiffs' model.

"the damages methodology does *not* award damages; it *calculates* damages on a classwide basis" and "Direct Purchasers propose to 'divide [damages] among class members based on the transaction-level impact analysis." App. 110a. But this simply begs the question whether Plaintiffs in fact have produced a sound method to allocate damages accurately and fairly.

The district court's statement that "Questions of allocation need not definitively be resolved now. Direct Purchasers must only show they can prove classwide damages using common evidence. And though questions of allocation will likely require individualized analysis, that is typical of aggregate litigation, and does not cause individual issues to predominate over common questions in this case" (App. 109a-111a) does not reflect this Court's statement in *Comcast* that "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Comcast* at 1433.

Finally, the district court's statement that "[s]hould this case reach a factfinder, Defendants are free to argue that despite Direct Purchasers having shown common questions are *susceptible* of classwide proof, Direct Purchasers do not, at the end of the day, succeed in using this common evidence to show impact *in fact* due to (for example) a lack of a sufficient number of coefficients coming in at the conventional significance level" (App. 88a-89a) misconstrues the duty of the district court at the certification stage

explained in *Comcast* and leads to the very danger this Court has noted with respect to the pressure to settle cases of dubious merit because the risk of enormous damages awards are too great. *See AT&T Mobility,* 131 S. Ct. 1740, 1752 (2011).

CONCLUSION

For the foregoing reasons, *amici curiae* urge the Court to grant the petition for a writ of certiorari.

December 19, 2014

Respectfully submitted,

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