No. 14-1091

In the Supreme Court of the United States

THE DOW CHEMICAL COMPANY, PETITIONER

v.

INDUSTRIAL POLYMERS, INC., QUABAUG CORP., AND SEEGOTT HOLDINGS, INC., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE AMERICAN TORT REFORM ASSOCIATION, THE NATIONAL COUNCIL OF FARMER COOPERATIVES, AND THE BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF CERTIORARI

KATE COMERFORD TODD
TYLER R. GREEN
U.S. Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

STEFFEN N. JOHNSON
Counsel of Record
ROBERT F. RUYAK
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000
sjohnson@winston.com

TYLER G. JOHANNES
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601

Additional Counsel for *Amici Curiae* Listed on Inside Cover

LINDA KELLY
National Association
of Manufacturers
733 10th Street, N.W.
Suite 700
Washington, DC 20001
(202) 637-3060

MARLIS CARSON
National Council of
Farmer Cooperatives
50 F Street, N.W.
Suite 900
Washington, DC 20001
(202) 879-0825

SHERMAN JOYCE
LAUREN SHEETS JARRELL
American Tort
Reform Association
1101 Connecticut Ave., N.W.
Suite 400
Washington, DC 20036
(202) 682-1168

MARIA GHAZAL
Business Roundtable
300 New Jersey Ave., N.W.
Suite 800
Washington, DC 20001
(202) 496-3268

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INTRODUCTION*

The Tenth Circuit's decision in this case raises recurring issues of vital importance to the law governing class actions, warranting this Court's review. Respondents' price-fixing claims were certified for class treatment and tried on that basis, producing a $1 billion judgment. Under the decision below, any plaintiff alleging an antitrust conspiracy can now invoke Rule 23 and put the defendants at risk of potentially ruinous liability—even if buyers in the relevant market negotiate prices individually and in practice often avoid price hikes. How? Based on an "inference" that a conspiracy to raise the products' "starting" prices injures *all* class members, regardless of whether, during actual negotiations, those price increases "stick." App. 13a. The plaintiff may then show class-wide damages by "extrapolation."

That decision calls out for this Court's review. As petitioner Dow has shown (at 15-18, 26-32), the decision breaks from the decisions of several other circuits. Even more fundamentally, however, the decision conflicts with this Court's precedents and historical and contemporary notions of due process. From the earliest days of the Republic, American courts have permitted representative litigation only when the plaintiff's claims are genuinely representative of the claims of the non-parties (today, "absent class

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* Pursuant to Rule 37.2(a), *amici* provided timely notice of their intention to file this brief. All parties consented. In accordance with Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici,* their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

members"). In those circumstances, any defense good against a non-party is good against the representative, and vice versa. Limiting representative litigation in this manner safeguards not only defendants' "right to be heard" on every claim (*Ownbey* v. *Morgan*, 256 U.S. 94, 111 (1921)), but also the chance to "present every available defense" (*Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972))—fundamental mandates of due process.

These due process requirements still apply today, when class litigation is governed by the requirements of Rule 23 and the Rules Enabling Act. *E.g.*, *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011). Indeed, other circuits have enforced these long-standing due process requirements in both antitrust cases and other contexts. For instance, other circuits have not hesitated to reject class certification, or to limit certification to issues of the defendant's conduct, based on the "highly individualistic" nature of whether that conduct "cause[d] harm and to whom." *E.g.*, *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 150, 164-166 (2d Cir. 1987). Similarly, "each plaintiff must still prove that [an antitrust] conspiracy * * * did in fact cause him injury." *State of Alabama* v. *Blue Bird Body Co., Inc.*, 573 F.2d 309, 327 (5th Cir. 1978).

In approving class treatment for antitrust conspiracies—and in depriving defendants of the right to show that some consumers avoided any overcharges at all—the decision below breaks from both these decisions and this Court's precedents. As the Tenth Circuit acknowledged, buyers of polyurethane "negotiate individually with manufacturers regarding price," and "sometimes avoided price hikes by negotiating with the supplier." App. 4a. In other words,

even if some buyers were injured, others were not. The Tenth Circuit certified the class anyway, reasoning that, by definition, "price-fixing affects all market participants." App. 13a. But this Court has rejected that theory of antitrust injury. *Atl. Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 339 n.8 (1990).

If allowed to stand, the decision below threatens to expose businesses to the risk of staggering class judgments and, even for those who manage to defeat liability, substantially higher litigation costs. Moreover, since the decision could be read to allow virtually any antitrust conspiracy to be prosecuted as a class action, the Tenth Circuit promises to become a hotbed for plaintiffs using the threat of nationwide class liability to pressure defendants into settling baseless claims—claims that defendants must defend without the ability to raise individualized defenses. Indeed, the antitrust laws' liberal venue provision states that "antitrust [suits] against a corporation may be brought * * * in any district wherein it may be found or transacts business." 15 U.S.C. § 22. Thus, the decision threatens to set a harmful nationwide rule.

Nor is the Tenth Circuit's reasoning necessarily limited to antitrust claims. It could potentially be applied to any conspiracy, including those under RICO. Plaintiffs asserting such claims may now advocate near-automatic class certification and an escape from individualized defenses.

The costs of this regime will ultimately be felt throughout the economy. Corporate defendants "may find it economically prudent to settle and to abandon a meritorious defense"—simply to avoid the "potential liability and litigation costs" (*Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978)), which may be

"ruinous" (Fed. R. Civ. P. 23(f) Advisory Comm.'s Notes to 1998 Amendments). Ultimately, it is ordinary citizens who will pay—in the form of fewer employment opportunities and higher prices.

INTEREST OF *AMICI CURIAE*

In light of the far-reaching consequences of the decision below, *amici* have a vital interest in its review.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and organizations of every size, in every industry sector, from every region of the country. One of the Chamber's important functions is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community.

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 over 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The National Council of Farmer Cooperatives (NCFC), founded in 1929, is a nationwide trade association representing America's farmer cooperatives. NCFC's membership includes roughly 55 regional marketing, supply, bargaining, and farm credit bank cooperatives, as well as state councils of cooperatives. NCFC members handle almost every type of agricultural commodity produced domestically, market those commodities both domestically and abroad, and furnish production supplies and credit to their individual and farmer cooperative members. NCFC's constituent members represent nearly 3,000 farmer cooperatives nationwide, whose own members include most of the Nation's more than two million farmers, ranchers, and growers. Those cooperatives also provide jobs for roughly 180,000 Americans, many in rural areas. NCFC is the primary voice of the American agricultural cooperative industry.

The American Tort Reform Association (ATRA), founded in 1986, 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 over two decades, ATRA has filed *amicus* briefs in federal and state cases involving important liability issues.

The Business Roundtable is an association of chief executive officers who collectively manage more than 14 million employees and $6 trillion in annual revenues. The association was founded on the belief that businesses should play an active and effective role in the formation of public policy. It participates in litigation as *amicus curiae* in numerous contexts where important business interests are at stake.

Given *amici*'s vested interest in the standards for class certification and the troubling implications of the decision below for the economy, *amici* urge this Court to grant certiorari.

STATEMENT

Respondents sued Dow and four other manufacturers of polyurethane products, alleging that they "coordinated 'lockstep' price-increase announcements and agreed to try to make the price increases stick in individual contract negotiations." App. 8a. But the polyurethane market is characterized by "myriad * * * products, pricing structure[s], individualized negotiations, and contracts." *Ibid*. Buyers in this market "negotiate individually with manufacturers regarding price and other terms," and "sometimes avoided price hikes by negotiating with the supplier." App. 3a, 4a. In other words, it is undisputed that some buyers were not injured. See also App. 58a.

The Tenth Circuit nevertheless held that the case was appropriate for class treatment, citing two bases for its decision. First, it held that a price-fixing conspiracy "creat[es] an inference of class-wide impact [*i.e.*, injury] even when prices are individually negotiated." App. 13a. Second, it held that "the existence of a [price-fixing] conspiracy [is] the overriding issue" and predominates over any "individualized damages issues." App. 15a. Both holdings establish the same precedent: Any alleged price-fixing conspiracy is now appropriate for class treatment.

At trial, respondents' expert, Dr. McClave, used "Extrapolation" to show classwide damages. App. 18a. Respondents won a $400 million verdict—which, after trebling and offsets, became a $1.06 billion judgment against Dow.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's decision conflicts with both historical and contemporary understandings of due process, as set forth in this Court's decisions, as well as Rule 23 and the Rules Enabling Act.

A litigant's right to raise any and all claims or defenses is a deeply rooted principle of American constitutional law. In class actions, this has meant that parties have the right to raise any claim or defense specific to the individual class members. The "inference of class-wide impact" adopted by the Tenth Circuit, however, deprives class action defendants of the right to prove that individual plaintiffs were not harmed. Applying this "inference," or using "extrapolation" to calculate classwide damages, does violence to the principles that have undergirded the class suit for generations, warranting this Court's review.

A. The decision below deprives class action defendants of the right, rooted in due process, to present every available defense.

It has long been settled that due process guarantees civil defendants an "opportunity to answer" (*Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 280 (1855)); a "right to be heard" on the asserted claims (*Ownbey*, 256 U.S. at 111); and a chance to "present every available defense" (*Lindsey*, 405 U.S. at 66). The means by which these rights are protected can vary with "the nature of the proceeding and the character of the rights which may be affected." *Dohany* v. *Rogers*, 281 U.S. 362, 369 (1930). But in all cases, "[t]he fundamental requisite of due process of law is the opportunity to be

heard." *Goldberg* v. *Kelly*, 397 U.S. 254, 267 (1970) (quotations omitted).

Here, however, Dow was denied any reasonable "opportunity to be heard" on the question of whether, and to what extent, the absent class members were able to negotiate away any price increase. As the Tenth Circuit recognized, buyers of industrial polyurethane "negotiate individually with manufacturers regarding price and other terms." App. 3a. These "buyers sometimes avoided price hikes by negotiating with the supplier," and thus "avoided damages." App. 4a.

Faced with these facts, the Tenth Circuit justified class certification by criticizing Dow for not "request[ing] individualized determinations on damages." App. 23a. But a court may not certify a class on the expectation that defendants will raise individual defenses later. Indeed, the very nature of the class suit precluded Dow from raising such issues. Defendants in a class action may not "propound discovery on each class member's individualized issues, [as] such discovery would frustrate the rationale behind Rule 23's representative approach to litigation." 3 W.B. Rubenstein, *Newberg on Class Actions*, § 9:16 (5th ed. 2013). And introducing such individual issues into the trial would be contrary to the very purpose of class certification. Where, as here, the action is adjudicated in a single aggregate trial, the premise is that "all of the issues in the case [including defenses] are common to all of the members of the class, and hence one unitary trial suffices." *Newberg*, § 11.2.

Certifying a class such as the one here, and consequently allowing a jury to award damages for these absent plaintiffs' alleged harm without giving Dow an

adequate opportunity to be heard, flagrantly violates due process. Dow had no opportunity to test the claims of its alleged victims, and thus no "reasonable opportunity to be heard and to present [its defense]" as to those claims. *Dohany*, 281 U.S. at 362. Accordingly, Dow was deprived of rights deeply rooted in American jurisprudence.

B. The decision below cannot be reconciled with historical notions of due process.

Federal courts heard representative litigation long before the enactment of the Rules of Civil Procedure. But even then, such litigation was a scalpel, not a club. It was appropriately used only when it did not deprive defendants of their opportunity to be heard—and especially to raise individualized defenses. Such limits remain vital to the due process implications of today's rules-based regime because, "from its first due process cases," this Court has emphasized that "traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994).

Since the nineteenth century, the courts have limited representative litigation to those instances where all legal and factual issues in the case could be fully and adequately litigated by a genuinely representative plaintiff.[1] The leading case is *Smith* v. *Sworm-*

[1] This due process requirement has roots in equity, where it was the general rule that "all persons materially interested" in a case "ought to be made parties to the suit, however numerous they may be." *West* v. *Randall*, 29 F. Cas. 718, 721 (C.C.D. R.I. 1820) (Story, Circuit J.). Equity made an exception, however, where "the parties are very numerous," making it "almost impossible to bring them all before the court." *Ibid.*

stedt, 57 U.S. (16 How.) 288 (1853), which involved a dispute between the northern and southern branches of a religious denomination over its publishing business (the "Book Concern"). The complainants sued on behalf of themselves, the constituent conferences of the southern branch, and all 1,500 ministers associated with the southern branch, against agents of the Book Concern and the 3,800 ministers associated with the northern branch. See *id.* at 300.

The defendants asserted that a representative suit was inappropriate, but the Court disagreed. "The rule is well established," the Court observed, "that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest." *Id.* at 302. In so holding, however, the Court emphasized the need for strict adherence to the traditional requirements for representative suits. Where "a few are permitted to sue and defend on behalf of the many," the Court cautioned, "care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried." *Id.* at 303. In short, the suit could proceed *only* because "there [was] very little danger but that the interest of all will be properly protected." *Ibid.*

The early American practice mirrored the practice in English courts. See *Discart* v. *Otes*, 30 Seld. Society 137, at xxxvii (No. 158, P.C. 1309) (1914) (holding that "a single complainant should argue the case" for "all similar complaints").

Swormstedt confirms that the procedural mechanism of representative litigation was never intended to deprive any litigant of her substantive right to try any issue in the case. Rather, by ensuring that the named representative adequately represented the absent non-parties, courts protected plaintiffs and defendants alike. See also *Wood* v. *Dummer*, 30 F. Cas. 435, 439 (C.C.D. Me. 1824) (Story, Circuit J.) (approving a defendant "class" absent any "complaint * * * that the defendants now before the court do not represent effectually the interests adverse to the plaintiffs"); *McArthur* v. *Scott*, 113 U.S. 340, 395 (1885) ("where a suit is brought by or against a few individuals as representing a numerous class," courts must ensure that "sufficient parties are before it to properly represent the rights of all"); *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356, 367 (1921) (to avoid "conflicting judgments," "the decree [in class suits] when rendered must bind all of the class properly represented").

These longstanding due process norms establish the minimum baseline of fairness essential to representative litigation. Yet the Tenth Circuit's decision here deviates from that baseline by authorizing a representative suit even when the defendant is precluded from raising individual defenses. Such a pronounced break from well-established due process principles warrants this Court's plenary review.

C. The decision below conflicts with contemporary notions of due process, the Rules Enabling Act, and Rule 23.

The decision below conflicts just as sharply with this Court's contemporary due process precedents. From the enactment of the Federal Rules of Civil

Procedure to the present day, due process has continued to protect the right to be heard on *each* element of *each* claim that a defendant faces. "The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart,* 131 S. Ct. at 2550 (quotations, citation omitted). Class treatment is appropriate only if it protects the defendant's right to "individualized proceedings"—*i.e.*, the right "to litigate [the] statutory defenses to individual claims." *Id.* at 2561. The Tenth Circuit's decision reflects a disturbing trend of lower-court decisions that have used the class action mechanism to circumvent these due process requirements.

1. The decision below conflicts with the Rules Enabling Act and Rule 23, which incorporate the mandates of due process.

a. The Rules Enabling Act, enacted in 1934, embodies the requirements of due process by providing that federal procedural rules "shall not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072. In class actions, this means that Rule 23 provides no shortcut to recovery for absent class members or the named representatives: Each plaintiff remains obligated to provide "the requisite proof," and Rule 23 gives the court "no power to define differently the substantive right of individual plaintiffs as compared to class plaintiffs." *Blue Bird Body*, 573 F.2d at 318. Similarly, "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *Wal-Mart*, 131 S. Ct. at 2561. Whether the action is litigated traditionally or on a class basis, a defendant

must have the right to challenge *every* element of *every* plaintiff's claim.

b. Rule 23, which was revised in 1966 into something like its current form, likewise embodies these due process requirements. Rule 23(a) provides that a class action may not be prosecuted absent typicality, reflecting this Court's insistence (rooted in due process, see *Swormstedt*, 57 U.S. at 303) that any defense to a class member's claim must be good against the class representative. To that end, this Court has held that "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members," and that the requirements of Rule 23(a) "effectively limit the class claims to those fairly encompassed by the named plaintiff's claims." *Gen. Tel. Co.* v. *Falcon*, 457 U.S. 147, 156 (1982) (quotations omitted).

Rule 23(b)(3), which was applied below and is discussed extensively in the 1966 Notes of the Advisory Committee, also embodies the dictates of due process. As the Committee stated, Rule 23(b)(3) "encompasses those 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*." Advisory Committee's 1966 Note on subd. (b)(3) of Fed. R. Civ. P. 23 (emphasis added). The Committee went on to highlight how the presence of individualized defenses on causation and damages could render class treatment inappropriate. For instance:

- A fraud case in which similar representations are made to each plaintiff may still require "separate determination of the damages suffered by individuals within the class." *Ibid.*

- The case "may be unsuited for treatment as a class action if there was material variation in * * * the kinds or degrees of reliance by the" plaintiffs. *Ibid.*
- Mass tort cases are "ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different way." *Ibid.*
- And finally, the Committee addressed antitrust actions specifically: putative class actions "arising out of concerted antitrust violations may *or may not* involve predominating common questions." *Ibid.* (emphasis added).

These comments reflect the very due process notions rejected by the court below.

2. The decision below conflicts with the decisions of other courts of appeals that have enforced the requirements of due process.

a. Unlike the Tenth Circuit, other courts of appeals have enforced the dictates of due process by safeguarding the rights of class action defendants to raise their defenses to each class member's claim. In *In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990), for example, the court invoked "defendants' right to due process" in reversing a district court's procedure that effectively stripped the defendants of their ability to present individual defenses. That procedure called for the parties to litigate the claims of just 41 plaintiffs: 11 class representatives, 15 plaintiffs chosen by plaintiffs, and 15 chosen by de-

fendants. *Id.* at 709. With the aid of "expert testimony," the jury was to render a lump-sum damage award to the entire 3,000-member class. *Ibid.*

As the Fifth Circuit recognized, however, this procedure violated due process. There were "too many disparities among the various plaintiffs or their common concerns to predominate." *Id.* at 712. For instance, the plaintiffs suffered from varying diseases, had been exposed to asbestos in varying ways and degrees, and had varying lifestyles. *Ibid.* Any of these facts could have formed the basis for a causation- or damages-related defense as to an individual plaintiff. Thus, "[c]ommonality among class members on issues of causation and damages can be achieved only by lifting the description of the claims to a level of generality that tears them from their substantively required moorings to actual causation and discrete injury." *Ibid.* The same is true here, but the Tenth Circuit reached a contrary result.

Other circuits have certified classes only while requiring individual trials on causation and damages. In *Agent Orange*, for example, the Second Circuit stressed the "highly individualistic" nature of determining whether a dangerous chemical "cause[d] harm and to whom." 818 F.2d at 150, 164-166. And the Fifth Circuit, in reversing a judgment after a class-wide trial, has emphasized that the trial "was not designed or intended to, and did not, provide any trial or any determination of whether" the defendant had caused any individual plaintiff's damage. *Cimino* v. *Raymark Indus., Inc.*, 151 F.3d 297, 311-319 (5th Cir. 1998).

b. Antitrust cases such as this one are ill-suited for class treatment for the same reasons as the cases

discussed above. For example, *Fibreboard* and *Cimino* stressed that the plaintiffs there "must prove causation and damage"—"elements [that] focus upon individuals, not groups." *Fibreboard*, 893 F.2d at 711; accord *Cimino*, 151 F.3d at 319. Antitrust plaintiffs must prove the same elements under the Clayton Act, which permits "any person who shall be injured in *his* business or property" to "recover threefold damages [for antitrust violations] *by him* sustained." 15 U.S.C. § 15(a) (emphasis added). As Professor Milton Handler observed, this language "could not be plainer" and "does not permit any person to recover damages sustained not by him, but by someone else who happens to be a member of * * * a class." *Twenty-Fourth Annual Antitrust Review*, 72 Colum. L. Rev. 1, 37 (1972).

Until the decision below, the courts of appeals adhered to these principles in antitrust cases. The Fifth Circuit, for instance, has explained that "the fact that a case is proceeding as a class action does not in any way alter the substantive proof required to prove up a claim for relief." *Blue Bird Body*, 573 F.2d at 327. "[E]ach plaintiff must still prove that this conspiracy was actually implemented in his state and that it did in fact cause him injury." *Ibid.* The plaintiff might do so by showing that "as a result of this conspiracy, he had to pay supracompetitive prices for school buses." *Ibid.*

Likewise, the Ninth Circuit has explained that, to bring a private antitrust class action, "each member of the class seeking recovery" is "required to prove that he patronized the hotel while the surcharge was in effect and that he absorbed the cost of the surcharge." *In re Hotel Telephone Charges*, 500 F.2d 86, 89 (9th Cir. 1974). Courts may not "allow the proce-

dural device of the class action to wear away the substantive requirements to maintain a private antitrust cause of action." *Ibid.*

Similarly, the Second Circuit has refused to substitute "the 'class as a whole'" "for the individual members of the class as claimants," holding that this would be "an unconstitutional violation of the requirement of due process." *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1019 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156 (1974). And finally, the Fourth Circuit has noted that "[w]hile [an antitrust] case may present a common question of violation, the issues of injury and damage remain the critical issues in such a case and are always strictly individualized." *Windham* v. *Am. Brands, Inc.*, 565 F.2d 59, 66 (4th Cir. 1977). The decision below splits from these decisions.

3. The decision below conflicts with this Court's decision in *Atlantic Richfield.*

The decision below breaks not only from the decisions of other circuits, but from this Court's antitrust precedent. In justifying its adoption of an "inference of class-wide impact," the Tenth Circuit held that, by definition, "price-fixing affects all market participants," especially where there is "evidence that the conspiracy artificially inflated the baseline for price negotiations." App. 13a. In *Atlantic Richfield*, however, this Court rejected that theory, holding that the antitrust injury requirement could *not* be satisfied merely "by alleging that the removal of some elements of price competition distorts the markets, and harms all the participants." 495 U.S. at 339 n.8 (internal quotations and brackets omitted). If it could, the requirement would become meaningless, because

"[e]very antitrust violation can be assumed to 'disrupt' or 'distort' competition." *Ibid*.

Although the Court's decision in *Atlantic Richfield* did not sound in constitutional law, due process likewise requires that defendants be given the opportunity to challenge the antitrust injury of individual class members where, as here, prices are "negotiate[d] individually" and some plaintiffs "avoided price hikes." App. 3a, 4a. As leading antitrust commentators have explained, whenever transactions are individually negotiated, "the actual price paid will be determined at least in part by the negotiating styles of the customers" and "proof of antitrust injury is bound to be individualized." 2A Areeda & Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* § 398(c), at 423 n.14 (2013). This Court's review is needed to restore uniformity to the law.

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"[N]o rule of procedure or judge-made innovation can deprive a defendant of his basic constitutional right to a judicial proceeding, at least to resist sham or exaggerated claims." Handler, *supra*, at 40-41. If a class can be certified under the "inference" employed below, resulting in award of damages "to all those who say (but do not prove) that they have been injured," then the proceeding is reduced to "a penal redistribution of wealth from the alleged wrong-doers to whomever the court deems worthy of its largess." *Ibid*. Certiorari should be granted to clarify that, consistent with historical and contemporary due process norms, the class suit is a limited tool reserved for cases where the members of the class are genuinely similarly situated, and injury and causation are susceptible to uniform classwide proof.

II. The decision below threatens to permit any conspiracy to be certified as a class action, thus potentially expanding the scope of class liability.

This Court's review is also warranted because the effects of the decision below—which made antitrust conspiracies far easier to certify as class actions—threaten to reach beyond the antitrust arena, to other conspiracies. For that reason too, the decision could expose companies to potentially crippling liability.

A. For instance, a RICO conspiracy may be predicated on an agreement to conduct a pattern of racketeering activity (18 U.S.C. § 1962(d)), and one of the most common racketeering acts is fraud (*id.* § 1961(1) (defining "racketeering activity" to include several fraud offenses, including mail and wire fraud)). As this Court has held, moreover, to show injury 'by reason of' a RICO violation," a RICO plaintiff must establish both but-for *and* "proximate caus[ation]." *Bridge* v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008); accord 18 U.S.C. § 1964(c) ("[a]ny person injured in his business or property by reason of a violation * * * may sue therefor").

These causation elements introduce myriad individualized issues into RICO conspiracy suits, especially ones alleging a fraud scheme. That is because the plaintiff typically "will not be able to establish even but-for causation if no one relied on the misrepresentation." *Bridge*, 555 U.S. at 658. And "the complete absence of reliance may prevent the plaintiff from establishing proximate cause." *Ibid.* RICO conspiracy cases—which likewise pose the risk of crippling "threefold" damages (18 U.S.C. § 1964(c))—are thus unsuitable for class treatment.

Left undisturbed, the decision below threatens to change this. If the lone common issue of a conspiracy predominates over individualized issues of injury and causation in antitrust cases alleging price-fixing conspiracies—where prices are individually negotiated by hundreds or thousands of plaintiffs—courts may erroneously read the decision below to suggest that the issue of a conspiracy likewise predominates over individualized issues of injury and causation in civil RICO cases. And if a class may be certified based on "an inference of class-wide impact even when prices are individually negotiated"—because "price-fixing affects all market participants" (App. 13a)—future Tenth Circuit panels may certify classes alleging a conspiracy to defraud, even where the misrepresentations are individually delivered, creating individualized questions of injury and causation.[2]

B. Further, the liberal venue provisions of the antitrust and RICO laws create the risk that the effects of the decision below will be felt throughout the Nation. "Any suit * * * under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or *transacts business*." 15 U.S.C. § 22 (emphasis added). Similarly,

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[2] Similarly, many States impose liability for civil conspiracy. *E.g.*, *Applied Equip. Corp.* v. *Litton Saudi Arabia Ltd.*, 869 P.2d 454, 478 (Cal. 1994); *Carroll* v. *Timmers Chevrolet, Inc.*, 592 S.W.2d 922, 925-926 (Tex. 1979). These actions, too, can lead to crippling liability. *E.g.*, *Applied Equipment*, 869 P.2d at 478 (each conspirator is "a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity").

RICO actions may be instituted in "any district in which [the defendant] resides, is found, has an agent, or *transacts his affairs*." 18 U.S.C. § 1965 (emphasis added). Thus, any national corporation could now potentially become a defendant in "bet the company" price-fixing or RICO class actions based only on plaintiff's allegations of a conspiracy. Antitrust and RICO plaintiffs can be expected to flock to the Tenth Circuit, with the hope of obtaining virtually automatic class certification in all conspiracy cases. Certiorari should be granted.

III. The decision below threatens to dramatically increase the costs of class actions, to the ultimate detriment of consumers and businesses alike.

The practical and economic effects of the decision below further underscore the need for review. By permitting any plaintiff who can allege an antitrust conspiracy to wield the threat of class certification, the decision expands both the reach of Rule 23 and the risk of bet-the-company liability. These changes concern not just class-action defendants, but also businesses that face merely the threat of a lawsuit. And as businesses adjust to this new landscape, the effects of the decision below will be felt throughout the economy.

A. The decision below will greatly increase the risk to business of massive liability, forcing them to settle meritless claims more frequently.

It is well known that class-action defendants face pressure to settle—and even to "abandon a meritorious defense" (*Coopers & Lybrand*, 437 U.S. at 476)—to avoid the "risk of potentially ruinous liability."

Fed. R. Civ. P. 23(f) Advisory Comm.'s Notes to 1998 Amendments. See Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1291-92 (2002) (referencing studies of settlement). These risks promise to skyrocket if classwide injury can be established by an "inference" that defendants undertook illegal conduct.

Certification of a class dramatically changes the parties' bargaining positions, and settlement pressure typically becomes immense. *E.g.*, *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (the rate of "blackmail settlements" likely will increase exponentially after certification). "If a cohesive class can be created through * * * savvy crafting of the evidence," then "[t]he law [will] run a considerable risk of unleashing the settlement-inducing capacity of class certification based simply on the say-so of one side." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 103 (2009).

These concerns are particularly acute in antitrust cases. Antitrust defendants risk not only damages arising from their own conduct, but both joint-and-several liability and treble damages. And because antitrust cases are among "the most complex action[s]" to litigate, litigation costs are especially large. *In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003). Given that defendants may incur many of these costs *after* a certification decision, the pressure to settle becomes even more acute at that point. See, *e.g.*, *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 559 (2007) (recognizing the "potentially enormous expense of discovery").

All told, even meritless class actions impose tremendous costs on defendants. And because the decision below makes class certification virtually automatic in antitrust conspiracies, these costs are certain to increase dramatically—and with it the pressure to settle regardless of the merits.

B. The costs of improper class actions impose a substantial burden on the public and the economy.

The effects of the Tenth Circuit's decision will be felt far beyond the businesses that must defend class actions. The high costs of class litigation are "passed along to the public" (*SEC* v. *Tambone*, 597 F.3d 436, 453 (1st Cir. 2010)), most recognizably in the form of higher prices. Further, defendants faced with burdensome class action litigation costs may be forced to reduce operations, curtail capital investment, and in extreme cases forgo entering new markets and developing new products—all of which curtail employment. And when courts unduly lower the standards for obtaining class certification, they encourage unwarranted class-action suits—which ultimately harm the taxpayer.

In other words, consumers and ordinary citizens may end up footing the bill for the economic toll of class actions. Both consumers and "innocent investors" suffer "for the benefit of speculators and their lawyers." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975). It is thus essential to the strength of our economy—and to all who invest or are employed in it—that the class-action device not be used to deprive defendants of their ability to litigate their "statutory defenses to individual claims." *Wal-Mart*, 131 S. Ct. at 2561.

CONCLUSION

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

Respectfully submitted.

STEFFEN N. JOHNSON
Counsel of Record
ROBERT F. RUYAK
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000
sjohnson@winston.com

TYLER G. JOHANNES
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600

KATE COMERFORD TODD
TYLER R. GREEN
U.S. Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

LINDA KELLY
National Association of Manufacturers
733 10th Street, N.W.
Suite 700
Washington, DC 20001
(202) 637-3060

MARLIS CARSON
National Council of Farmer Cooperatives
50 F Street, N.W.
Suite 900
Washington, DC 20001
(202) 879-0825

SHERMAN JOYCE
LAUREN SHEETS JARRELL
American Tort Reform Association
1101 Connecticut Ave., N.W.
Suite 400
Washington, DC 20036
(202) 682-1168

MARIA GHAZAL
Business Roundtable
300 New Jersey Ave., N.W.
Suite 800
Washington, DC 20001
(202) 496-3268

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