NO. 16-841

In the

Supreme Court of the United States

INTERNATIONAL PAPER COMPANY, ET AL.,

PETITIONERS,

v.

KLEEN PRODUCTS LLC, ET AL.,

RESPONDENTS.

On Petition for a Writ of Certiorari to the Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* BUSINESS ROUNDTABLE, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN FOREST AND PAPER ASSOCIATION, AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF THE PETITION FOR CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Amici and their members represent a diverse array of businesses and business interests across the United States. *Amici* regularly advocate for the interests of their members in federal and state courts in cases of national concern. They support the petition in this case because they have a strong interest in ensuring that the lower courts comply with this Court's precedents, including undertaking the rigorous analysis required by Federal Rule of Civil Procedure 23 before permitting a case to proceed as a class action.

Amici are deeply concerned that the Seventh Circuit departed from this Court's precedents and impermissibly relaxed the standards for class certification when it approved the district court's presumption of classwide antitrust impact based on an alleged increase in an index price. Because many of *amici*'s members operate in industries that feature price indexes, they are concerned that the Seventh Circuit's decision will increase their members' exposure to expansive class action antitrust liability. They are also deeply concerned about the broader economic impact caused by the continuing splits in circuit authority resulting from certain lower courts'

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[1] Pursuant to Supreme Court Rule 37.2(a), *amici* timely notified the parties of their intent to file this brief, and the parties have consented to the filing. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

persistent failures to comply with Rule 23's requirements.

The four organizations that are signatories to this brief are:

Business Roundtable. Business Roundtable CEO members lead companies with more than $6 trillion in annual revenues and nearly 15 million employees. The combined market capitalization of Business Roundtable member companies is the equivalent of nearly one-quarter of total U.S. stock market capitalization, and Business Roundtable members invest $103 billion annually in research and development—equal to 30 percent of U.S. private R&D spending. Members' companies pay $226 billion in dividends to shareholders and generate $412 billion in revenues for small and medium-sized businesses annually. Business Roundtable companies also make more than $7 billion a year in charitable contributions.

National Association of Manufacturers. The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private sector research and development in the Nation. NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps

manufacturers compete in the global economy and create jobs across the United States.

American Forest & Paper Association. The American Forest & Paper Association ("AF&PA") serves to advance a sustainable U.S. pulp, paper, packaging, tissue, and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative—*Better Practices, Better Planet 2020*. The forest products industry accounts for approximately 4 percent of the total U.S. manufacturing GDP, manufactures over $200 billion in products annually, and employs approximately 900,000 men and women. The industry meets a payroll of approximately $50 billion annually and is among the top 10 manufacturing sector employers in 45 states. AF&PA regularly files amicus briefs in cases that raise issues of concern to the forest-products industry.

American Tort Reform Association. The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil-justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus* briefs in cases involving important liability issues.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is worthy of this Court's review because it raises a recurring question of federal class action law that has divided the lower courts and is extraordinarily important to the Nation's businesses: When may a court apply a presumption of classwide injury to avoid individualized inquiries that would otherwise preclude class certification?

In the proceedings below, the district court applied, and the Seventh Circuit approved, a presumption of classwide antitrust injury based on alleged price increases that occurred in an unrepresentative price index. They then made that presumption irrebuttable, deeming the class action requirements of Rule 23 satisfied despite extensive evidence showing that the index price did not reflect the prices that individual class members actually paid, which were frequently individually negotiated and driven by a variety of market inputs, of which only one was price. In the courts' simplistic view, because the index price "factored into" the individually negotiated prices, the allegation that the index price increased as a result of alleged market manipulation was sufficient to presume that each and every individually negotiated price paid by each and every individual buyer was higher than it otherwise would have been and, as a result, common questions predominate over individual ones.

This example of judicial inventiveness is improper under this Court's precedents. The Court has made clear that presumptions are to be sparingly employed in class actions, including because of their

tendency to deprive defendants of their due process right to present all available individual defenses. *See, e.g.*, *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007). That concern is especially relevant here, as the lower courts' presumption does not take into account the realities of the market, which is made up of sophisticated repeat players, often locked in long-term relationships, that negotiate individual prices for custom products based on a variety of market inputs such as size, volume, and the availability of substitute goods. The simplistic observation that the index price "factored into" all prices says nothing about the actual price ultimately negotiated and paid by any individual customer.

If this Court does not intervene and correct the lower courts' errors, the presumption they have endorsed threatens to expand antitrust liability well beyond the scope of anything Congress intended. Hundreds of industries (including most industries that *amici*'s members work in) calculate indexes for thousands of goods, services, and commodities. As a matter of design, these indexes reflect price fluctuations in the markets they index. Under the Seventh Circuit's reasoning, allegations that fluctuations are the result of market manipulation can be sufficient to establish that an alleged antitrust impact is classwide, even though the actual prices paid by individual customers vary significantly because they are the product of individual negotiations and a variety of non-price inputs.

As this Court is well aware, class certification—though nominally a threshold issue—is often the end of any class action lawsuit. Faced with the enormous

potential costs and liability of litigating a sweeping class action, defendants are often forced to settle without being able to litigate their individual defenses. This is especially true in the antitrust context, where treble damages, joint and several liability, and the lack of a contribution rule combine to leave the "last settling defendant" with potentially company-breaking liability—regardless of its level of involvement in any alleged conspiracy or the damages its actions allegedly caused. Unless this Court intervenes, the ultimate result of this novel presumption will be more abusive class actions, even greater legal costs for businesses, and higher prices for consumers.

ARGUMENT

This Court is often asked to consider petitions challenging class certification decisions, but this one differs in a fundamental respect: the Seventh Circuit has approved a presumption of classwide injury in an antitrust case, where the prospect of treble damages and joint-and-several liability multiplies the stakes for defendants many times over. The decision dramatically expands antitrust liability far beyond the scope of Congress's intent.

I. The Court Should Grant Review To Clarify When Presumptions May Be Applied In Favor Of Class Certification.

The Court should grant review because, as the petition explains, the decision below represents a significant departure from this Court's class action precedents and deepens a well-developed circuit split. Although the courts below purported to undertake

the careful analysis that Rule 23 requires, they in fact swept away significant individualized issues by applying an irrebuttable presumption that all prices negotiated and paid by individual buyers were higher as a result of alleged market manipulation that increased an index price.

A. A Presumption That Short-Circuits The Rigorous Analysis Required By Rule 23 Is Contrary To This Court's Precedents.

This Court has long recognized that Rule 23's requirements protect the rights of both defendants and absent class members, by ensuring that the procedures for aggregating claims and streamlining litigation are employed only in appropriate circumstances. *See Taylor v. Sturgell*, 553 U.S. 880, 900–01 (2008). As this Court has noted, aggregation of individual claims for joint resolution endangers the right of absent class members to press their distinct interests and undermines the right of defendants "to present every available defense." *Philip Morris USA*, 549 U.S. at 353 (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)); *see also Hansberry v. Lee*, 311 U.S. 32, 42 (1940) (courts must "fairly insure[] the protection of the interests of absent parties"). These concerns are heightened with respect to class actions (like this one) that seek certification under Rule 23(b)(3), the "most adventuresome" class certification provision. *Amchem*, 521 U.S. at 614.

The drafters of Rule 23 established certain "procedural protections"—the familiar requirements of adequacy, commonality, typicality, and predominance—to protect defendants and absent class members. *See* 28 U.S.C. § 2072(b) (instructing

that rules of procedure "shall not abridge, enlarge or modify any substantive right"). Interpreting Rule 23's requirements, the Court has emphasized that litigating a case as a class action is supposed to be "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties." *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979). Before a case may proceed as a class action, plaintiffs must prove that class members share the "same injury" and possess claims presenting a "common question" that, if adjudicated on a classwide basis, "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350; *see also East Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (class members must "suffer the same injury"). Rule 23(b)(3) plaintiffs also must satisfy the more demanding requirement of proving that common questions "predominate" over individual ones, which ensures that the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. The predominance requirement is not met when "[q]uestions of individual damage calculation will inevitably overwhelm questions common to the class." *Comcast Corp.*, 133 S. Ct. at 1433.

Significantly, because "actual, *not presumed*, conformance" with Rule 23's requirements is "indispensable," *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 160 (1982) (emphasis added), plaintiffs have the burden to "affirmatively demonstrate" their compliance with Rule 23. *Comcast Corp.*, 133 S. Ct. at 1432 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). In addition, "courts must

conduct a 'rigorous analysis' to determine whether" plaintiffs have carried that burden, "even when that requires inquiry into the merits of the claim." *Id.* at 1433 (quoting *Dukes*, 564 U.S. at 351). Plaintiffs must offer "a theory of liability that is . . . capable of classwide proof." *Id.* at 1434. It is not enough that a class propose "any method[ology] . . . so long as it can be applied classwide." *Id.* at 1433 Nor can the answers generated by that methodology be "arbitrary" or "'speculative.'" *Id.*

In light of these essential requirements, this Court has applied presumptions in the class action context only in very limited circumstances, where Congress has strongly indicated that a presumption is appropriate, where "direct proof" is "rendered difficult," and where the presumption is "supported by common sense and probability." *Basic Inc. v. Levinson*, 485 U.S. 224, 245, 246 (1988). The Court has held, for example, that in actions alleging violations of the federal Securities Exchange Act, it is permissible to apply a rebuttable presumption that stock markets are efficient and, therefore, an investor that buys or sells stock at the market price does so in reliance on the integrity of that price. *Id.* at 247; *see also id.* at 241–42.

This "fraud on the market" presumption arose from the Court's view that Congress structured the Securities Exchange Act to take account of empirical evidence suggesting that markets for securities are efficient. *See id.* at 247, 249 n.29 (describing the securities market as "impersonal, well-developed," and "information-hungry"). Although that evidence has since been widely criticized, the Court has

continued to apply the presumption as a matter of *stare decisis* because the presumption arises out of the Court's interpretation of a federal statute and, as a result, Congress is free to change that interpretation. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2411 (2014). Equally important, the presumption is *rebuttable*. Defendants can defeat class certification in any particular case by presenting evidence that the market is not efficient or that individual investors did not rely on the market price. *See id.* at 2408 ("'[A]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance'" and prevent class certification.) (quoting *Basic*, 485 U.S. at 248)).

The presumption of classwide reliance permitted in the narrow context of securities litigation has not been extended to other contexts. As courts have held, when consumers act for a variety of reasons, and base their decisions on a variety of information sources, a presumption of reliance is inappropriate and a court should not certify a class. *See, e.g.*, *McLaughlin v. Am. Tobacco Co.,* 522 F.3d 215, 224 (2d Cir. 2008) (rejecting extension of the fraud on the market presumption because "the market for consumer goods . . . is anything but efficient"); *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 665 (9th Cir. 2004) (noting the various motivations of casino patrons as evidence that a class cannot be certified); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 435 (4th Cir. 2003) (rejecting application of the *Basic* presumption to the health insurance market); *Sikes*

v. Teleline, Inc., 281 F.3d 1350, 1363 (11th Cir. 2002), *abrogated in non-relevant part by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008) ("The securities market presents a wholly different context than a consumer fraud case[.]").

That courts "have been loathe to extend the fraud on the market presumption beyond the securities field," William B. Rubenstein, *Newberg on Class Actions* § 4:60 (5th ed.), reflects the larger principle that due process requires careful scrutiny of a plaintiff's theory of certification lest defendants be deprived of their right to press their distinct issues and present their individual defenses. That is undoubtedly one reason this Court has relaxed Rule 23's protections only in limited circumstances and only when Congress has enacted a statute that supports the application of a classwide presumption. Because the Rules Enabling Act does not allow Rule 23's procedural device to change any substantive right, *see* 28 U.S.C. § 2072(b), any presumption must necessarily reflect a change in the underlying statutory cause of action, which would apply in both individual cases and in class actions. Courts should therefore be especially wary of recognizing presumptions made from whole cloth and not grounded in statutory language.

B. The Presumption Created And Applied By The Courts Below Is Legally Improper And Factually Unsupported.

Plaintiffs' theory of liability in this case rests on a blanket presumption—that all prices paid by individual customers for both containerboard and finished corrugated products were inflated by

increases in a price index (the PPW index) reflecting a survey of prices paid for a particular type of containerboard by a limited subset of purchasers in a particular geographic region. Pet. App. 6a. Plaintiffs argue that there is a "lock-step" relationship between defendants' allegedly collusive practices, the PPW index price, and the actual prices customers ultimately paid. Pet. App. 50a; *see also* Pet. App. 43a (noting that plaintiffs' experts "rely in part on the movement of that index in demonstrating that all or nearly all class members suffered antitrust impact").

Accepting these arguments, the district court's certification decision presumed that all class members suffered a common injury that is susceptible to common proof. According to the district court, "[e]ven for transactions where prices were negotiated individually or a longer term contract existed," the "'starting point for those negotiations would be higher if the market price for the product was artificially inflated'" and, as a result, "every person or entity in North America paid . . . overcharges" as a result of defendants' alleged collusive practices. Pet. App. 17a. The district court then made that presumption effectively irrebuttable. It refused to consider evidence demonstrating that the PPW index is only one factor among many that affected containerboard prices, and that there is no reasonable basis for concluding that every person or entity paid an overcharge. Pet. App. 51a.

On appeal, the Seventh Circuit recognized that the district court's presumption glossed over individualized liability issues. Pet. App. 14a. It also recognized that the presumption would leave

unresolved difficult questions relating to the calculation of individual damages. Pet. App. 14a–17a. The Seventh Circuit nonetheless asserted that the presumption was "reasonabl[e]" and, applying the presumption, concluded that common issues predominate over individualized ones. Pet. App. 17a. Taking a certify-now-worry-later approach, and with a winking recognition that its decision will impose enormous pressures on defendants to settle, the Seventh Circuit suggested that the problems of determining the amount of damages for each individual class member could be worked out later "should the case ever reach that point." Pet. App. 19a.

The application of this presumption—built on armchair speculation about the effect a narrowly drawn index has on a complex and highly personal set of market exchanges—makes no sense under antitrust law, this Court's class action cases, or the requirements of due process. It adds to the confusion in the lower courts and is also unwarranted based on the evidence in the record. There are at least four flaws in the Seventh Circuit's decision.

First, the Court has indicated that presumptions that short-circuit the required Rule 23 showing are permissible only where Congress has strongly indicated that a presumption is warranted. *Basic*, 485 U.S. at 246. But the evidence here is just the opposite. The novel presumption embraced by the lower courts is not anchored to any provision of the federal antitrust laws or of any other statute.

Second, a presumption of classwide injury based on movements in an index price is not supported by

either record evidence in this case or common sense about how markets operate, especially those for specialized goods with relatively few market participants. The record evidence is clear—and the lower courts recognized—that the PPW index price is not the actual price that most class members paid. Pet. App. 50a–51a; Pet. 18. This makes sense: the index reflects only the average price paid for a particular type of containerboard by a limited subset of purchasers (small to mid-size buyers) in a particular geographic market, as self-reported in a trade periodical survey.

Whatever evidentiary value an index price might have in a large and impersonal securities market, the market for containerboard and finished corrugated products is structured much differently. An efficient market is one "in which anyone, or at least a large number of persons, can buy or sell," features "a relatively high level of activity and frequency," and for which "trading information (*e.g.*, price and volume) is widely available." *Freeman v. Laventhol & Horwath*, 915 F.2d 193, 198 (6th Cir. 1990); *see also Basic*, 485 U.S. at 249 n.29 (describing the securities market as "impersonal, well-developed," and "information-hungry"). By contrast, the market for containerboard and corrugated products consists of a relatively limited number of repeat players, responding to a variety of market inputs besides price and volume. Market participants are often bound together by long-term agreements, and purchasers directly negotiate with producers, often for customized and highly individual final products. Pet. 4–8, 18–19. The record evidence shows that as prices increased, customers were able to leverage the

availability of replacement products and negotiate different discounts from the list price, rebates, caps on future increases, and contract provisions that permitted price-shopping. *Id*. These are the actions of sophisticated market participants in a small and highly *personal* market, not the kind of impersonal exchange that in *Basic* warranted applying a presumption.

Third, the lower courts' presumption is at odds with this Court's class action cases. Even if the substantial record evidence to the contrary is discounted (and it should not be), the district court's weak assertions that defendants "largely rel[ied]" on the PPW index, and that the index price "factored into" individually negotiated prices, Pet. App. 51a, are inconsistent with the rigorous analysis that this Court has demanded and its rejection of arbitrary, speculative evidence in support of class certification. The district court's decision rests on equating the PPW index price with a "standard market price" from which all actual prices in the marketplace are derived. Pet. App. 40a. Even on its own terms, however, that equation makes no sense. The PPW index tracks containerboard purchases by a narrow group of smaller purchasers in a particular geographic region—a group that one would expect to be less able to negotiate rebates, discounts, and other price reductions—and does not track purchases of finished products, which account for more than three-quarters of the damages sought here. Pet. App. 18a. Moreover, as noted, this assertion ignores the extensive record evidence that prices are often individually negotiated and that individual

purchasers frequently negotiated around price increases.

Similarly, the Seventh Circuit's statement (paraphrasing the district court, but evidently reflecting its own view) that defendants failed to offer "any other reasonable explanation for the tight correlation" between price increases and the index, Pet. App. 11a, is directly at odds with this Court's decisions imposing the burden *on the class action plaintiff* to "affirmatively demonstrate his compliance" with Rule 23's requirements. *Dukes*, 564 U.S. at 350. Plaintiffs' expert assumed that price increases in the containerboard market were driven by the alleged conspiracy, and never sought to isolate the effect of other potential explanations, such as inflation in raw material prices. Pet. 21. But that assumes its own conclusion—that there is a lock-step link between price increases and movements in the PPW index—and falls far short of meeting this Court's requirement that Rule 23 compliance be affirmatively demonstrated.

Fourth, the Seventh Circuit approved class certification despite its awareness that, if plaintiffs succeed on the merits, the district court would eventually be forced to make hundreds of individual damages allocations to distribute any "aggregate," class-wide determination of damages. Pet. App. 18a–19a. Even if individual damages calculations do not preclude class certification in every case, this Court has stated that predominance is not established where "[q]uestions of individual damage calculation will inevitably overwhelm questions common to the class." *Comcast*, 133 S. Ct. at 1433.

Here, because of all the various inputs to the actual price that each individual plaintiff paid—which included not just a list or index price, but also company size, level of desired customization, the terms of individual long-term contracts, and the availability of substitute goods—there is no easy formula that can be applied to determine the actual individual damages (which are then trebled), *see* 15 U.S.C. § 15(a)) to which each individual plaintiff may be entitled. Instead, the district court will be required to conduct a series of mini-trials to review the history of these negotiations and (years later) come to some determination of just how much, if at all, the alleged collusion affected the price of each individual transaction. As explained below, that approach will put enormous pressures on defendants to settle in the face of potentially overwhelming liability; but as relevant to class certification, the Seventh Circuit has simply ignored this Court's admonition not to certify a class where individual damage calculations "overwhelm questions common to the class." *Comcast*, 133 S. Ct. at 1433.

II. The Court Should Grant Review Because The Issues Raised In This Case Are Recurring And Important.

The presumption applied by the Seventh Circuit cannot help but harm businesses and consumers insofar as it expands potential antitrust class action liability on the basis of swings in price indexes that are not determinative of the actual, individually negotiated prices paid by individual customers. There are literally thousands of producer and consumer price indexes developed and compiled by

third parties that measure the average or median price charged at a particular point in time and are used by market participants for forecasting, contracting, and bid development. As a matter of mathematics, these indexes will move in concert with price increases in the markets they index. Under the Seventh Circuit's reasoning, these movements suffice to certify industry-wide class actions even in the face of evidence that prices are individually negotiated, and without evidence that the markets they index warrant the use of a *Basic*-like presumption.

The federal Bureau of Labor Statistics, for example, publishes the Producer Price Index, which "measures average changes in prices received by domestic producers for their output" in "approximately 535 mining, forestry, utility, construction, manufacturing, and services industries." Bureau of Labor Statistics, *Handbook of Methods*, at 14-1 (2014), *available at* https://www.bls.gov/opub/hom/pdf/homch14.pdf. This includes "over 500 indexes for groupings of industries; and more than 4,000 indexes for specific within-industry product and service categories" as well as "[m]ore than 3,700 commodity price indexes for goods and about 800 for services." *Id.* These indexes are widely used by private firms, especially as an escalator or deflator in long-term sales or purchase contracts. *Id.* at 14–15. Outside the government, hundreds of trade associations, journals, and private companies publish consumer and producer price indexes (like the PPW index) for the benefit of their members and interested parties. *See, e.g.*, Milliman Medical Index, *available at* http://www.milliman.com/mmi/ (index of "the projected

total cost of healthcare for a hypothetical family of four covered by an employer-sponsored preferred provider organization"; compiled by a private firm); Library Materials Price Index, *available at* http://www.ala.org/alcts/mgrps/cmtes/ats-lmpi (index of library material prices; compiled by the Association for Library Collections & Technical Services); Electrical Price Index, *available at* http://electricalmarketing.com/industry-stats/electrical-price-index (index of electrical component prices, including prices for conduit, wire and cable, fans and blowers, and industrial fixtures; compiled by *Electrical Marketing* magazine).

Many varied industries feature price indexes that reflect the average or median price of goods, commodities, and services and are a factor in individual price negotiations between buyers and sellers, but this does not mean that every price index has a direct, predictable, and uniform impact on the prices each individual buyer actually paid. Whether that is true depends on industry practice and the nitty-gritty of individual negotiations between industry players—*i.e.*, precisely the evidence that the courts in this case ignored. Under the Seventh Circuit's reasoning, movements in an index price will become evidence from which it will be "reasonabl[e]" to presume classwide antitrust impact, "[e]ven for transactions where prices were negotiated individually or a longer term contract existed," if it can be shown that the index price somehow "factored into" actual prices. Pet. App. 17a. Given the large number of industries that feature price indexing, this decision, if upheld, has the potential to subject broad new swathes of businesses to potential class action

liability, far beyond the scope of what Congress intended.

The Seventh Circuit's answer to these concerns is simple: defendants can take their chances on the merits and, if the case does not settle, the intractable problems of determining individual damages can surely be worked out at some point, somehow, some way. *See* Pet. App. 19a ("If in the end the Defendants win on the merits, this entire matter will be over in 'one fell swoop.'"). But that answer is entirely unsatisfactory. Because the potential liability is so enormous, the practical effect of the lower courts' novel presumption will be to create even greater pressures for companies to give up their right to press their own interests and assert all their available defenses.

As this Court has often recognized, class certification "may so increase the defendant's potential damages liability and litigation costs" to the point "that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting "the risk of 'in terrorem' settlements that class actions entail"); Fed. R. Civ. P. 23(f) advisory committee notes, 1998 Amendments (defendants may "settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"). Although nominally a threshold question, "[w]ith vanishingly rare exception[s], class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial."

Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009); *see also* Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 9 (Fed. Judicial Ctr. 2010). In fact, a "study of certified class actions in federal court in a two-year period (2005 to 2007) found that all 30 such actions had been settled." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2010) (citing Emery G. Lee III, et al., *Impact of the Class Action Fairness Act on Federal Courts* 2, 11 (Fed. Judicial Ctr. 2008)).

While this pressure to settle exists in every class action case, it is especially intense in antitrust conspiracy class actions, because of treble-damage provisions and joint-and-several liability rules that combine to saddle the last settling defendant with potentially company-breaking liability. In a private antitrust suit, the plaintiff may recover "threefold the damages by him sustained." 15 U.S.C. § 15(a). As antitrust conspiracies sound in tort, liability is joint and several, meaning that every defendant is fully liable for the entire amount of damages caused by the alleged conspiracy. *See, e.g.*, *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 635 (1981). There is no right to contribution among the joint tortfeasors, *see id.*, and the practice in regards to class action settlements is to deduct settlement amounts dollar-for-dollar from the amount of single damages proven, and then assess the last remaining defendant with whatever remains of the total single damages, *which are then trebled*—without regard to the amount of damages its conduct allegedly caused. This creates an unseemly scramble to settle among antitrust class action defendants in order to avoid

potentially being left holding the bag for enormous trebled damages. *See* Antitrust Modernization Commission: Report and Recommendations 243–44 (April 2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/chapter3.pdf.

The drafters of Rule 23 well understood the potential for class action abuse, with the class action device wielded as a weapon to diminish the due process rights of defendants. Mindful of this dynamic, this Court has called for "undiluted" application of Rule 23(b)(3)'s requirements in every case. *Amchem*, 521 U.S. at 620; *see also id.* (noting that the Rule, as written, "sets the requirements [courts] are bound to enforce" and counseling against "judicial inventiveness" in application of the Rule). The presumption applied by the district court and approved by the Seventh Circuit guarantees precisely the result that this Court and Rule 23's drafters sought to avoid: that defendants will be deprived of the right to press their individual defenses.

Finally, while this Court has been assiduous in safeguarding Rule 23's requirements against erosion, lower courts are increasingly failing to faithfully apply this Court's precedents. The perennial temptation to depart from Rule 23's strict requirements is particularly strong where, as here, there is an impression that aggregated litigation would be more efficient than individual litigation and where plaintiffs lawyers are able to take unproven allegations and, ignoring the nuances of market realities, spin a tale of purported wrongdoing. But none of these considerations should permit the evasion of Rule 23's unmistakable commands. There

are many ways in which companies are regulated to prevent antitrust violations, and when individual customers are injured, they are entitled to seek individual (treble-damages) recoveries in individual litigation (as well as recover their costs and attorney fees, *see* 15 U.S.C. § 15(a)). There is no need to turn the class-action device into a blunt instrument for industry-wide regulation that strips defendants of available defenses and forces settlements. The Court should grant certiorari to ensure that the essential requirements of Rule 23 are respected.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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