No. 11-864

In The
Supreme Court of the United States

COMCAST CORPORATION, ET AL.,

Petitioners,

v.

CAROLINE BEHREND, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF THE AMERICAN ANTITRUST INSTITUTE AND THE AMERICAN INDEPENDENT BUSINESS ALLIANCE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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October 2, 2012

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INTEREST OF *AMICI CURIAE*

The American Antitrust Institute (AAI) is an independent and nonprofit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. *See* http://www.antitrustinstitute.org. The goals of U.S. competition policy could be seriously undermined if the Court were to break with settled doctrine and demand that antitrust plaintiffs must prove the amount of damages to which class members are entitled as part of the predominance requirement of Federal Rule of Civil Procedure 23(b)(3). The AAI respectfully submits this *amicus* brief for two reasons: (1) the issues pertaining to the predominance requirement in antitrust cases are not obvious – they can be highly nuanced – and may have potential implications that are difficult to identify for anyone not intimately familiar with doctrine and practice in the area; and (2) the parties may not address all of the policy issues of concern to antitrust litigants generally.[1]

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[1] The parties have lodged blanket consents to the filing of *amicus* briefs with the Clerk. No counsel for a party has authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae* has made a monetary contribution to its preparation or submission.

The AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 130 prominent

(Continued on following page)

The American Independent Business Alliance (AMIBA) joins this brief as *amicus curiae*. AMIBA is a national nonprofit organization helping communities implement programs to support independent locally-owned businesses and maintain ongoing opportunities for entrepreneurs. AMIBA supports more than 80 affiliated community organizations across 38 states. AMIBA's affiliated organizations represent approximately 25,000 independent businesses covering virtually every sector of business, many of which face direct competition from multinational and other large corporations.

AMIBA seeks to strengthen and enforce federal laws that prohibit predatory pricing, price discrimination, and unfair practices disadvantaging independent businesses. AMIBA maintains that preventing the largest businesses from misusing their size, market and political power to gain an unfair advantage over or to place an undue burden upon smaller competitors is essential to protecting consumers and ensuring independent businesses have an opportunity to compete and receive fair and reasonable treatment under the law.

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antitrust lawyers, law professors, economists, and business leaders. The AAI's Board of Directors alone has approved this filing for the AAI. The individual views of members of the Advisory Board may differ from the AAI's positions.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici understand this Court to have narrowed the issue before it on *certiorari* to focus on the kinds of evidence a plaintiff must submit in support of class certification. To be more precise, we understand the Court to have focused its inquiry on whether plaintiffs moving for class certification must submit "admissible evidence, including expert testimony." *Comcast Corp. v. Behrend*, 655 F.3d 182 (3d Cir. 2011), *cert. granted*, 80 U.S.L.W. 3707 (U.S. Jun. 25, 2012). This issue seems to follow naturally from one that remained open after this Court's opinion in *Dukes* about the scope of *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554 (2011) (raising but not resolving whether a *Daubert* analysis is appropriate at class certification). In other words, the issue appears to be about *how* plaintiffs may make an appropriate showing to certify a class. There is, however, at least the potential that the Court could address a different issue, even if only incidentally.

The second issue is about *what* it is that plaintiffs must show for a court to certify a class. Admittedly, this Court may choose not to address that second issue at all. But it is implicated by this Court's framing of the showing plaintiffs must make to certify a class: "that the case is susceptible to awarding damages on a class-wide basis." *Comcast Corp. v. Behrend*, 655 F.3d 182 (3d Cir. 2011), *cert. granted*, 80 U.S.L.W. 3707 (U.S. Jun. 25, 2012). In other words, a

secondary issue could potentially be *what* plaintiffs must show for a court to certify a class.

This brief will not address the former issue – the *how* – in any great depth. The parties have done so. Instead, this brief focuses on the latter issue, the *what*. *Amici* respectfully suggest both that it is unclear what it means to require plaintiffs to show a case is "susceptible to awarding damages on a class-wide basis" and that any such requirement, however framed, could have significant unintended ramifications and, potentially, could conflict with well-settled doctrine.

ARGUMENT

I. PLAINTIFFS' BURDEN REGARDING DAMAGES AT CLASS CERTIFICATION REQUIRES CAREFUL CONSIDERATION

Reading Petitioners' brief, it would be possible to infer that plaintiffs seeking to satisfy Rule 23(b)(3)'s predominance requirement must use common evidence to persuade a court that each absent class member is entitled to damages and must demonstrate the amount of the damages each class member should receive. Such a legal standard would upset decades of settled doctrine in ways both obvious and subtle. For example, courts have long held that plaintiffs need not show for purposes of class certification that they will *prevail* at trial, but only that common issues will predominate as they endeavor to do so. Similarly,

courts have held that it is generally sufficient – but not always necessary – for plaintiffs to offer common proof capable of showing that a defendant's conduct caused *some* harm to a significant proportion of the class, but not necessarily to all class members and not necessarily in an amount for each class member that can be calculated using common evidence.

As the phrasing of these points suggests, these are refined and technical matters. The differences in legal standards can seem quite small, yet they can have sweeping consequences. It would be easy to place a burden on plaintiffs – even inadvertently – that makes certification of an antitrust class impractical, and to do so in a way that is inconsistent with the requirements of Rule 23 and with sound policy. *See, e.g.*, *Kohen v. Pacific Inv. Mgmt. Co.,* 571 F.3d 672, 677 (7th Cir. 2009) (Posner, J.) (suggesting the existence of uninjured members in a class may be inevitable); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001) (Sotomayor, J.) (suggesting that there would be little room left for antitrust class actions if individualized issues regarding the amount of damages could defeat class certification).

The subtlety of the topic is apparent in the difficulty of giving precise content to the phrase "susceptible to awarding damages on a class-wide basis." The phrase can have various meanings. Does it signify that plaintiffs must persuade the judge by a

preponderance of the evidence that common evidence shows *all* class members suffered some harm?[2] That plaintiffs can use common evidence to *attempt* to show that *all* class members suffered *some* harm? That plaintiffs can use common evidence to *attempt* to show that *most* – or some supermajority – of the class suffered *some* harm? That plaintiffs can use common evidence to show the *amount* of the harm to *each* individual class member, perhaps through the use of some formula?

Amici respectfully submit that the answer to all of these questions should be negative, at least if they are posed categorically. A court should at times certify a class under Rule 23(b)(3) even if a judge concludes common evidence *does not* establish some harm to all class members, even if the judge believes common evidence *cannot* show the overall harm to the class as a whole, and even if the judge concludes common evidence *cannot* provide a formulaic approach for gauging the damages of each class member. This is in part because Rule 23(b)(3) requires only that common issues predominate, not that litigation involves only common issues. In some antitrust cases, the common predominant issue is whether a defendant violated

[2] *But see* Fed. R. Civ. P. 23(c)(1)(A) advisory committee notes to 2003 Amendment (noting "an evaluation of the probable outcome on the merits is not properly part of the certification decision" and suggesting an issue before a court at class certification is whether "the issues likely to be presented at trial" are "susceptible of class-wide proof").

the antitrust laws, not whether it caused harm to the class in general, much less whether every single class member suffered harm or the amount of damages to which each class member is entitled. *Amici* submit this brief in part to bring these distinctions to the attention of the Court.

A. Five Key Points About Antitrust Class Actions

Five points are paramount in understanding class certification doctrine as it has been applied in antitrust cases. The first is that plaintiffs need show that common issues will predominate in their *attempt* to prevail, not that they will ultimately succeed. *See, e.g., In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311-12 (3d Cir. 2008) (holding the plaintiffs' burden at class certification is not to prevail on the merits but to show issues are "capable of proof at trial through evidence that is common to the class"); *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 152 (3d Cir. 2002) (holding plaintiffs must propose a plausible or colorable method of proving their case using predominantly common evidence); *see generally* Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 Geo. Mason L. Rev. 969, 976-78 (2010) (hereinafter "Davis & Cramer, *Politics of Procedure*"). We do not understand this Court in *Dukes* or lower courts in other cases to have disturbed that time-honored rule. *See Dukes*, 131 S. Ct. at 2551 (noting standard at class certification is whether an issue is "*capable* of classwide resolution –

which means that determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke") (emphasis added).[3]

This principle has significant consequences for the showing plaintiffs must make to establish for purposes of Rule 23(b)(3) that a case is susceptible to awarding damages on a class-wide basis. In particular, class certification would be perfectly appropriate if the trial would resolve the claims of all class members, even if it appeared highly likely that the defendant would prevail. What matters, in other words, is whether evidence *capable* of persuading a court is predominantly common, *Dukes*, 131 S. Ct. at 2551, not that the factfinder will ultimately be persuaded.

A second point is that Rule 23(b)(3) requires merely that common issues predominate, not that all issues are common. Certification of a class may be warranted under Rule 23(b)(3) even if litigation will involve some – even significant – individual issues. *Cordes & Co. Financial Services, Inc. v. A.G. Edwards & Sons, Inc*., 502 F.3d 91, 108-09 (2d Cir. 2007). Rule 23(b)(3) requires only that common issues play a predominant role – a greater role in litigation than

[3] *Amici* recognize that *Dukes* addressed class certification only under Rule 23(b)(2) – not Rule 23(b)(3) – and as a result the case offers little or no guidance regarding the predominance standard under Rule 23(b)(3). *Dukes*, 131 S. Ct. 2541, 2554. *Amici* understand the Third Circuit to have distinguished *Dukes* in part for this reason. *Behrend v. Comcast Corp.*, 655 F.3d 182, 203 n.12 (3d Cir. 2011).

individual issues – not that individual issues play an insignificant role or no role at all. *Id*; *Visa Check*, 280 F.3d at 140 ("The predominance requirement calls only for predominance, not exclusivity, of common questions.") (quoting *In re Alcoholic Beverages Litig.*, 95 F.R.D. 321, 328 (E.D.N.Y. 1982)); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 340 (D.N.J. 1997) ("That common issues must be shown to 'predominate' does not mean that individual issues need be nonexistent.").[4] Thus common issues may predominate even if an inquiry into the harm caused by an antitrust violation requires individualized attention. For example, litigation and trial may focus on what legal standard applies to a defendant's conduct and whether the defendant engaged in behavior that violated that legal standard. In other words, the predominant issue in an antitrust case may be – and often is – whether the defendant violated the antitrust laws. And that issue may be – and often is – common to the class. If so, common issues may predominate, despite individualized issues regarding the harm done to particular class members. *Cordes*, 502 F.3d at 108 ("Even if the district court concludes that the issue of injury-in-fact presents individual questions, . . . it does not necessarily follow

[4] *See also Linerboard*, 305 F.3d at 162 ("[T]he mere fact that [individual statute of limitations] concerns may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones."); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000) (same).

that they predominate over common ones and that class action treatment is therefore unwarranted."); *Visa Check*, 280 F.3d at 140; *see also* Davis & Cramer, *Politics of Procedure*, 17 Geo. Mason L. Rev. at 1006-08.

A third point – related to the second – is that plaintiffs need not be able to offer common evidence that *all* members of a proposed class suffered some harm for common issues to predominate. If plaintiffs can rely on common evidence in attempting to establish that a defendant violated the antitrust laws and thereby caused harm to most – or some supermajority – of the class, common issues are likely to predominate. *Kohen,* 571 F.3d at 677 ("[A] class will often include persons who have not been injured by the defendant's conduct. . . . Such a possibility or indeed inevitability does not preclude class certification."); *see also Messner v. Northshore Univ. Healthsystem*, 669 F.3d 802, 825 (7th Cir. 2012) (suggesting presence of uninjured class members does not preclude certification unless there are "a great many" of them); *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010) (same); *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 321 (E.D. Mich. 2001) (existence of uninjured class members does not preclude class certification); *In re Urethane Antitrust Litig.*, 251 F.R.D. 629, 638 (D. Kan. 2008) (generalized injury establishes class-wide impact); *Meijer, Inc. v. Warner Chilcott Holdings Co. III*, 246 F.R.D. 293, 310 (D.D.C. 2007) (widespread injury is sufficient for class certification purposes); *In re Rubber Chemicals Antitrust*

Litigation, 232 F.R.D. 346, 352 (N.D. Cal. 2005) (same); *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc*., 225 F.R.D. 208, 219 (S.D. Ohio 2003) (same). As noted above, litigation may well focus on whether a defendant violated the antitrust laws. The further inquiry into whether that conduct harmed the class in general – although not necessarily each and every class member – could also be common, leaving only a small part to be played by individual issues. Accordingly, plaintiffs need not offer evidence showing harm to *every* class member to establish the predominance of common issues.

A fourth point is that under longstanding precedent courts in antitrust cases treat the burden of proof regarding the *fact of damage* very differently than they treat the issue of the *amount of damages*. *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555, 562 (1931) ("[T]here is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."). Plaintiffs have a much lighter burden in proving the amount of their damages than in proving they were harmed at all. *Bigelow v. RKO Radio*

Pictures, Inc., 327 U.S. 251, 265-66 (1946); *Story Parchment Co.,* 282 U.S. at 562-63.[5] The logic of this doctrine is, in part, that once a plaintiff has proven it has been wronged under the antitrust laws, any doubt caused by the complexities of economic analysis should be resolved in favor of the innocent plaintiff rather than the culpable defendant. *Bigelow*, 327 U.S. at 265-66; *Story Parchment Co.,* 282 U.S. at 562-66. After all, the defendant created the difficulties of determining damages by interfering illegally with the workings of the market. *Bigelow*, 327 U.S. at 265-66; *Story Parchment Co.,* 282 U.S. at 562-66.

A fifth point – closely related to the fourth – is that if plaintiffs can use common evidence to show an antitrust violation and fact of damage (or impact), common issues are very likely to predominate even if individual issues arise regarding the *amount of damages* to which each class member is entitled. *Visa Check*, 280 F.3d at 140 ("If defendants' argument (that the requirement of individualized proof on the question of damages is in itself sufficient to preclude class treatment) were uncritically accepted, there would be little if any place for the class action device in the adjudication of antitrust claims. Such a result should not be and has not been readily embraced by

[5] One way to interpret this case law is as drawing a distinction between injury or fact of damage as an element of a plaintiff's antitrust claim – something plaintiffs must prove to prevail – and amount of damages as relevant only to the relief a prevailing plaintiff may obtain.

the various courts confronted with the same argument.") (quoting *Alcoholic Beverages*, 95 F.R.D. at 327-28); *Seijas v. Republic of Arg.*, 606 F.3d 53, 58 (2d Cir. 2010) ("[I]t is well-established that the fact that damages may have to be ascertained on an individual basis is not sufficient to defeat class certification."); *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 306 (5th Cir. 2003) ("Even wide disparity among class members as to the amount of damages suffered does not necessarily mean that class certification is inappropriate . . . , and courts, therefore, have certified classes even in light of the need for individualized calculations of damages.") (citation omitted); *Linerboard*, 305 F.3d at 149 ("The courts have repeatedly focused on the liability issues, in contrast to damage questions, and, if they found issues were common to the class, have held that Rule 23(b)(3) was satisfied.") (internal quotation omitted); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir. 1977) ("[I]t has been commonly recognized that the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate."); 7B Charles Alan Wright, Arthur Miller & Mary Kay Kane, Federal Practice and Procedure § 1781 (2d ed. 1986) ("It uniformly has been held that differences among the members [of a class] as to the amount of damages incurred does not mean that a class action would be inappropriate.") (collecting cases). As one court put the matter, "'Common proof of impact is possible without common damage amounts.'" *Cardizem*, 200

F.R.D. at 317 (quoting *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 694 (D. Minn. 1995)).

Even if the calculation of the amount of damages requires individualized inquiry, the great bulk of the issues may well be common to all class members: antitrust violation, causation, and fact of damage. Moreover, in practice those issues are likely to play an even more significant role than may be immediately evident. Defendants at trial generally argue that they did not engage in the alleged conduct and that they did not cause *any* harm at all. If they are willing to address the amount of damages in any depth – which they are often reluctant to do for strategic reasons – their concern is with their total liability, not with the allocation of damages among class members. Finally, courts can deal with individual damages issues in various ways, including: "(1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class." *Visa Check*, 280 F.3d at 141; *accord* Manual for Complex Litigation, Fourth § 21.5 (2004) ("[T]he court may consider trying common issues first, preserving individual issues for later determination.").

B. Significance for Petitioners' Arguments

Amici raise these points in part because Petitioners muddle them. In arguing against predominance, for example, Petitioners claim " 'measurable damages' is an essential element of Plaintiffs' antitrust claims," Pet'r's Br. at 18, and that "the need to prove individualized damages for each of the two million class members would overwhelm any purported common questions in this litigation." *Id*. at 19. This argument could be construed to conflate multiple issues. First, as the Second Circuit noted in *Cordes*, common issues can predominate even if fact of damage involves individualized issues. Second, *impact or fact of damages* is a very different issue than the *amount of damages*. When it comes to the amount of damages – as opposed to the fact of damage – courts often hold that, to certify a class, common evidence need not necessarily be available to calculate the recovery of each class member.

Similarly, Petitioners argue that the "element of damages in antitrust cases (or other cases where proof of damages is an element of plaintiffs' claim) is similar to other claim elements that will preclude class certification in the absence of an acceptable method of class-wide proof." *Id*. at 32. Petitioners then cite to cases holding that reliance is an element of a fraud claim and that individual issues regarding reliance can preclude class certification in fraud cases. *Id*. at 32-33. Petitioners then discuss the difficulties they believe would be involved in calculating the *amount of damages* for each class member in

the case before the Court. *Id*. at 33. This line of argument badly jumbles together distinct issues and, as a result, culminates in a *non sequitur*. Courts may treat fact of damage in antitrust cases just like they treat reliance in some fraud claims, but they treat both very differently than they treat the *amount of damages* in antitrust cases. The fact that some cases have held that individual issues regarding reliance sometimes preclude class certification in non-*antitrust* cases, then, is not relevant. Those cases say little, if anything, about whether individual issues regarding the *amount of damages* should similarly prevent class certification in an *antitrust* case. And the very flexible standard courts have adopted for estimating the amount of damages in antitrust cases makes it, at best, highly implausible that calculating individual damages would involve the "more than 38 years to adjudicate" that Petitioners suggest. *Id*. at 34.

C. Conclusion

In sum, the predominance requirement of Rule 23 is subtle. Significant repercussions may follow from taking a categorical stand – even inadvertently – on, for example, whether plaintiffs must demonstrate they are capable of using common evidence to attempt to show *amount of damages*, as opposed to *fact of damage*. *Amici* write to highlight these issues for the Court, as well as to raise important policy considerations.

II. PETITIONERS' POLICY ARGUMENTS OVERLOOK THE VALUE OF CERTIFYING CLASSES IN APPROPRIATE ANTITRUST CASES

As an additional basis for seeking reversal, Petitioners suggest, in effect, that raising the standard at class certification is necessary to serve public policy interests. *Id*. at 51-53. But policy reasons weigh both for and against certifying classes in antitrust cases, and Petitioners' view fails to provide a balanced picture. Specifically, Petitioners ignore the importance of certifying antitrust claims for class treatment for various reasons, including to promote the compensation and deterrence goals of the antitrust laws, to honor the right to trial by jury, and to adjudicate claims efficiently and accurately. *Amici* emphasize the policy reasons *for* certification because they are often overlooked. Of course, no class should be certified that does not comport with Rule 23. *Amici* respectfully submit, however, that the policy arguments sometimes made for requiring as rigorous a showing as possible under Rule 23 are not very compelling. Rule 23 should be read, instead, in the established manner in antitrust cases.

A. Unpersuasive Arguments Against Certifying Antitrust Classes

1. Neither Evidence Nor Theory Supports the Proposition that Class Certification Creates "Insurmountable Pressure" on Defendants to Settle Cases for More than a Reasonable Amount Relative to the Merits

Petitioners suggest – citing to the unsubstantiated opinions of others – that class certification places tremendous pressure on antitrust defendants to settle. But Petitioners offer no *evidence* for this proposition. *Amici* are not aware that any such evidence exists, and we suspect it does not. *See* Charles Silver, "*We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357 (2003) (debunking the notion that class certification in effect is a form of legalized blackmail). For example, Petitioners contend that settlement often takes place before defendants file all available dispositive motions, Pet'r's Br. at 52, but without providing any evidentiary basis for this contention. Petitioners also note the effects of the high costs of litigation without attending to whether those costs fall primarily on defendants or plaintiffs, or similarly on both. Given the lack of evidence, it is worth considering the likely dynamics of litigation and settlement.

Several key observations merit consideration. First, antitrust defendants – by definition – tend to be powerful and well-funded. Less so antitrust

plaintiffs. And even if plaintiffs are successful, they are generally not entitled to prejudgment interest on their damages. The plaintiffs, in other words, are unwilling providers of interest-free loans. Defendants in turn can use delay to drive a hard bargain in settlement negotiations – to resolve litigation on highly favorable terms for themselves. Antitrust defendants, then, generally can tolerate extended litigation – and may even gain strategic and other benefits from it – whereas antitrust plaintiffs often cannot. Finally, the evidence suggests that discovery costs are just as high for plaintiffs as they are for defendants in complex litigation. *See generally* Davis & Cramer, *Politics of Procedure*, 17 Geo. Mason L. Rev. at 978-79; Joshua P. Davis & Eric L. Cramer, *Of Vulnerable Monopolists: Questionable Innovation in the Standard for Class Certification in Antitrust Cases*, 41 Rutgers L. J. 355, 369-71 (2009) (hereinafter "Davis & Cramer, *Of Vulnerable Monopolists*").

Of course, this analysis fails to take into account the role of attorneys. But attention to lawyers just reinforces the same conclusion. Most importantly, the defense attorneys in antitrust class actions tend to be paid by the hour while the plaintiffs' attorneys are compensated on a contingent basis. *Amici* do not mean to impugn the ethics of any lawyers but do believe compensation structures of attorneys are relevant in the settlement context. No doubt many attorneys for both defendants and plaintiffs sacrifice their own interests to those of their clients, as they are ethically required to do. But a policy analysis

should acknowledge what economists call agency costs – including the idea that the judgment of lawyers may at times, even subconsciously, skew toward their own interests. Agency costs tend to suggest that antitrust defendants will fare even better in settlement negotiations. After all, defense attorneys can credibly threaten to protract litigation, impose high costs, and force plaintiffs to survive every meaningful obstacle shy of trial before settling. Contingency fee lawyers, in contrast, generally do better by settling early, even for a relatively modest amount. The upshot is that the lawyers' interests are likely to exacerbate the tendency for antitrust defendants to settle for too little rather than too much. And empirical evidence suggests that in complex cases costs are likely to fall as heavily on plaintiffs – or their attorneys – as on defendants. Thus, costs do not serve as a corrective. *See generally* Davis & Cramer, *Politics of Procedure*, 17 Geo. Mason L. Rev. at 980 (discussing these dynamics); Davis & Cramer, *Of Vulnerable Monopolists*, 41 Rutgers L. J. at 371-72 (same).

None of this is to contest that class certification *increases* the pressure on antitrust defendants to settle. The point instead is that we have every reason to believe those defendants have great advantages in settlement negotiations. Class certification in all likelihood fails to overcome those advantages, although it evens the proverbial playing field to some extent. If anything, that is a reason to favor class certification, not to be leery of it.

Petitioners' suggestion that the Court should distort the requirements of Rule 23 to protect defendants from pressure to settle is unpersuasive for two other reasons. First, the federal rulemaking process has already addressed this issue through Federal Rule of Civil Procedure 23(f), which permits interlocutory appeals of class certification decisions. That approach leaves the class certification standard intact but protects against potential harms from erroneous certification decisions. To base a change in class certification doctrine on the same concern would fail to respect the rulemaking process and would be excessive. Second, class certification is a poor means for assessing the merits of claims. It is not designed for that purpose. *See* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 149 (2009) ("[L]aw declaration is warranted in class certification only insofar as it has the potential to reveal dissimilarity within the class, not as a substitute for the proper evaluation of evidence said to reveal a fatal similarity on an element of the plaintiffs' case on the merits. The latter inquiry remains the proper domain of summary judgment, such as to implicate the role of the court vis-à-vis the factfinder at trial."). If this Court is concerned that defendants face undue pressure to settle in antitrust cases – to be clear, *Amici* believe it should not be – a better way to address the issue is by adjusting the standard for dispositive motions on the merits,

including motions to dismiss and for summary judgment.[6] Indeed, the Court has already taken these measures. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Altering the class certification standard in addition would be overkill, with counterproductive consequences.

2. Class Certification Generally Does Not Hurt Absent Class Members

Petitioners also suggest that certification of a class has "real costs" for absent class members, who may prefer to "go it alone." Pet'r's Br. at 52. But that logic does not withstand scrutiny, at least not in a case like this one. This is not litigation, like *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997), in which class members have not yet suffered injury or cannot yet know they have been injured. Class members who wish to opt out of a class certified under Rule 23(b)(3) can do so. If they lack the resources to take that step, it is hard to imagine they will have the resources to pursue individual litigation. Indeed, that point suggests that Petitioners shed crocodile tears.

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[6] *See* The American Law Institute, Principles of the Law on Aggregate Litigation § 2.6, Reporters' Notes, Comment b. (2010) ("The limitation that the courts should engage questions of law or fact (or mixed questions thereof) only insofar as relevant to its class certification determination stems from the recognition that other procedural mechanisms or pretrial rulings – such as summary judgment – appropriately regulate the relationship between the court and the fact-finder generally.").

Their interests lie (understandably) not in preserving the legal rights of absent class members but in depriving them of any meaningful prospect of pursuing those rights.[7] After all, a class member recovery means a loss to Petitioners.

B. Policy Reasons for Certifying Antitrust Classes in Appropriate Cases

1. Private Antitrust Enforcement: Private Actions Play a Key Role in Enforcing the Antitrust Laws

Of course, failing to certify classes in antitrust cases would not be a matter of much concern if private antitrust enforcement adds little of value to public enforcement. But there is good reason to believe the opposite is true: private antitrust enforcement plays an important policy role.

Legal scholarship has demonstrated the benefits of private enforcement. Research has shown that private enforcement – primarily through class actions – has resulted in recoveries of over $30 billion since 1990. *See* Joshua P. Davis & Robert H. Lande, *Towards an Empirical and Theoretical Assessment of*

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[7] *Cf. AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1761 (2011) (Breyer, J., dissenting) (noting that where small-dollar claims are concerned, "'[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits'") (quoting *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

Private Antitrust Enforcement, 36 Seattle U. L. Rev. (forthcoming 2013), *available at* http://ssrn.com/abstract=2132981 (discussing sixty case studies of successful private antitrust enforcement); Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. Rev. 879 (2008) (discussing forty case studies of successful private antitrust enforcement actions).[8] Private enforcement usually provides the only means for compensating the victims of antitrust violations, who are often U.S. purchasers preyed on by foreign actors. *See* Davis & Lande, *Towards an Empirical and Theoretical Assessment of Private Antitrust Enforcement* at 19-20; Lande & Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. Rev. at 894. It also appears to provide a more powerful deterrent to antitrust violations than criminal enforcement of the antitrust laws by the Department of Justice. *See generally* Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*,

[8] The University of San Francisco Law Review article was based on forty case studies reported in Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: Forty Individual Case Studies*, *available at* http://ssrn.com/abstract=1105523. The forthcoming Seattle University Law Review article is based on those same forty case studies as well as an additional twenty case studies reported in Joshua P. Davis & Robert H. Lande, *Summaries of Twenty Cases of Successful Private Antitrust Enforcement*, *available at* http://ssrn.com/abstract=1961669.

2011 B.Y.U. L. Rev. 315 (2011). Making it more difficult to certify a class in antitrust cases, therefore, could significantly undermine the important functions of private antitrust enforcement.

2. Raising the Standard for Class Certification Runs Counter to the Spirit – and Perhaps also the Letter – of the Seventh Amendment Right to Trial by Jury

In many proposed class actions, individual litigation is not a viable alternative, at least not for the vast majority of class members. *See* Fed. R. Civ. P. 23(f) advisory committee notes to 1998 Amendments (noting that a potential class member may have "an individual claim that, standing alone, is far smaller than the costs of litigation"). A denial of class certification will therefore mean that many plaintiffs will lose without ever having a chance to prove their case. Yet Petitioners' argument would empower judges to rule on many issues relating to the merits – even to the amount of damages – before allowing a jury to hear any evidence, even when these issues are irrelevant to the predominance analysis under a straightforward reading of Rule 23. That is at odds with the spirit of the Seventh Amendment. A right to a trial by jury only if a judge believes a plaintiff has satisfied the burden of persuasion is no meaningful right at all. *See* Davis & Cramer, *Politics of Procedure*, 17 Geo. Mason L. Rev. at 1011-12; *see also* The American Law Institute, Principles of the Law on Aggregate

Litigation § 2.6, Reporters' Notes, Comment b. (2010) ("Wholesale displacement of [summary judgment] principles by the lesser threshold of a mere preponderance of the evidence – the standard prescribed for the class certification setting – threatens an unwarranted intrusion by the court upon the role of the factfinder at trial.") (citing Nagareda, 84 N.Y.U. L. Rev. at 140, 149).

Moreover, as this Court has long held, when a party seeks equitable relief – and class certification is a form of equitable relief – the judge should await and abide by the jury's findings. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479 (1962); *Bigelow Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959). Given how deeply into the merits Petitioners believe a court should delve at class certification, they could well be suggesting a change in doctrine that would violate the Seventh Amendment. *See* Davis & Cramer, *Politics of Procedure*, 17 Geo. Mason L. Rev. at 1010-15.

3. Benefits of Collective Action: Petitioners' Proposal Would Undermine Efficiency and Accuracy

Adjudication of antitrust cases on a class basis can have various salutary effects. It can make litigation far more efficient by resolving issues once for a large number of class members. It also can improve the measurement of a defendant's liability for reasons both subtle and obvious, including by allowing a statistical approach to damages that is far more

likely to prove accurate than anecdotal evidence – or a "he said, she said." Given the expense of experts and statistical analyses, and the limits courts may impose on discovery, anecdotal evidence often is the only practical option in individual litigation. Assessing the overall impact of anticompetitive conduct on prices is a superior way to understand the effects of an antitrust violation. The alternative may be trying to determine how negotiations would have proceeded on an individual basis if the conduct had never occurred. *See generally* Joshua P. Davis, *Class-Wide Recoveries*, Geo. Wash. L. Rev. (forthcoming 2013-14), *available at* http://ssrn.com/abstract=1768148.

In various ways, Petitioners' proposal would undermine these benefits in efficiency and accuracy. First and foremost, it would make class litigation more costly. The more plaintiffs must prove to certify a class, the more discovery that must be taken, the more involved the expert analysis must be, and the more time courts and parties must dedicate to resolving class certification. Adding routine *Daubert* motions as part of the class certification process would further undermine efficiency. *Cf.* James Langenfeld & Christopher Alexander, Daubert *and Other Gatekeeping Challenges of Antitrust Experts*, 25 ANTITRUST 21, 23, 25 (Summer 2011) (reporting on empirical study suggesting that "antitrust experts are subject to a disproportionately high rate of [*Daubert*] challenges" compared to other areas of the law and determining that plaintiff damages and liability experts

account for 85% of all antitrust *Daubert* challenges). If anticipated costs really drove defendants to settle, Petitioners would be taking the exact opposite position – arguing for a standard at class certification that is less taxing rather than more taxing on the court and the parties.

Indeed, if many defendants were actually given a choice between defending individual lawsuits or a single class action, they would very likely choose the latter. But they are not. They know that if class certification is denied then the vast majority of the members of the proposed class will have no ability to protect their rights under the antitrust laws at all. That does not by itself provide a reason to certify a class in this case. The requirements of Rule 23 must of course be honored. But it does provide a firm basis not to depart from settled precedent and make the standard for certifying a class in an antitrust case ever more stringent, and the process ever more expensive. This view should be properly weighted against the view expressed by Petitioners.

CONCLUSION

For the foregoing reasons, and those set forth in Respondents' brief, the judgment of the court of appeals should be affirmed. *Amici* recognize that this Court may address only *how* plaintiffs must make their showing at class certification, not *what* showing plaintiffs must make. *Amici* nevertheless respectfully

submit this brief for two reasons: (1) to help identify various issues, some of them subtle, regarding the traditional burden courts have placed on plaintiffs at class certification and (2) to suggest that policy considerations do not support upsetting longstanding doctrine and imposing a greater burden on plaintiffs to protect antitrust defendants from undue pressure to settle.

Respectfully submitted,

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October 2, 2012