No. 17-441

IN THE

Supreme Court of the United States

FERRELLGAS PARTNERS, L.P., ET AL.,
Petitioners,

v.

MORGAN-LARSON, LLC, ET AL.,
Respondents.

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

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, or in what circumstances, a plaintiff adequately pleads a "continuing violation" of the antitrust laws, sufficient to satisfy the statute of limitations, by alleging continuing sales during the limitations period when the alleged price-fixing conspiracy was formed outside the limitations period.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amicus curiae* Atlantic Legal Foundation states that Atlantic Legal Foundation is a not-for-profit corporation incorporated under the laws of the Commonwealth of Pennsylvania. It has no shareholders, parents, subsidiaries or affiliates.

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... I
CORPORATE DISCLOSURE STATEMENT.. ii
TABLE OF AUTHORITIES..... iv
INTEREST OF *AMICUS CURIAE*..... 1
BACKGROUND..... 2
Proceedings Below..... 4
The District Court Decision..... 7
The Eighth Circuit Panel Decision..... 7
The Eighth Circuit *En Banc* Decision.... 7
SUMMARY OF ARGUMENT..... 9
ARGUMENT..... 11
THERE IS A CLEAR SPLIT OF AUTHORITY AMONG THE CIRCUITS... 12
CONCLUSION..... 17

TABLE OF AUTHORITIES

Page(s)

CASES:

Al George, Inc. v. Envirotech Corp.,
939 F.2d 1271(5th Cir. 1991).. 13
AMF, Inc. v. General Motors Corp.
(In re Multidistrict Vehicle Air Pollution)
591 F.2d 68 (9th Cir. 1979). 13
Atlantic Textiles v. Avondale Inc.
(In re Cotton Yarn Antitrust Litig.)
505 F.3d 274 (4th Cir. 2007). 15
Ashcroft v. Iqbal, 556 U.S. 662 (2009). 2
Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007). 2
California Pub. Emps.' Ret. Sys. v. ANZ
Sec., Inc., 137 S. Ct. 2042 (2017).... 10, 11, 17
In re: Pre-Filled Propane Tank Marketing
& Sales Practice Litig.,*
No. 4:09-2086-MD-W-GAF. 3
Kahn v. Kohlberg, Kravis, Roberts & Co.,
970 F.2d 1030 (2d Cir.), *cert. denied*,
506 U.S. 986 (1992). 13, 14
Kaiser Aluminum & Chem. Sales, Inc. v.
Avondale Shipyards, Inc., 677 F.2d 1045
(5th Cir. 1982), *cert. denied*,
459 U.S. 1105 (1983). 13, 14
Kaw Valley Elec. Coop. Co. v.
Kansas Elec. Power Coop., Inc.,
872 F.2d 931 (10th Cir. 1989). 13
Klehr v. A.O. Smith Corp.,
521 U.S. 179 (1997). 7, 8, 15

TABLE OF AUTHORITIES (cont'd)

Page(s)

CASES (cont'd):
Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007). . . 10, 16
Midwestern Waffles, Inc.v. Waffle House, Inc., 734 F.2d 705 (11th Cir. 1984). 12-13
Morton's Mkt., Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823, 828 (11th Cir. 1999) cert. denied, 529 U.S. 1130 (2000). 15
National Souvenir Ctr., Inc. v. Historic Figures, Inc., 728 F.2d 503 (D.C. Cir.), *cert. denied*, 469 U.S. 825 (1984). 12
Oliver v. SD-3C, LLC, 751 F.3d 1081 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1733 (2015). 15
Orr v. Ferrellgas Partners, L.P., No. 16-4164 (8th Cir.). 4
Ortiz v. Ferrellgas Partners, L.P., No. 16-4086 (8th Cir.). 4
Poster Exch., Inc. v. National Screen Serv. Corp., 517 F.2d 117 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976). 13
Varner v. Peterson Farms, 371 F.3d 1011 (8th Cir. 2004). 8
West Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85 (3d Cir. 2010), *cert. denied*, 565 U.S. 817 (2011). 12
Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971). 11
Z Techs. Corp. v. Lubrizol Corp., 753 F.3d 594 (6th Cir. 2014). . . . 13, 14, 15, 17

TABLE OF AUTHORITIES (cont'd)

Page(s)

ADMINISTRATIVE PROCEEDINGS

In re Ferrellgas Partners, L.P.,
FTC Docket No. 9360 (Mar. 27, 2014),
2014 WL 1396496. . . . . 3-4, 5

In re Ferrellgas Partners, L.P.,
FTC Docket No. 9360 (Oct. 31, 2014),
2014 WL 5787604. 4

In re Ferrellgas Partners, L.P.,
FTC Docket No. 9360 (Oct. 31, 2014),
2014 WL 5787605. 4

STATUTES

Clayton Act. section 4B, 15 U.S.C. § 15b. *passim*

TREATISES

2 Phillip E. Areeda & Herbert
Hovenkamp, *Antitrust Law* ¶ 338b
(rev. ed. 1995). 9

Phillip E. Areeda & Herbert Hovenkamp,
Antitrust Law ¶ 320c1 (2017 online ed.). . . . 16

INTEREST OF *AMICUS CURIAE*[1]

The Atlantic Legal Foundation is a non-profit public interest law firm founded in 1976 whose mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. Atlantic Legal Foundation's board of directors and legal advisory council consist of legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists.

Members of Atlantic Legal's board of directors and legal advisory council are familiar with the need for statutes of limitation and repose which provide predictability in legal relationships and avoid claims based on events that can no longer be verified because of the dimming of memories because of the passage of time.

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[1] Pursuant to Rule 37.2(a), *amicus* has given notice of intent to file this brief to all parties more than 10 days before this brief was filed. All parties have consented to the filing of this brief.

Pursuant to Rule 37.6, *amicus* affirms 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* nor their counsel made a monetary contribution to the preparation or submission of this brief.

This case raises important issues that implicate potential open-ended and interminable exposure to litigation arising from acts undertaken years in the past and unless this Court resolves the clear circuit split described herein, the risk is dependent upon the venue of the lawsuit.

Atlantic Legal believes that the *en banc* majority incorrectly interprets Supreme Court precedent, fails to hold the plaintiffs' complaint to the plausibility standard of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and ignores the purposes of the antitrust statute of limitations. See *en banc* panel dissent at App. 23a (Shepherd, J.). Most importantly, this case aggravates a pronounced circuit split with respect to the application of the continuing violation doctrine .

Atlantic Legal Foundation respectfully submits that this case affords the Court an opportunity to clarify the judge-made "continuing violation" exception to the otherwise clear four-year limitations period of Clayton Act, 15 U.S.C. § 15b and to eliminate the court uncertainty and confusion over the application of the continuing violation doctrine.

BACKGROUND

Petitioners are suppliers of propane exchange tanks. App. 83a (¶ 1) who sell the pre-filled propane tanks which are of a standard size (with a fill capacity of 20 pounds) directly to retailers, such as Respondents, including gas stations, convenience stores, hardware stores, grocery

stores, and big-box stores. *Id.* at 83a (¶¶ 2, 3). Retailers then sell those tanks to consumers, either in exchange for a near-empty tank or as a stand-alone sale . *Id.* at 83a, 94a-95a (¶¶ 2, 44- 45).

Before 2008, Petitioners sold tanks pre-filled with 17 pounds of propane. *Id.* at 83a-84a (¶ 3). In 2008, following increases in the price of propane, both Petitioners reduced the fill levels in their tanks from 17 to 15 pounds, but kept the per-tank prices at the pre-2008 level. *Id.* at 84a-85a (¶¶ 4-7).

After Petitioners reduced the fill level in their exchange tanks, 18 class action complaints were filed, alleging that Petitioners' reduction from 17- to 15-pounds of propane in the tanks violated consumer protection and antitrust statutes. The named plaintiffs were all indirect purchaser end-consumers, but they purported to bring their cases on behalf of all purchasers of propane exchange tanks, including resellers such as Plaintiffs-Respondents in this case. The cases were consolidated into an MDL proceeding. By October 6, 2010, all of the indirect purchaser cases had settled. See *In re: Pre-Filled Propane Tank Marketing & Sales Practice Litig.*, No. 4:09-2086-MD-W-GAF (*"Propane I"*), ECF Nos. 2, 114, 166.

In March 2014, the Federal Trade Commission ("FTC") filed an administrative complaint alleging that Petitioners took concerted action in 2008 to obtain Walmart's agreement to the reduction in fill level, thus illegally restrained competition. See Complaint ¶¶ 1-9, 48-59, *In re Ferrellgas Partners,*

L.P., FTC Docket No. 9360 (Mar. 27, 2014), 2014 WL 1396496. See Petition at 5.

Petitioners settled with the FTC on October 31, 2014, not admitting liability. See Agreement Containing Consent Order as to Ferrellgas Partners, L.P. and Ferrellgas L.P., *In re Ferrellgas Partners, L.P.*, FTC Docket No. 9360 (Oct. 31, 2014), 2014 WL 5787604, at *9-11; Agreement Containing Consent Order as to AmeriGas Partners, L.P. and UGI Corporation, *In re Ferrellgas Partners, L.P.*, FTC Docket No. 9360 (Oct. 31, 2014), 2014 WL 5787605, at *1-3; see Petition at 6, n. 3.

Proceedings Below

Starting in May 2014, soon after the FTC Complaint was filed, direct and indirect purchasers of refilled propane tanks filed 37 cases. The Judicial Panel on Multi-District Litigation consolidated all actions in the Western District of Missouri before the district judge who presided over *Propane I*.

This Petition concerns the claims of the direct purchaser plaintiffs (*i.e.*, resellers rather than end-user consumers or "indirect purchasers").[2] Respondents filed their Consolidated Amended

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[2] The district court granted summary judgment to Petitioners on the indirect purchaser plaintiffs' claims. Those dismissals are being appealed in the Eighth Circuit. *See Ortiz v. Ferrellgas Partners, L.P.*, No. 16-4086 (8th Cir.); *Orr v. Ferrellgas Partners, L.P.*, No. 16-4164 (8th Cir.).

Complaint – the operative complaint in this case – on January 29, 2015 ("Complaint"). See App. 117a.

The Complaint largely repeats the allegations in *Propane I* that Petitioners conspired "[n]o later than the last week of June 2008." *Id.* at 100a (¶ 66) to reduce the fill levels of their propane tanks from 17 to 15 pounds, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. (*Compare* App. 84a-85a, 96a-101a (¶¶ 7, 50-68), *with* Consolidated Class Action Complaint ¶¶ 50-67, *Propane I*, No. 09-2086 (W.D. Mo. Feb. 22, 2010), ECF No. 76) and that "[b]y October 2008 the propane conspiracy succeeded." *Id.* at 85a (¶ 10). See Petition at 6-7.

The Complaint also repeats many of the FTC's allegations that in 2008 Petitioners pressured Walmart to accept the fill reduction because, Respondents allege, Petitioners believed they could not sustain the fill reductions unless Walmart accepted them, App. 101a (¶ 69), and therefore they "combined efforts" to "forc[e] Walmart" to accept the fill reduction on October 10, 2008. (Compare Complaint ¶¶ 10, 68-89 id. at 85a, 100a-05a , *with* Complaint ¶¶ 30-59, *In re Ferrellgas Partners, L.P.*, FTC Docket No. 9360 (Mar. 27, 2014), 2014 WL 1396496), *id.* at 104a-05a (¶¶ 87-88).[3]

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[3] These allegations all involve conduct in 2008 about a conspiracy that had "succeeded" in October 2008, and the core allegations were publicly known to by mid-2009 at the latest. Respondents' claims were thus untimely under the Clayton Act's four-year statute of limitations. Respondents

The District Court Decision

The district court on July 2, 2015 granted Petitioners' motions to dismiss the Complaint. *See* App. 80a. The court held that Respondents' claim accrued in August 2008; that "absent any tolling theories, the statute of limitations expired on August 1, 2012, almost two years before the first claim was filed"; and that Respondents had not alleged a continuing violation sufficient to commence a new limitations period. *Id.* at 57a-66a. The district court found that the fact that Petitioners continued to sell 15-pound tanks after 2008 did not mean that the supposed conspiracy as a continuing violation. *Id.* at 61a-62a. The district

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added conclusory allegations about conduct during the limitations period – in 2010 and onward. They allege that, "[t]hrough at least the end of 2010, [Petitioners] regularly communicated to assure compliance with the conspiracy" (App. 105a-06a (¶ 92)), and engaged in "unlawful communications regarding pricing, fill levels, and market allocation" that "continued until at least late 2010" (App. at 114a (¶ 125)). The most specific allegation Respondents make about these "unlawful communications" is that, "during calls and meetings [with other AmeriGas executives – not with other companies] occurring at least as late as 2010, [AmeriGas's Director of National Accounts] repeatedly dismissed concerns that BlueRhino [Ferrellgas] might undercut AmeriGas on price or fill levels with words to the effect of, 'I talked to BlueRhino [Ferrellgas], and that's not going to happen.' " *Id.* at 86a (¶ 13). As best we can discern, there are no allegations that an agreement with a competitor or conspirator was reached as a result of the conversations.

court further held that bare allegations about communications between Petitioners "at least as late as 2010" were insufficient to plausibly allege a continuing violation. *Id.* at 64a-65a; *id.* at 86a (¶ 13).

The Eighth Circuit Panel Decision

In a 2-1 decision, a panel of the Eighth Circuit affirmed. App. 33a-49a. The panel majority concluded that Respondents "have not alleged any overt acts within the limitations period that were new and independent acts, uncontrolled by the initial agreement." *Id.* at 43a because "[Respondents] do not allege that [Petitioners] met to fine-tune their agreement, further increased price of the propane tanks, further reduced the fill levels without reducing the price, or took any other novel overt act in furtherance of the conspiracy within the limitations period." *Id.*

Judge Benton, dissenting, said that Respondents had plausibly alleged a continuing violation based on *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997), which he understood to stand for the proposition that "each sale to the plaintiff[] starts the [Clayton Act] statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." *Id.* at 46a-48a.

The Eighth Circuit *En Banc* Decision

The Eighth Circuit granted Respondents' petition for rehearing *en banc* and reversed in a 5-4 decision. App. 1a-32a.

Judge Benton wrote the majority opinion which, like his panel dissent, relied on *dicta* in *Klehr*. The *en banc* majority held that allegations of "sales at artificially inflated prices are overt acts that restart the statute of limitations." *Id.* at 6a. The majority recognized that its decision conflicted with circuit precedent holding that "unabated inertial consequences" of pre-limitations period anticompetitive conduct, without more, do not commence a new limitations period on a continuing violation theory. *Id.* at 13a (citing *Varner v. Peterson Farms*, 371 F.3d 1011, 1019 (8th Cir. 2004)), but it distinguished those cases because "the horizontal restraint here is a per se antitrust violation," which "has 'manifestly anticompetitive effects, and lack[s] . . . any redeeming virtue.'" App. at 13a-14a (alterations in original) (citation omitted).

The majority also held that Respondents sufficiently pleaded that the conspiracy continued into the limitations period because the Complaint alleged that "conversations" that were "similar" to those in 2008 occurred "until at least late 2010." *Id.* at 17a, 20a.

Judge Shepherd, joined by Judges Wollman, Loken, and by Judge Kelly (in part), dissented. The dissent assert that the majority misunderstood *Klehr*'s discussion of the continuing violation doctrine and effectively eliminated any requirement to "show a live, ongoing conspiracy within the limitations period to survive a motion to dismiss." *Id.* at 23a. The dissent noted that *Klehr*

had borrowed its example from the leading antitrust treatise, which "says nothing about 'each sale to the plaintiff' constituting an overt act." *Id.* at 25a. Rather, the dissent said, the treatise "explains that, '*so long as an illegal price-fixing conspiracy was alive*,' each sale at the fixed price [started the four-year statute of limitations anew]." *Id.* (emphasis and alterations by dissent) (quoting 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 338b at 145 (rev. ed. 1995). "Therefore each sale to the plaintiff can start the statutory period running again *so long as* an illegal price-fixing conspiracy is alive and ongoing." *Id.*

The dissent would have found that the Complaint here failed to allege a continuing violation. Other than the fact that Petitioners both continued to sell 15-pound tanks, te dissenters wrote, the only allegations of conduct during the limitations period were "naked assertions of misconduct, combined with a name discovered from a company directory, [which] are not enough" to establish a continuing violation within the limitations period. App. at 29a n.4. The dissent also noted that Respondents' counsel "essentially conceded [at oral argument] that the[y] . . . lack any factual allegations of a live, ongoing conspiracy during the limitations period." *Id.* at 29a.

SUMMARY OF ARGUMENT

The language of section 4B of the Clayton Act, 15 U.S.C. § 15b provides in relevant part: "Any action to enforce any cause of action under section

15 . . . shall be forever barred unless commenced within four years after the cause of action accrued" – is unambiguous and "cannot easily be read as containing implicit exceptions"). *California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2049 (2017).

There is a clear split among the circuit courts with respect to the interpretation of the "continuing violation" exception to the facially clear four-year time in which an action for violation of the antitrust laws must be brought. A plurality of the circuits hold that acts subsequent to the original antitrust violation are not continuing violations if they are, like continued sales outside the limitations period, "the abatable but unabated inertial consequences of some pre-limitations action." A minority of circuits, on the other hand, have adopted a broad interpretation of what acts or injuries amount to a continuing violation.

In this case, the Eighth Circuit *en banc* majority held that because the Complaint alleged a horizontal restraint," a *per se* violation that has no "redeeming virtue." App. 14a, *citing Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007), a new lawsuit against Petitioners filed years after the alleged formation of the "conspiracy" would withstand a motion to dismiss based on continued sales at the same price.

The split among the circuits promises continued uncertainty, turmoil and forum shopping. The split

is unlikely to resolve itself and this Court should grant the petition to resolve it now.

ARGUMENT

The language of section 4B of the Clayton Act, 15 U.S.C. § 15b provides in relevant part that "[a]ny action to enforce any cause of action under section 15 . . . shall be forever barred unless commenced within four years after the cause of action accrued." It is well-settled that the limitations period generally begins to run "when a defendant commits an act that injures a plaintiff's business," and ends four years later. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971).

The Clayton Act's statute of limitations is emphatic and apparently unambiguous, and "cannot easily be read as containing implicit exceptions"). *California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2049 (2017). Nevertheless, numerous judge-made exceptions have evolved, including, relevant to this case, the "continuing violations" doctrine, which provides that when a violation continues into the limitations period, a plaintiff may recover for injuries sustained as a result of that violation, but recovery for injuries incurred more than four years prior is barred.

The continuing violations doctrine has generated confusion as lower courts have applied it differently as between circuits and as between to various types of alleged antitrust violations. The consequence is that the timeliness of antitrust

claims often depends on what court, and what judge, is deciding the issue.

THERE IS A CLEAR SPLIT OF AUTHORITY AMONG THE CIRCUITS.

The federal courts of appeals are divided on when an antitrust violation continues into the limitations period. Some – a minority – of courts of appeals have held that virtually any act or injury occurring during the limitations period is sufficient to establish a continuing violation. In contrast, most courts of appeals distinguish between new, independently injurious acts by a defendant – which constitute a continuing violation – and a "mere reaffirmation" or "the abatable but unabated inertial consequences" of pre-limitations conduct – which are not deemed a continuing violation.

In addition to the Eighth Circuit *en banc*, the D.C. Circuit, and the Third and Eleventh Circuits have adopted a broad interpretation of what acts or injuries amount to a continuing violation. *See National Souvenir Ctr., Inc. v. Historic Figures, Inc.*, 728 F.2d 503, 514 (D.C. Cir.), *cert. denied*, 469 U.S. 825 (1984) (continued payments under a pre-limitations lease actionable because of their "continuing allegedly 'anticompetitive' effect[s]."); *West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 107 (3d Cir. 2010), *cert. denied*, 565 U.S. 817 (2011) (new limitations period commences even though "the acts that occurred within the limitations period were reaffirmations of decisions originally made outside the limitations period."); *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734

F.2d 705, 714 (11th Cir. 1984) (per curiam) (claims challenging activities occurring more than four years before suit commenced were proper "because each payment under a contract which constitutes an illegal tie is a new injury.").

The Second, Fifth, Sixth, Ninth, and Tenth Circuits have all held that acts subsequent to the original antitrust violation are not continuing violations if they are "the abatable but unabated inertial consequences of some pre-limitations action." *Poster Exch., Inc. v. National Screen Serv. Corp.*, 517 F.2d 117, 128 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976); *see also Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045 (5th Cir. 1982) (citation omitted), *cert. denied*, 459 U.S. 1105 (1983); *Kahn v. Kohlberg, Kravis, Roberts & Co.*, 970 F.2d 1030, 1041-42 (2d Cir.), *cert. denied*, 506 U.S. 986 (1992); *Al George, Inc. v. Envirotech Corp.*, 939 F.2d 1271, 1274 (5th Cir. 1991); *Z Techs. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 600 (6th Cir. 2014); *AMF, Inc. v. General Motors Corp. (In re Multidistrict Vehicle Air Pollution)*, 591 F.2d 68, 72 (9th Cir. 1979); *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 238 (9th Cir. 1979); *Kaw Valley Elec. Coop. Co. v. Kansas Elec. Power Coop., Inc.*, 872 F.2d 931, 933-34 (10th Cir. 1989).

Under this interpretation of the "continuing violation" doctrine, merely continuing to collect money due under an allegedly anticompetitive contract does not constitute a continuing violation. "[P]rofits, sales and other benefits accrued as the

result of an initial wrongful act are not treated as 'independent acts.' Rather, they are uniformly viewed as 'ripples' caused by the initial injury, not as distinct injuries themselves." *Z Techs.*, 753 F.3d at 600, and are not "independent injuries flowing from 'some injurious act actually occurring during the limitations period.' " *Kaiser Aluminum*, 677 F.2d at 1052-53 (citation omitted); and "performance under the contract merely affects damages and does not give rise to a new cause of action" because they are not "new wrongs." *Kahn*, 970 F.2d at 1041. A continuing violation must be "a new and independent act that is not merely a reaffirmation of a previous act" and must "inflict new and accumulating injury on the plaintiff." *Pace Indus., Inc.*, 813 F.2d 234, 238.

Continued payments made pursuant to anticompetitive agreements are not continuing violations, but are "manifestation[s] of the previous agreement[s]." *Grand Rapids Plastics, Inc. v. Lakian*, 188 F.3d 401, 406 (6th Cir. 1999) and do not commence a new limitations period.

Even among the majority of the courts of appeals that have articulated an "inertial consequences," "ripples" or "mere reaffirmation" standard, the courts of appeals have diverged in applying that standard to alleged conspiracies, and a number of courts of appeals have applied a different – more lax standard: when the complaint alleges a price-fixing conspiracy, a plaintiff need only plead a sale of the product within the limitations period to survive a motion to dismiss.

See En Banc opinion at App. 10a-12a; *Oliver v. SD-3C, LLC*, 751 F.3d 1081, 1086 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1733 (2015). Under this version of the continuing violation doctrine, a post-limitation sale is sufficient to start a new limitations period and a plaintiff need not allege that there were collusive acts after the limitations period, so long as the complaint alleges the sales were at a price affected by a pre-limitations agreement. See *Oliver*, 751 F.3d at 1086; *Atlantic Textiles v. Avondale Inc. (In re Cotton Yarn Antitrust Litig.)*, 505 F.3d 274, 290-91 (4th Cir. 2007); *Morton's Mkt., Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 828 (11th Cir. 1999), *cert. denied*, 529 U.S. 1130 (2000).[4]

Interpreted this way, the "continuing violation" exception swallows the rule. Without requiring a clear and credible allegation of a connection between an alleged injury and an active conspiracy, any sale could extend the limitations period and defeat a statute of limitations defense at the pleading stage. "[P]rofits, sales, and other benefits accrued as the result of an initial wrongful act are not treated as 'independent acts' " but "are uniformly viewed as 'ripples' caused by the initial injury" (see *Z Techs.*, 753 F.3d at 600); see also

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[4] This approach is based on an incorrect reading of dicta in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997). It is beyond the scope of this amicus brief to explain why *Klehr* is not a basis for this interpretation of the continuing violation doctrine. See Pet. Section II.A.1.

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 320c1 (2017 online ed.) ("[H]igh prices following an anticompetitive merger or the creation of a monopoly are mere 'inertial consequences' that one naturally expects to flow from such acts.").

As the dissent from the Eighth Circuit *en banc* opinion noted, nothing in the majority opinion prevents a new lawsuit against Petitioners here many years – even decades – after the alleged formation of the "conspiracy" or after the last "overt act" to further that "conspiracy," "so long as fill levels remain at 15 pounds" and sales continue to be made. App. 31a n.6. Respondents themselves acknowledged that, under their interpretation of the continuing violation doctrine, they could have waited "100 years" before bringing suit. See Petition at 14.

Particularly distressing is the *en banc* majority's rationale that "as a *per se* violation, the horizontal restraint" has "manifestly anticompetitive effects, and lack[s] . . . any redeeming virtue." App. 14a, *citing Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). The legislative branch did not incorporate a value judgment as to the "worthiness" of different classes of antitrust violations in enacting its statute of limitations provision. Clayton Act, 15 U.S.C. § 15b is unambiguous and "cannot easily be read as containing implicit exceptions". *California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042,

2049 (2017), but in this case the Eighth Circuit majority created a potentially broad exception by making a policy decision best reserved for the political branches..

Section 15b "is designed to prevent . . . parties sleeping on their rights" (*Z Tech. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 603), which is precisely what Respondents here have done, or, worse, they are seeking multiple recoveries for the same alleged violation.

The split among the circuits promises continued uncertainty, turmoil and forum shopping. The split is unlikely to resolve itself and this Court should intervene now to resolve it.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Respectfully submitted,
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