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 Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

DONALD L. PERELMAN
ROBERTA D. LIEBENBERG
GERARD A. DEVER
MATTHEW DUNCAN
PAUL COSTA
FINE, KAPLAN AND BLACK, RPC
One South Broad Street
23rd Floor
Philadelphia, PA 19107

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
TAYLOR A.R. MEEHAN
BANCROFT PLLC
1919 M Street NW, Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Respondents
Additional Counsel on Inside Cover

May 11, 2015

RICHARD A. KOFFMAN
KIT A. PIERSON
CHRISTOPHER J. CORMIER
SHARON K. ROBERTSON
LAURA M. ALEXANDER
COHEN MILSTEIN SELLERS & TOLL, PLLC
1100 New York Ave. NW
Suite 500, West Tower
Washington, DC 20005

MICHAEL J. GUZMAN
REBECCA A. BEYNON
MICHAEL N. NEMELKA
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, PLLC
1615 M Street NW
Suite 400
Sumner Square
Washington, DC 20036

JOSEPH GOLDBERG
FREEDMAN BOYD HOLLANDER GOLDBERG URIAS & WARD, P.A.
20 First Plaza
Suite 700
Albuquerque, NM 87102

ROBERT W. COYKENDALL
ROGER N. WALTER
MORRIS, LAING, EVANS, BROCK & KENNEDY, CHARTERED
300 North Mead
Suite 200
Wichita, KS 67202

QUESTIONS PRESENTED

Dow no longer disputes its involvement in a years-long price-fixing cartel that artificially inflated prices on billions of dollars of transactions in commodity urethane chemicals, and featured everything from secret off-shore meetings to clandestine calls from gas station pay phones. After a four-week trial, during which the jury heard substantial common evidence concerning the conspiracy and its impact on the class, the jury returned a verdict finding that Dow participated in an unlawful price-fixing conspiracy and that the class was injured by Dow's actions.

Dow now seeks to upset the unfavorable jury verdict on the ground that the class never should have been certified in the first place because common issues could not "predominate" over individualized issues. The District Court denied Dow's motion to decertify the class as both untimely and meritless, and the Tenth Circuit unanimously affirmed.

The questions presented are:

1. Whether the District Court abused its discretion by denying Dow's untimely motion for class decertification based on an extensive evidentiary record showing that common questions *actually* predominated at trial.

2. Whether the courts below properly affirmed the jury's aggregate damages award where Dow never sought an individualized determination of damages and presented its damages arguments fully and fairly at trial.

PARTIES TO THE PROCEEDING

The named plaintiffs are Industrial Polymers, Inc., Quabaug Corporation, and Seegott Holdings, Inc., on behalf of themselves and all other plaintiffs similarly situated. The defendant is The Dow Chemical Company ("Dow"). All other members of the price-fixing conspiracy have settled.

CORPORATE DISCLOSURE STATEMENT

Named plaintiffs Industrial Polymers, Inc., Quabaug Corporation, and Seegott Holdings, Inc., have no parent corporation or affiliates that are publicly traded, and no publicly traded company owns 10% or more of the stock of any named plaintiff.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

This case involves a years-long conspiracy to fix the prices of billions of dollars of commerce in the urethane chemicals industry, featuring everything from secret off-shore meetings to clandestine calls from gas station pay phones. After a four-week trial and a vast evidentiary showing, including extensive common evidence of the conspiracy and its class-wide impact, the jury found that Dow engaged in an unlawful cartel that resulted in a class of corporate purchasers paying higher prices for urethane chemicals than they would have paid but-for the conspiracy. Dow does not challenge the jury's finding that it participated in this price-fixing cartel. Nonetheless, having taken its case to the jury and lost, Dow now insists that the class should have been decertified and that the jury's verdict should be wiped out.

The judgment below is correct in all respects, does not conflict with the decisions of any other court, and does not warrant this Court's review. The underlying antitrust claims involve an executive-level price-fixing conspiracy, long understood both to represent "the supreme evil of antitrust," *Verizon Commc'ns v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004), and to implicate issues uniquely well-suited for class treatment under Rule 23, *see Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1997).

Unlike many class-action disputes that arise in an interlocutory posture, the courts below did not need to predict whether common issues would predominate or class litigation would prove workable. The actual trial confirmed that common issues and common evidence

in fact overwhelmingly predominated over any individual issues and that the class action was eminently manageable. Plaintiffs (Respondents here) introduced days of common proof concerning the scope and nature of the conspiracy, the class-wide impact of that conspiracy on urethane purchasers, and the damages suffered as a result. Dow, in turn, introduced common proof of its own in an attempt to obtain class-wide exoneration, including evidence of customer negotiations, damages methodology, and other class-wide issues. The jury carefully considered all of this evidence and found that Dow participated in a multi-year price-fixing conspiracy of somewhat shorter duration than alleged, that the class was injured by the cartel's actions, and that damages totaled more than $400 million, but again somewhat less than alleged.

With the benefit of the exhaustive trial record and its experience overseeing eight years of litigation, the District Court rejected Dow's untimely attempt to decertify the class. The Tenth Circuit unanimously affirmed, finding both preservation issues and legal flaws with Dow's objections. Both courts relied upon the overwhelming evidentiary record of class-wide impact and damages and the jury's "unequivocal findings" on those issues. Pet.App.39. Dow subsequently sought panel and *en banc* rehearing—in which it raised the same arguments it advances here—but not a single judge voted to grant the petition.

Dow's petition for certiorari does not come close to warranting this Court's review. Dow accuses the courts below of adopting a "presumption" of class-wide

antitrust impact, but the courts did no such thing. Neither court "presumed" anything, but instead relied on the extensive evidence of Dow's misdeeds and their systematic impact on the class, including evidence of class-wide impact from Dow's own witnesses and documents. The District Court and the Tenth Circuit carefully considered that evidence, and their rigorous, factbound analysis is entirely consistent with the decisions of other circuits, all of which hold that class certification turns on the facts of each case and is committed to the sound discretion of the district courts. Dow's claimed circuit split does not exist. Indeed, courts have repeatedly recognized that claims involving price-fixing of commodity products are uniquely well-suited for class-wide resolution.

Dow also repackages its sufficiency-of-the-evidence challenge to the damages award into a new argument that contrives a circuit split where none exists. The damages methodology used by Respondents' experts is widely accepted, even by Dow's own expert. Furthermore, Dow chose *not* to request individual damages proceedings in favor of pursuing a class-wide defense verdict. All of Dow's damages arguments were fully considered at trial. The jury's verdict resolving these factual disputes deserves the utmost deference and does not warrant this Court's review.

STATEMENT OF THE CASE

A. Dow's Price-Fixing Conspiracy

Horizontal price-fixing by ostensibly competing firms is the "supreme evil of antitrust." *Trinko*, 540 U.S. at 408. Here, Dow and its primary competitors (Bayer, BASF, Huntsman, and Lyondell) engaged in a

years-long, executive-level conspiracy to control prices of billions of dollars of commerce in "urethane" chemicals, which are basic raw materials used to produce insulation, flexible foams, and many other products. Several structural features of the urethanes industry made it particularly ripe for successful price-fixing, including market concentration, "high barriers to entry," and "homogenous" products with "no close product substitutes." Pet.App.35-36. Textbook economics instructs that these structural features are highly conducive to price-fixing with market-wide effects. SA2642-59.

The cartel was formed in response to excess industry capacity. A series of new urethane plants came online in the late 1990s and early 2000s, but industry demand was flat. This excess capacity put "significant" downward pressure on prices. SA2650-59, 2681-82. To stabilize prices, the cartel issued a series of lockstep price announcements coordinated by senior executives with market-wide pricing authority. SA13, 2680-85, 5048-49 ("many studies report that a cartel was formed during a period of falling prices"). The conspiring firms announced identical price increases simultaneously or within a very short time period, *see* AA1772-92, a "hallmark" of commodity price-fixing cartels as Dow's own expert concedes, SA5221-22. These price increases covered all urethane products and "would apply to all [customers] regardless [of] what they were paying at the time." SA4097-99.

The evidence of collusion was overwhelming. One Dow executive flatly stated that "there was an agreement" to fix prices. SA1274. And Dow played a

central role in the conspiracy. For example, one Dow executive directly participated in "8 to 15" price-fixing discussions with his urethanes counterpart at Bayer, including episodes in which the Bayer executive left his office to return a call from a gas station pay phone and had his office swept for "bugs" to avoid detection. SA881-82, 905-08, 921, 997. The cartel held secret price-fixing discussions in airports, hotels, golf resorts, coffee shops, in side meetings at trade association events, in walks outside to avoid "listening devices," on home and cellular phones, and at a restaurant in Belgium (for which the expense report was falsified to conceal the identity of the participants). SA15, 29-30, 867-893, 1995-98.

B. The Cartel's Class-Wide Impact on Purchasers

The conspiracy unquestionably achieved its goal of increasing prices or maintaining prices at supracompetitive levels. *See, e.g.*, AA599. As Dow's own witnesses acknowledged, the cartel aimed to stabilize prices—despite excess industry capacity—by announcing price increases that successfully raised prices by a few percent or forestalled an expected decline. *See*, *e.g.*, SA1273-74, 3886, 4156; *see also* SA1964 (many of the collusive price increases were intended "to stop price decrease[s]"). Dow's own witness explained that the lockstep industry price announcements formed the baseline for all customer negotiations and that many of the announcements caused post-negotiation prices to increase by the full amount. SA4095, 4156-57. Dow's expert economist likewise conceded that actual price increases routinely followed the lockstep announcements. SA5258.

Internal documents from the conspirators also described the price-increase announcements as "successful," SA303, and "solid," AA1639. Cartel members boasted that they "got the full increases" and that "the price increases [are] becoming effective and being paid." SA342; Pet.App.37 n.22. As one cartel member reported, "margins enhanced greatly" as a result. SA330; *see also* SA314 (reporting 25% increase for product). Other documents noted that certain increases had been "full[y]," SA341-42, or at least "partially" successful in inflating prices, SA892-93; *see* SA299-301 ("price increases becoming effective"). Another Dow document gleefully announced that the price increases were "Working!!!!!!!." Pet.App.37 n.22.

The class-wide impact of the conspiracy was also addressed at length by Respondents' experts. Dr. John Solow, co-author of a leading antitrust treatise—whose testimony Dow did not challenge on appeal—testified that the conspiracy was a textbook price-fixing cartel designed to keep prices from falling to competitive levels and injured nearly all class members. SA2641, 2732, 2741. Statistical evidence corroborated Solow's testimony. Another expert, Dr. James McClave, analyzed all the transaction data the defendants produced in discovery—a massive dataset of approximately one million representative urethane transactions. Using a multiple regression analysis, a common statistical tool in price-fixing cases, McClave confirmed that *post-negotiation* prices vastly exceeded competitive levels. Pet.App.37 n.22. Controlling for industry variables such as raw material cost, capacity, and demand, the regression showed systematic price inflation that was attributable to the cartel—across all urethane product categories, defendants, geographic

areas, time periods, and for large and small customers alike. SA3474, 3502-03, 3520-23. The models showed that more than 98% of modeled customers were injured and paid overcharges at some point in the class period. AA2441, 2445.

To quantify class-wide damages, McClave used the multiple regression results and applied those estimated overcharges to each class member's purchase data. For approximately one million transactions—50% of the purchase volume—McClave estimated the overcharge directly through multiple regression analysis. For the remaining transactions for which data were incomplete or unavailable, McClave extrapolated damages based on the results of his multiple regression analysis. As both McClave and *Dow's own expert* testified at trial, this "extrapolation" methodology for estimating damages is standard practice in cases where the data produced by defendants in discovery are incomplete. SA3535 ("That's Statistics 101"); SA5552-54.

C. Proceedings Before the District Court

Respondents filed this suit more than a decade ago on behalf of a class of purchasers of urethane products under the Clayton Act, 15 U.S.C. §15, alleging that Dow, Bayer, BASF, Huntsman, and Lyondell engaged in an illegal price-fixing cartel between January 1999 and December 2004, in violation of the Sherman Act, 15 U.S.C. §1.

After nearly four years of pre-certification discovery, the District Court "carefully and thoroughly reviewed the class certification record" and granted Respondents' motion for certification. Pet.App.103. The court "perform[ed] a rigorous analysis" and

required Respondents to satisfy a "strict burden of proof" to establish that the requirements of Rule 23 were met. Pet.App.89. Considering the class certification record as a whole, the court found that common issues regarding both the existence of a conspiracy and price impact predominated. Moreover, even if certain individualized damage issues were to arise at a later stage of the litigation, the court concluded that class certification was still appropriate to determine liability. Pet.App.108-10. The Tenth Circuit denied Dow's petition to appeal class certification.

The parties subsequently engaged in another four years of merits discovery, including voluminous document production, dozens of depositions, and the commissioning of expert reports. After the District Court set the case for trial, *see* AA479, Dow—based on a fully developed discovery record—made the strategic decision *not* to request individualized damages proceedings (as the District Court had suggested Dow could do). Pet.App.108-10. Dow also represented to the District Court at the final pretrial conference that it had no intention of moving to decertify the class. SA515. Dow opted instead to pursue a class-wide defense verdict on all issues at trial, including damages. *See* Pet.App.23 n.11 (discussing Dow's strategic decision to "ask[] for a single finding on class-wide damages").

On January 22, 2013, *one day* before the start of trial, 21 months after receiving Respondents' expert report, 18 months after this Court's *Wal-Mart* decision, and 6 months after advising the District Court that it had no plans to seek decertification, Dow

moved to decertify the class. The District Court took Dow's "untimely" motion under advisement and deferred a ruling until after trial, given the highly prejudicial timing of the motion. Pet.App.56-57.

A four-week trial followed that featured common evidence introduced by not only Respondents but also Dow, consistent with its strategy of pursuing a class-wide defense verdict on all issues so that it could avoid potential liability from individual suits. The evidence concerning the existence of a conspiracy was entirely common. *Supra* pp.3-5. Likewise, virtually all of the evidence of impact was common to the class. *Supra* pp.5-7. And the damages issues were resolved on a common basis as well, including all of Dow's arguments concerning extrapolation, expert credibility, and the extent to which the damages estimate "fit" the theory of liability. Pet.App.23-24 & n.11.

After carefully weighing all of this evidence—and receiving proper instructions and interrogatories that Dow does not challenge on appeal—the jury returned a class-wide verdict for Respondents. The jury found that: (1) Dow participated in a conspiracy to fix, raise, or stabilize prices for urethane chemicals; (2) the conspiracy caused Respondents to pay more for urethane chemicals than they would have paid absent a conspiracy; and (3) class-wide damages totaled $400,049,039. AA514-15.

The District Court then denied Dow's motion for decertification. The court found that Dow's motion was "untimely" in light of Dow's strategic gamesmanship on the eve of trial, and that the untimely motion also "failed on the[] merits."

Pet.App.56, 58. The court emphasized that both class certification and the verdict were supported by extensive common *evidence* of a conspiracy causing class-wide harm. Pet.App.65-72. Moreover, even if some members of the class might have mitigated damages by negotiating away some portion of some price increases, the trial record established that the cartel succeeded in stabilizing prices throughout the industry, and "that all members of the class may be shown to have been impacted." Pet.App.58-59.

The District Court also rejected Dow's belated argument that certification ran afoul of *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), finding that *Comcast* was distinguishable in several key respects. Pet.App.62-63. Here, unlike *Comcast*, a full trial confirmed that common issues predominated, that a class action was workable, and that Respondents' expert model reliably measured the damages caused by the wrongdoers.

D. The Tenth Circuit's Decision and Denial of Rehearing

The Tenth Circuit unanimously affirmed, holding that the District Court did not abuse its discretion by certifying the class. Pet.App.10-24. The court concluded that whether the conspiracy impacted prices was "a common question that was capable of class-wide proof." Pet.App.13-14. The District Court "could reasonably weigh the evidence" and conclude that price-fixing "affected the entire market." *Id.* The jury also "could have inferred" and, indeed, did infer "that a conspiracy existed and … caused prices to be higher than they would have been in a marketplace free of collusion." Pet.App.14, 36-37 & nn.21-22. The

Tenth Circuit credited Respondents' extensive common proof of class-wide injury, Pet.App.37, and noted that "Dow has not identified a single class member for whom injury was impossible." Pet.App.40.

The court rejected Dow's attempt to analogize this case to the proposed class in *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011). In *Wal-Mart*, individualized proceedings were necessary because "the common questions—the reasons for the pay and promotion disparities—could not yield a common answer 'in one stroke.'" *Id.* at 2551-52. Here, in contrast, "there were two common questions that could yield common answers at trial: the existence of a conspiracy and the existence of impact." Pet.App.16.

The court also rejected Dow's criticisms of the damages award. Dow sought to challenge Respondents' expert's use of "extrapolation" techniques, but Dow "did not raise its present argument in the district court." Pet.App.18.[1] Nor did the District Court abuse its discretion in concluding that McClave's use of the common statistical technique of extrapolation—which was based on a multiple regression analysis of one million actual urethanes transactions—reliably estimated damages for class-member transactions that could not be modeled. Pet.App.18, 59.

Finally, the Tenth Circuit rejected Dow's argument that the damages model contravened this Court's decision in *Comcast*. Pet.App.19-24 & n.10.

---

[1] Before trial, Dow moved to exclude McClave's expert testimony under *Daubert*, but made no mention of the damages issues it raises here. The District Court denied that motion.

Rather than raising this argument in its *Daubert* motion or at trial, Dow "waited until after trial to raise" it. Pet.App.22. The court also concluded that *Comcast* was inapposite. Whereas *Comcast* involved an interlocutory appeal in which the lower courts improperly refused to consider the merits of a damage model at the class-certification stage, here the District Court carefully evaluated the reliability of the model *at trial*. Pet.App.22-24. Furthermore, the standard cartel damages methodology used here did not implicate the substantive modeling concerns at issue in *Comcast*. Pet.App.19 n.10.

Dow subsequently petitioned for panel rehearing and rehearing *en banc*, raising essentially the same arguments it raises here. *See* Pet. for Reh'g at 1. The Tenth Circuit denied the petition on November 7, 2014. Not a single judge voted to grant rehearing.

REASONS FOR DENYING THE PETITION

Neither of the issues Dow raises in its petition comes close to warranting this Court's review.

I. Dow urges this Court to grant review and decertify the class on the ground that the lower courts applied a "presumption" that the conspiracy caused class-wide injury. But the lower courts did not "presume" class-wide injury, instead relying on extensive *evidence* from the four-week trial showing that class-wide issues of conspiracy, impact, and damages *actually* predominated over any individualized issues.

Whether class-wide issues predominate is a discretionary determination that turns on the unique facts of each case. While courts often have to predict whether common issues will predominate at the class-

certification stage, here the trial confirmed that common issues and common evidence in fact predominated. Having put on a defense largely based on common evidence in an effort to procure a class-wide defense verdict, Dow is poorly positioned to claim that individualized issues predominated after all. And contrary to Dow's suggestion, no court of appeals has adopted a bright-line rule that the predominance requirement can *never* be satisfied if customers have some ability to negotiate prices. Any such rule would contravene longstanding precedent recognizing that price-fixing cases involving commoditized products are uniquely well-suited for class treatment under Rule 23.

In all events, this case is not an appropriate vehicle to consider the issues Dow raises, each of which rests on a litany of fact-based contentions already aired at trial and resolved by the jury. Moreover, Dow raised many of the arguments in its petition for the first time in its eve-of-trial decertification motion, which was both untimely and contrary to Dow's previous representations to the District Court. To reach the substantive issues raised by Dow, this Court would first have to address the threshold and factbound question whether both lower courts abused their discretion in finding that Dow's dilatory tactics justified denial of its decertification motion.

II. Dow's effort to manufacture a cert-worthy damages issue fares no better. Dow had eight years of discovery to develop its evidence and arguments, and it made a strategic decision to seek exoneration on a *class-wide* basis through common proof. Only after

that strategy backfired did Dow suggest there was something impermissible about using a standard extrapolation methodology to estimate class-wide damages.

That eleventh-hour argument does not warrant this Court's review. Countless decisions from both this Court and the lower courts recognize that damages calculations in antitrust cases require a flexible and fact-dependent inquiry that can employ a wide array of evidence, including statistical models that calculate damages on an aggregate basis. No court has ever held that damages in a price-fixing case may not be established through class-wide statistical proof. Just as important, a jury weighed all of the evidence and *resolved* the disputed damages issues in Respondents' favor, and the Seventh Amendment demands deference to that verdict. Finally, as both courts below explained at length, this Court's *Comcast* decision is readily distinguishable as a matter of both fact and law.

I. Certiorari Is Not Warranted To Address The District Court's Correct, Factbound, And Discretionary Determination That Common Issues Predominated At Trial.

A. The District Court's Finding of Predominance Was Based on an Extensive Evidentiary Record, Not a "Presumption" of Class-Wide Harm.

1. "Predominance is a test readily met in certain cases alleging … violations of the antitrust laws." *Amchem*, 521 U.S. at 625. Like the vast majority of price-fixing cartels in commoditized markets, this cartel was paradigmatically suited for class

treatment. And unlike the vast majority of pre-trial class-action certification decisions where courts are engaged in a predictive exercise about how the case will be tried, there is no need for predictions here because this case was actually tried to a jury. As the Tenth Circuit emphasized, "we know *from the actual trial* that individualized issues did not predominate" or render the trial unworkable. Pet.App.20 (emphasis added). There is no basis for reviewing that factbound and discretionary determination.

Dow urges this Court to grant certiorari to address "[t]he propriety of *presuming* class-wide harm to satisfy Rule 23(b)(3)'s predominance requirement in antitrust cases." Pet.13-14 (emphasis added). But, as even Dow seems to acknowledge in a footnote, *see* Pet.14-15 n.3, the lower courts applied no such presumption. The District Court relied not on presumptions but on a concrete evidentiary record of class-wide impact caused by the cartel. Pet.App.65-72, 103. In affirming the District Court's holding that common issues predominated, the Tenth Circuit similarly emphasized that "*there is evidence*" of class-wide impact. Pet.App.13 (emphasis added). The Tenth Circuit expressly credited this extensive common evidence of impact in its opinion affirming the verdict. Pet.App.12-17 & n.6, 36-37 & nn.21-22.

That evidence was overwhelming. Respondents presented common proof showing that cartel members issued a series of industry-wide lockstep price increase announcements coordinated by top executives with nationwide pricing authority. Pet.App.12-17, 36-37 & nn.21-22, 59, 67; *see In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 67-68 (2d Cir. 2012) (class-wide

impact supported by coordinated lockstep price increases). Even Dow's own witnesses recognized that the collusive price increases were successful. Pet.App.37 n.22. One Dow witness admitted that the collusive announcements served as the starting point for all customer negotiations and that, post-negotiation, customers routinely accepted the full price increases and partially accepted many others. SA4156; *see In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656 (7th Cir. 2002) (the higher the list price, "the higher the ultimately bargained price is likely to be"). And dozens of documents and admissions in the record, including testimony from Dow's own employees, showed that the increases "stuck" and were "Working!!!!!!!!" *See* Pet.App.12-15, 36-37 & nn.21-22, 67-68. Those coordinated price increases prevented prices from falling, despite excess industry capacity and other market forces putting downward pressure on price. SA1964.

Expert testimony also provided common evidence of class-wide impact. Dr. Solow (whose testimony Dow did not challenge on appeal) testified that the structural features of the urethane industry—a "concentrated" market of "homogenous" products with "high barriers to entry" and "no close product substitutes"—made the industry highly conducive to class-wide price increases or price stabilization, and that nearly all class members had been impacted. Pet.App.22, 34-36, 69; *see also High Fructose Corn Syrup*, 295 F.3d at 656-58; *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 153-55 (3d Cir. 2002). Similarly, Dr. McClave's multiple-regression analysis of more than one million *actual* urethane transactions (comparing actual post-negotiation prices to prices

that would have prevailed in a competitive market) showed systematic overcharges throughout the conspiracy period, across all urethane products, all geographic regions, and for large and small customers alike. Pet.App.16, 25-31.[2]

The courts below correctly concluded based on this extensive evidentiary showing that the cartel's impact on purchasers was a common question. *See Zenith Radio v. Hazeltine Research*, 395 U.S. 100, 114 n.9, 125 (1969) (trial court may "infer from this circumstantial evidence that the necessary causal relation between the [antitrust violator's] conduct and the claimed damage existed"). Dow's suggestion that the decisions below turned on a "presumption" of impact simply cannot be squared with the record and the course of proceedings below.[3]

---

[2] Dow and its *amici* seem to challenge *any* use of statistical models to prove class-wide injury, Pet.23; DRI Br.19, but both plaintiffs and defendants commonly rely on such models in antitrust cases. *See, e.g.*, *High Fructose Corn Syrup*, 295 F.3d at 660-61; Federal Judicial Center, *Reference Guide on Multiple Regression* 348 n.90 (3d ed. 2012). In all events, Respondents also relied on voluminous non-econometric evidence of price impact. *See* Pet.App.37 n.22. And Dow never argued in its pre-trial motions that statistical modeling was categorically impermissible for proving cartel overcharges.

[3] Dow incorrectly conflates reasonable inferences from the evidence with "presumptions." Inferences are a staple of jury factfinding, *see Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986), including in antitrust cases. *E.g., Zenith*, 395 U.S. at 125; *Perkins v. Standard Oil*, 395 U.S. 642, 648 (1969). The jury instructions here made no mention of "presumptions." Jurors were properly instructed that they could "draw reasonable inferences … if reason and common sense lead you to draw particular conclusions from the evidence." ASA3; *see* ASA24-25.

2. Despite all the evidence summarized above, Dow asserts that the District Court abused its discretion by finding predominance because "prices are the product of individualized negotiations," and some customers may have been able to negotiate away the price hikes. Pet.25. But the District Court's findings regarding predominance were well within its discretion, and Dow's argument to the contrary fails as a matter of both law and fact.

As a matter of law, even if Dow could prove that a few customers were unaffected by the cartel over the full class period (not just for individual transactions), "pick[ing] off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate." *Halliburton v. Erica P. John Fund*, 134 S. Ct. 2398, 2412 (2014). The theoretical possibility that a few class members were entirely unaffected by years of coordinated price increases is simply not a basis for defeating class certification. *See In re Nexium Antitrust Litig.*, 777 F.3d 9, 24 (1st Cir. 2015); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 823 (7th Cir. 2012).

The proper inquiry—which both courts conducted here—is simply whether common questions of impact *predominate*. Pet.App.13. Courts have repeatedly rejected the narrow interpretation of Rule 23 advanced by Dow in commodity price-fixing cases involving lockstep price-increase announcements, even when some prices are individually negotiated. *See*, *e.g.*, *High Fructose Corn Syrup*, 295 F.3d at 656; *In re Titanium Dioxide Antitrust Litig.*, 284 F.R.D. 328, 346-47 (D. Md. 2012); *In re EPDM Antirust Litig.*, 256 F.R.D. 82, 88-89 (D. Conn. 2009). "Neither a

variety of prices nor negotiated prices is an impediment to class certification if it appears that plaintiffs may be able to prove at trial that, as here, the price range was affected generally." *In re Nasdaq Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 523 (S.D.N.Y. 1996).

Even beyond the legal deficiencies of Dow's position, Dow has failed to identify any *actual* class members that were not impacted in some way by the cartel, as the Tenth Circuit correctly recognized. Pet.App.40. The record showed that the cartel's coordinated pricing *maintained* prices that otherwise would have fallen in a competitive market. It is no answer to say that certain customers threw away a particular price announcement or negotiated away an increase on a few occasions. The existence of some negotiations hardly disproves class-wide impact in a case where prices would have fallen sharply absent the cartel. Pet.App.105 n.6.

At most, Dow's evidence shows that particular price announcements did not result in higher prices for certain specific *transactions*. But this evidence does not show that any particular *purchaser* emerged unscathed over the course of the entire class period. The urethanes cartel issued more than a dozen lockstep price announcements. Even if a purchaser were hypothetically able to fully negotiate away a price increase in one particular transaction, that customer would nonetheless be impacted if it paid an overcharge on another transaction or missed out on price declines that would have occurred in a competitive market.

Dow suggests that it "had no choice … but to litigate [these issues] on a class-wide basis," and was deprived of the ability to "challenge each individual's claims" of price impact. Pet.21, 25. But that is nonsense. Dow had eight years of discovery to obtain evidence of "individualized" negotiations. Nothing stopped Dow from introducing evidence of customers who purportedly resisted the cartel's efforts to increase prices. Indeed, Dow presented such evidence in an effort to secure a class-wide defense verdict, *see* SA5891, 5894, but the jury was persuaded by the sea of common evidence of pervasive price impact. Having tried its case and lost on this issue, Dow cannot now suggest that it was not given a full and fair opportunity to respond to Respondents' evidence of class-wide impact.[4]

Dow further contends that it lacked more extensive evidence of individualized negotiations because it was unable to take discovery from absent class members. Pet.25. The Tenth Circuit disagreed, noting that Dow "has not pointed us to any such order limiting discovery." Pet.App.23 n.11. And Dow glosses over the fact that it was a *seller* of the products in question, and thus any evidence of "individualized negotiations" was readily accessible to the cartel. Dow and other cartel members would obviously know if one

[4] For the same reason, *amici*'s suggestion that Dow's due process rights were violated falls flat. *See* Chamber of Commerce Br.13. Dow received all the process to which it was due: Dow took years of discovery, had the right to challenge every element of every plaintiff's claim, and presented copious evidence over the course of a four-week trial (including exhaustive cross-examination of Respondents' witnesses).

of their customers had negotiated down the price of a product.

B. Every Court Evaluates Predominance Based on the Facts of Each Case.

Dow's assertion that "[t]he class in this case could not and would not have been certified in the First, Fifth, or Eighth Circuits," Pet.17, mischaracterizes decisions that applied the same legal standard as the Tenth Circuit and turned on highly fact-dependent inquiries. Notably, even though Dow alleges a sprawling circuit conflict, Pet.15-17, not a single one of the cited cases acknowledges a conflict of authority on this issue.

In *every* circuit, the key consideration in evaluating predominance is not some "presumption" of impact, but whether the evidence establishes that common questions of class-wide impact will predominate over individual questions. *See Amgen v. Conn. Retirement Plans*, 133 S. Ct. 1184, 1196-97 (2013). Whether impact can be proved on a class-wide basis "reflect[s] more a factual difference in the cases themselves than a difference over legal principles." *Windham v. Am. Brands*, 565 F.2d 59, 68 (4th Cir. 1977) (en banc). There are no "hard and fast rules … regarding the suitability of a particular type of antitrust case for class action treatment," and "*the unique facts of each case will generally be the determining factor governing certification*." *Robinson v. Tex. Auto. Dealers Ass'n*, 387 F.3d 416, 421 (5th Cir. 2004) (emphasis added).

None of the decisions that Dow cites on the other side of the purported split involved the extensive evidentiary showing of class-wide impact that

characterizes the record in this case. Nor did those cases involve a jury verdict crediting plaintiffs' common proof.

In *Robinson*, for example, the Fifth Circuit noted that many price-fixing cases are "particularly suitable" for class certification because "impact may be shown simply by proof of purchase at a price higher than the competitive rate." 387 F.3d at 422. But, based on the unusual facts of that case, the court found predominance lacking because the plaintiffs did not put on *any* proof of impact other than the bare fact that the proposed class included all car buyers who had paid an allegedly anticompetitive vehicle tax. *Id.* at 423. Plaintiffs merely "assume[d]" without any additional evidence that payment of the tax would "artificially increase[] the final purchase price for every consumer in the class." *Id.*

In stark contrast, neither the District Court nor the Tenth Circuit needed to "assume" anything here. Unlike the pre-certification prediction in *Robinson*, an extensive trial record showed that nearly all purchasers paid supracompetitive prices at some point during the class period. Pet.App.22, 69. That evidentiary showing renders this case precisely the sort of price-fixing case *Robinson* described as "suitable for class action treatment." 387 F.3d at 422.[5]

---

[5] Dow cites a lone footnote from Areeda & Hovenkamp *Antitrust Law*, which cites *Robinson*. 2A Phillip E. Areeda et al., *Antitrust Law* §398 n.21 (3d ed. 2004). Contrary to Dow's position, however, both *Robinson* and the treatise make clear that predominance is a factbound inquiry and that no bright-line rule immunizes whole classes of antitrust violations from class-action treatment. *See Robinson*, 387 F.3d at 420-21; Areeda §331.

The Fifth Circuit's decision in *Alabama v. Blue Bird Body*, 573 F.2d 309, 322 (5th Cir. 1978), similarly acknowledged that nationwide price-fixing conspiracies for "standardized" products "are particularly suitable for class action treatment." As the court explained, in cases involving "homogeneous" or "fungible" goods, "'impact' and 'buyer' become almost synonymous," and class-wide impact is readily established. *Id.* at 324. The *Blue Bird* conspirators targeted the manufacture of school bus bodies, which are "not a homogeneous product" and must "meet the individualized specifications of thousands of different public entities." *Id.* at 312 & n.9. Purchasing procedures likewise varied state-by-state depending upon each state's bidding practices. *Id.* at 313-14. Given these significant disparities among both purchasers and products, the Fifth Circuit refused to certify the class. *Id.* at 327-28. But *Blue Bird* hardly suggests that certification would be inappropriate in the market for *commodity* urethane chemicals. *See* Pet.App.35-36.

Citing *In re New Motor Vehicles Litigation*, 522 F.3d 6 (1st Cir. 2008), Dow also claims that the First Circuit has endorsed its theory of predominance. But Dow fails to mention a subsequent First Circuit decision that *favorably cited* the Tenth Circuit's decision here for the very issue on which Dow claims a split of authority, thereby dispelling any suggestion of a split. *See Nexium*, 777 F.3d at 31 (also citing *New Motor Vehicles*). The court made clear that its earlier decision in *New Motor Vehicles* turned on a preliminary failure of proof because the plaintiffs "did not [yet] have evidence" of class-wide impact. *Id.* at

24.[6] Here, of course, both the District Court and the Tenth Circuit relied on extensive evidence of class-wide impact in finding the predominance requirement satisfied.

The Eighth Circuit's decision in *Blades v. Monsanto*, 400 F.3d 562 (8th Cir. 2005), is no more helpful to Dow. The conspiracy in *Blades* was not a traditional horizontal price-fixing conspiracy and applied only "to some (but not all)" of hundreds of non-commodity products. *Id.* at 573-74. The district court also concluded that the plaintiff's expert opinions fell "far short" of establishing impact and there was no "reliable methodology to determine the premiums paid by farmers." *Id.* at 570-71.

Acknowledging that certification was a "close" call, the Eighth Circuit deferred to the district court's denial of class certification based on an extensive evidentiary record. Tellingly, however, the court expressly *declined* to adopt the district court's rationale that certification was improper solely because the plaintiffs "often received varying discounts from the list prices, so each … would have to prove separately that he paid an actual transaction price that was supra-competitive." *Id.* at 572. Instead, the court found certification improper because the conspiracy targeted only some of the roughly 250 kinds of non-commodity seed varieties sold in varying regional markets. *Id.* at 568, 573. In

[6] In *New Motor Vehicles*, the First Circuit did not even resolve whether common issues could predominate in that case but instead merely remanded for the district court to engage in additional discovery and the "searching inquiry" required by Rule 23. 522 F.3d at 25-26.

stark contrast, Dow and its co-conspirators engaged in a classic price-fixing scheme that imposed lockstep, *across-the-board* price increases on each of the homogenous products at issue. Indeed, the Tenth Circuit cited *Blades* with approval in the decision below. *See* Pet.App.14.

In sum, each of these decisions stands for the unremarkable proposition that whether common issues predominate over individualized issues is a fact-dependent inquiry. There is no conflict over the correct legal standard for "predominance." The outcome of each case does not turn on a purported "presumption" of impact, but instead depends entirely upon the evidence put forth by the plaintiff (or lack thereof) in support of class certification. The application of a settled legal standard to the facts of this case does not warrant this Court's review.

C. Dow's Proposed Bright-Line Rule Would Have Severe Consequences for Antitrust Litigation.

It is unsurprising that no court has ever endorsed Dow's view of the law, as that position would have severe consequences for antitrust litigation. Dow effectively seeks a bright-line rule that, even in a highly commoditized and homogenous market, an executive-level price-fixing cartel cannot be the subject of a class action if there is *any* individual negotiation of prices. Pet.21. This would be a radical reinterpretation of Rule 23, which has never been construed as requiring that every class member be affected in *exactly the same way* in order to certify a class. *See Halliburton*, 134 S. Ct. at 2413. Even though courts have long viewed commodity cartel

claims as uniquely well-suited for certification, *Amchem*, 521 U.S. at 625, and even though private actions play a "significant" role in enforcement of the antitrust laws, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979), Dow's proposed rule would immunize not only Dow's established wrongdoing here, but also the vast majority of price-fixing cases from civil litigation.[7] There is no circuit split for this Court to resolve because there is no circuit authority for Dow's position.

Even if there were some basis for adopting Dow's proposed bright-line rule—and there is not—this case would not be the proper vehicle in which to take that drastic step. Evidence, not presumptions, led the District Court and the Tenth Circuit to rule that common issues predominated. The jury, moreover, considered and rejected Dow's class-wide evidence and arguments about the effect of customer negotiations on the question of impact, and Dow is not entitled to re-litigate those disputed factual questions on appeal. *See Perkins*, 395 U.S. at 648.

Both the District Court and the Tenth Circuit also concluded that Dow's decertification motion—filed one day before the start of trial—was untimely and contrary to Dow's previous representation that it would not move to decertify. Pet.App.17, 56. The District Court made clear that Dow's waiver was an independently sufficient basis to deny the motion. Pet.App.56-57. This Court could not even reach the

---

[7] Nearly every major cartel resulting in fines in excess of $10 million prosecuted by the Antitrust Division of the Department of Justice over the past 30 years—dozens of cases—involved collusion in "negotiated price" industries.

substance of Dow's arguments unless it first considered, and reversed, the highly factbound holding that Dow's motion was dilatory and untimely.[8]

II. Petitioner's Factbound Challenge To The Damages Award Does Not Warrant This Court's Review.

A. The Damages Award Was Eminently Reasonable and Based on a Well-Established and Reliable Methodology.

1. Numerous courts have recognized that a jury may award class-wide damages based on reliable estimates drawn from available industry data. *See, e.g.*, *In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599, 603 (7th Cir. 2014) (expressing preference for "uniform" class-wide damage methodology instead of "buyer-specific remedial approach"); *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 534-35 (6th Cir. 2008) (affirming aggregate damage award in price-fixing case); *see also* Newberg on Class Actions §10:5 (4th ed. 2005) ("[a]ggregate computation of class monetary relief is lawful and proper").

Plaintiffs also bear a "more relaxed burden of proof" on damages than on other elements of a claim, "especially if … the defendants' conduct has made it difficult for the plaintiff to prove the precise extent of his damages." *BCS Servs. v. Heartwood*, 637 F.3d 750, 759 (7th Cir. 2011). Once the plaintiff establishes the

---

[8] Perhaps recognizing that the untimeliness of Dow's motion to decertify poses an obstacle to this Court's review, one *amicus* encourages the Court to grant certiorari on that issue as well. *See* WLF Br.14-19. But the presence of this dispositive threshold issue is a reason to deny certiorari outright, not to add another question presented.

fact of damages, as to the amount, the "wrongdoer" must "bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-65 (1964). It is thus sufficient for an antitrust plaintiff to offer a "just and reasonable estimate of the damage based on relevant data," which can include "probable and inferential as well as … direct and positive proof." *Id.*

Here, the jury's damage award credited testimony from McClave, who calculated aggregate class-wide damages by estimating damages for each class member based on each member's total purchases. SA3501-04. McClave used his multiple regression model to estimate damages directly for all class transactions for which adequate data were available. As to the remaining transactions for which data were unavailable or unreliable, McClave used standard "extrapolation" methodology and estimated damages by applying the modeled, post-negotiation overcharges to the relevant class members' purchase data. SA3531-61. Far from "assum[ing] that every transaction involved an overcharge," Pet.26, McClave's methodology accounted for the *actual* variations produced by individual negotiations.[9]

Dow's argument that McClave's "aggregate damages calculations"—"well established in federal court and implied by the very existence of the class action mechanism itself"—"violated Rule 23 or [its]

---

[9] The regression analysis demonstrated that approximately 90% of class period transactions involved an overcharge, that 98% of modeled customers were injured during the class period, and that 99.9% of modeled sales were to injured customers. AA2441, 2445.

due process rights … fails in the starting gate." *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 197-98 (1st Cir. 2009). Indeed, Dow's own expert did not dispute that extrapolation may be used in precisely such scenarios where "there's not enough data points to do an analysis" for certain individual plaintiffs' damages. SA5552-54.

To the extent Dow is concerned about "the merits" of McClave's conclusions and analysis, those concerns "should normally be left to the jury." *Manpower, Inc. v. Ins. Co. of Penn.*, 732 F.3d 796, 808 (7th Cir. 2013). The jury's class-wide determination of damages based on the evidence offered at trial is a paradigmatic factual finding entitled to exceptional deference on appeal. *See, e.g., Cooper Indus. v. Leatherman Tool Grp.*, 532 U.S. 424, 432 (2001) ("A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination[.]").

2. Dow now argues that the Tenth Circuit erred by approving a damages award that involved extrapolations when necessary. Pet.26. But Dow made a strategic decision to litigate damages on a class-wide basis and thus *affirmatively invited* the jury's class-wide resolution of this issue. Pet.App.23 & n.11.

Dow did not so much as mention "extrapolation" as an issue in any of its pre-trial *Daubert* filings. Nor did it request individualized damages determinations in the Pretrial Order, its proposed jury instructions, its proposed verdict form, or its (untimely) motion to decertify. Pet.App.59; *see* AA468-69, 554. Dow also declined the District Court's invitation to move to bifurcate the damages portion of the trial, instead

requesting "a single finding on class-wide damages." Pet.App.23 n.11. At trial, Dow exhaustively cross-examined McClave regarding the reliability of his conclusions, and presented class-wide evidence through competing expert opinions on extrapolation methodology in an attempt to undermine McClave's estimates.

Following this exchange of class-wide evidence, the jury was properly instructed on the relevant legal standards for establishing class-wide damages. After weighing all the evidence and crediting McClave's estimates in part, the jury issued a single award of "total damages." While Dow's subsequent regret in the face of an adverse class-wide verdict is understandable, Dow is not entitled to a mulligan to remedy its own tactical decisions and deliberate waiver of the opportunity to address damages on an individualized basis.

3. Dow's attempt to repackage its challenge to the damage award as a *Wal-Mart* defect also fails. For example, Dow contends that McClave's use of extrapolation—a standard statistical technique—is akin to the "Trial by Formula" this Court rejected in *Wal-Mart*. Pet.29-30.

At the outset, this argument is waived and untimely. Rather than present this supposed methodological concern in a *Daubert* motion or any other timely pre-trial submission, Dow waited until "the day before trial," even though Dow "had received Dr. McClave's report 21 months earlier" and this Court had decided *Wal-Mart* 18 months earlier. Pet.App.17. Dow now argues that it "directly challenged the propriety of McClave's extrapolation"

at trial. Pet.30. But that merely underscores that Dow in fact litigated and the jury resolved these issues on a class-wide basis. Having opted for a trial strategy that relied on class-wide damages evidence, it is far too late for Dow to invoke vague concerns about "Trial by Formula."

In all events, as the Tenth Circuit correctly concluded, *Wal-Mart* is inapposite. Pet.App.11-18. This case did not involve some *avant garde* use of "test cases" as a substitute for a trial on class-wide liability, but rather a well-established extrapolation methodology that has been used to estimate damages in a wide array of civil cases, including antitrust cases.[10] *See, e.g.*, *Scrap Metal*, 527 F.3d at 532-34.

The *Wal-Mart* class was doomed from the start because there was no way to prove *liability* without a "company-wide policy of discrimination" or "a common mode of exercising discretion." 131 S.Ct. at 2554-55; *see id.* at 2551, 2557 n.10; *IKO Roofing*, 757 F.3d at 602 ("In that situation damages differ, to be sure, but only because the underlying conduct differs."). Here, in contrast, McClave did not extrapolate to "prove Dow's liability"; instead "Dow's liability as to each class member was proven through common evidence" that went well beyond McClave's testimony. Pet.App.18; *supra* Part I.A. With Dow's liability otherwise established, McClave used extrapolations—

[10] This Court recently denied a petition for certiorari insisting, as Dow does here, that aggregate damages awards violate Rule 23(b)(3). *See Carpenter, Co. v. Ace Foam*, 135 S. Ct. 1493 (2015). This case is even less worthy of review in light of the post-trial posture and commoditized market far less complicated than the market in *Carpenter*.

an uncontroversial statistical tool in price-fixing cases—solely to reliably estimate damages. That well-established use of statistical techniques in damages calculations is entirely consistent with *Wal-Mart*.

B. There Is No Split Over the Use of Class-Wide Damages Calculations in Antitrust Cases.

Dow is flatly wrong to suggest that there is a split of authority over "whether class-wide damages can be based on estimated averages." Pet.26-32. No court has adopted Dow's categorical rule that damages may *never* be estimated through class-wide statistical proof.

For example, Dow cites the Second Circuit's decision in *McLaughlin v. American Tobacco*, but that suit involved a sprawling RICO class action against the tobacco industry filed on behalf of tens of millions of smokers, none of whom could establish the elements of reliance, injury, and damages on a class-wide basis. 522 F.3d 215, 220, 222 (2d Cir. 2008), *abrogated by Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639 (2008). The concern in *McLaughlin* was not the award of aggregate damages but the problem of a "fluid recovery" award where plaintiffs could not identify who was injured and who was not. *Id.* at 231-32. The award in *McLaughlin* would have "involve[d] an initial estimate of the percentage of class members who were defrauded," and "[t]he total amount of damages suffered would then be calculated based on this estimate." *Id.* at 231. Such "fluid recoveries" based on pure speculation risk "an astronomical damages figure that does not accurately reflect the number of plaintiffs actually injured by defendants

and that bears little or no relationship to the amount of economic harm actually caused by defendants." *Id.*

The Ninth Circuit's decision in *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974), also involved plaintiffs' request for "fluid recovery" in a class action involving "forty million" plaintiffs, "hundreds" of defendants, and antitrust injury issues so individualized that they "could require decades of litigation." *Id.* at 88-89. The Ninth Circuit rejected the "fluid recovery" solution as a mechanism to avoid proving injury because that methodology "allow[ed] gross damages by treating unsubstantiated claims of class members collectively." *Id.* at 90.

Dow's discussion of *McLaughlin* and *Hotel Charges* "confuses the concept of fluid recovery with aggregate damages." *Scrap Metal*, 527 F.3d at 534; *see also In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 945 (9th Cir. 2015) (cautioning against "conflat[ing]" a settlement fund with "fluid recovery"). Unlike "fluid recovery" awards where damages are determined before liability is established, the use of aggregate damages is common where each member of a well-defined class has been identified with particularity and class-wide injury has been established at trial. *See* Newberg on Class Actions §10:5 (4th ed. 2005).

Nor does *Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331 (4th Cir. 1998), call into question aggregate awards. *Broussard* involved a class of franchisees plagued by conflicts of interest and other issues that "seriously infected the class certification." *Id.* at 340-42. And because the franchisees' dispute involved individualized "lost

profit" claims, any damages issues were "not a natural candidate for class-wide resolution." *Id.* at 343. The lost-profits calculation required consideration of "market saturation, shop location, and the local economy," as well as "the level of service at each shop and the management skills of the franchisee." *Id.* Worse still, the plaintiffs' expert "admitted that he had 'not attempted to calculate the damages that *any* individual franchisee ha[d] suffered.'" *Id.* (emphasis added). *Broussard* does not remotely cast doubt on the standard class-wide damages methodology used here.

Finally, Dow invokes *Espenscheid v. DirectSat USA*, which involved a damages model based on a "small, unrepresentative sample." 705 F.3d 770, 774-75 (7th Cir. 2013). But in the absence of the methodological deficiencies unique to *Espenscheid*, the Seventh Circuit has expressly *approved* damages estimates based on "average" statistical analysis, "especially [where] the defendants' conduct has made it difficult … to prove the precise extent of his damages." *BCS Servs.*, 637 F.3d at 759-60; *see IKO Roofing*, 757 F.3d at 602-03. Neither *Espenscheid* nor any of the other cases cited by Dow conflicts with the Tenth Circuit's decision here.

C. The Tenth Circuit's Decision Is Entirely Consistent With *Comcast*.

Dow makes a final, half-hearted contention that McClave's model suffers from the "same error" that precluded certification in *Comcast*, contending that Respondents' damages case is not "'consistent with [their] liability case.'" Pet.32 (quoting *Comcast*, 133 S. Ct. at 1433). This issue is not properly presented to this Court, given Dow's failure to challenge McClave's

model in a timely fashion. Pet.App.22, 61. But *Comcast* is also inapposite in both posture and substance, as the Tenth Circuit methodically explained. Pet.App.19-24 & n.10.

In *Comcast*, the lower court "refus[ed]" to undertake a "rigorous analysis" of predominance at the class-certification stage. 133 S. Ct. at 1432-33. Here, in contrast, not only did the District Court conduct the requisite analysis, but the actual trial confirmed that the model was reliable and that "individualized issues did not predominate." Pet.App.20. Before trial, the District Court scrutinized a voluminous factual record and found that McClave's model was relevant and reliable under *Daubert*, a ruling Dow did not challenge on appeal. The jury, in turn, considered all the evidence, including Dow's cross-examination of McClave, and found that the model was reliable and fit the liability case. The courts below credited the jury's damages award. Whereas *Comcast* involved *no* findings on the merits of the damages model, here a jury and four federal judges scrutinized the record at multiple stages of the case and unanimously found that Respondents' models reliably measured the damages caused by the cartel.

Beyond these procedural differences, there is also no substantive issue akin to that addressed in *Comcast*. As the Tenth Circuit explained, the model here shared none of the "benchmark" concerns at issue in *Comcast*. Pet.App.20 n.10. Unlike *Comcast*, Dow's liability "fits" the damage estimate and there is no basis for believing damages were inflated. The model controlled for non-conspiracy variables such as input

costs and demand, and compared urethane chemical prices during a "competitive" period in the industry to prices for the same products, producers, and customers during the conspiracy period. This is the textbook methodology for estimating cartel damages, as even Dow's own expert acknowledged at trial. SA5537; *see also* SA2919-20; Areeda §392d; *Bigelow,* 327 U.S. at 262-64. Based on the evidence presented at trial, the jury was entitled to conclude that the price-fixing conspiracy caused an anti-competitive overcharge, and that is precisely what the jury found.

Moreover, Dow had every opportunity to argue at trial that allegations of a "customer allocation" conspiracy somehow inflated damages beyond those caused by the price-fixing cartel. But Dow first made this argument only after it lost at trial. Pet.App.22. Such *post hoc* speculation is no basis for upsetting the jury's unequivocal finding that McClave's model reliably estimated damages caused by Dow's cartel. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000) (court "must disregard" factual assertions by Dow at this stage). In all events, the factual record, jury verdict, and Dow's trial strategy render this case a decidedly poor vehicle for addressing any *Comcast* questions.

Finally, Dow suggests that there was a problem with McClave's model because the jury's ultimate award was lower than the damage figures estimated by McClave. Pet.33. But there is a world of difference between the proof problems in *Comcast* and the common, unobjectionable practice of a jury finding liability and awarding damages for a shorter period than the plaintiff alleged. *See* Pet.App.42-43

(collecting cases). Respondents' "failure to prove a conspiracy for part of the alleged conspiracy period does not invalidate the finding of liability for [another] part of th[e] period." Pet.App.39. Nothing about that reasonable weighing of the evidence—quintessentially the role of the jury—undermines McClave's model. The verdict should stand.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari.

Respectfully submitted,

DONALD L. PERELMAN
ROBERTA D. LIEBENBERG
GERARD A. DEVER
MATTHEW DUNCAN
PAUL COSTA
FINE, KAPLAN AND BLACK, RPC
One South Broad Street
23rd Floor
Philadelphia, PA 19107

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
TAYLOR A.R. MEEHAN
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

RICHARD A. KOFFMAN
KIT A. PIERSON
CHRISTOPHER J. CORMIER
SHARON K. ROBERTSON
LAURA M. ALEXANDER
COHEN MILSTEIN SELLERS & TOLL, PLLC
1100 New York Ave. NW
Suite 500, West Tower
Washington, DC 20005

MICHAEL J. GUZMAN
REBECCA A. BEYNON
MICHAEL N. NEMELKA
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, PLLC
1615 M Street NW
Suite 400
Sumner Square
Washington, DC 20036

JOSEPH GOLDBERG
FREEDMAN BOYD HOLLANDER GOLDBERG URIAS & WARD, P.A.
20 First Plaza
Suite 700
Albuquerque, NM 87102

ROBERT W. COYKENDALL
ROGER N. WALTER
MORRIS, LAING, EVANS, BROCK & KENNEDY, CHARTERED
300 North Mead
Suite 200
Wichita, KS 67202

Counsel for Respondents

May 11, 2015