No. 11-864

In The Supreme Court of the United States

COMCAST CORPORATION, COMCAST HOLDINGS CORPORATION, COMCAST CABLE COMMUNICATIONS, INC., COMCAST CABLE COMMUNICATIONS HOLDINGS, INC., and COMCAST CABLE HOLDINGS, LLC,

Petitioners,

v.

CAROLINE BEHREND, STANFORD GLABERSON, JOAN EVANCHUK-KIND, and ERIC BRISLAWN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.

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BRIEF FOR RESPONDENTS

Respondents Caroline Behrend, Stanford Glaberson, Joan Evanchuk-Kind, and Eric Brislawn respectfully submit that the Court should dismiss the writ as improvidently granted or, if it reaches the Question Presented in spite of the parties' pending settlement and Comcast's failure to preserve its claims of error, affirm the judgment of the court of appeals.

STATEMENT OF THE CASE

This appeal involves an attempt by Comcast to avoid a settlement agreement that the parties signed two weeks before the Court granted review and that is presently before the district court on a motion to enforce. The agreement settles a case asserting collusion and abuse of market power claims that Respondents brought in 2003 under the Sherman Act to remedy the anticompetitive conduct that gave rise to Comcast's regional dominance in wireline cable services.

The complaint alleges that, starting in 1998, Comcast violated section 1 of the Sherman Act by agreeing with Time Warner and other cable operators to allocate multi-channel video customers in the Philadelphia area to Comcast[1] and that, during the

[1] *See Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49 (1990) (per curiam) (holding agreement between former competitors not to compete in Georgia violated section 1); *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972) (striking down under section 1

(Continued on following page)

same time period, Comcast violated section 2 of the Sherman Act by monopolizing and attempting to monopolize the Philadelphia market.

The parties do not dispute that Comcast became the dominant provider of multichannel video programming distribution ("MVPD") services in the Philadelphia designated marketing area ("DMA")[2] by entering into a series of contracts with competing cable providers. Pet. App. 97a-99a; J.A. 727a-40a. In some of the contracts, Comcast "swapped" cable systems it owned in areas outside the Philadelphia DMA for systems within it. In others, Comcast bought entire companies and, with them, the cable systems they had operated inside the Philadelphia DMA. Pet. App. 97a-99a; J.A. 727a-31a.

The swaps and acquisitions increased Comcast's share of subscribers in the Philadelphia DMA from 23.9 percent in 1998 to 77.8 percent by 2002. Pet. App. 108a. The deals also raised the Herfindahl-Hirschman Index ("HHI") for the Philadelphia DMA from 1,833 in 1998 to between 6,148 and 6,178 in 2002. *Id.* The HHI ranges from zero to 10,000, and

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agreement not to compete in territories where parties had never competed before).

[2] The Philadelphia DMA covers 18 counties in Delaware, New Jersey, and Pennsylvania. The class definition excludes the two counties in which Comcast does not provide cable services.

federal antitrust agencies consider an HHI above 2,500 to indicate "Highly Concentrated Markets".[3]

The departures of non-Comcast MVPD operators ended any competitive threat they posed to Comcast in the DMA as potential overbuilders of Comcast's own systems.

The swaps and acquisitions, which Respondents challenge as unlawful restraints of trade under section 1 and as illegal monopolization and attempt to monopolize under section 2, increased Comcast's geographic footprint in the Philadelphia DMA and created a Comcast "cluster". The growth of the Comcast cluster in turn decreased the availability of desirable potential points of entry for overbuilders and increased the economic incentive of Comcast to hinder overbuilding. Pet. App. 123a-39a. It also put systems that once belonged to smaller cable operators into the hands of a large multi-system operator ("MSO"). Pet. App. 101a.

Because the economics of overbuilding made the process less expensive and risky if the overbuilder could start from a location near its existing infrastructure, because ownership of systems by MSOs and clustering increase prices, and because owning contiguous systems enhances the incumbent's ability and incentive to prevent or limit overbuilding, the

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[3] U.S. Dep't of Justice and Federal Trade Comm'n, *Horizontal Merger Guidelines* § 5.3 & n.9 (2010); *see* Pet. App. 108a n.12.

swaps and acquisitions had the effect of deterring overbuilding while raising subscribers' prices to supra-competitive levels. Pet. App. 123a-46a.

Government studies and academic research support the conclusion that clustering and ownership of systems by MSOs discourage overbuilding and lead to higher prices for cable. Pet. App. 123a-36a.

RCN, an overbuilder, planned to overbuild five of the counties in the Philadelphia DMA. Pet. App. 82a (Jordan, J.). But for Comcast's anticompetitive conduct, RCN would likely have continued overbuilding beyond the original five counties. *Id.* But in 2001, RCN withdrew from its efforts to overbuild in Philadelphia.

In the district court, U.S. Senior District Judge John R. Padova rejected Comcast's multiple attacks on the pleadings. D.E. 155, 188 & 220. After extensive motion practice and appeals regarding Comcast's attempt to compel arbitration, the parties waived any right to arbitrate and stipulated that this case and cases relating to Comcast's similar conduct in the Boston area would proceed before Judge Padova. D.E. 244.

In May 2007, Judge Padova issued an order certifying a class of cable subscribers from the Philadelphia area to assert antitrust claims against Comcast. D.E. 195. Comcast sought leave to appeal under Federal Rule of Civil Procedure 23(f), claiming errors

in Judge Padova's class certification order and complaining of "hydraulic pressure" to settle.[4] The Court of Appeals for the Third Circuit denied Comcast's Rule 23(f) petition on June 29, 2007. D.E. 210.[5]

Soon after the Third Circuit decided *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008), Comcast sought to apply *Hydrogen Peroxide* to decertify the Philadelphia and Chicago classes. D.E. 317. After briefing and argument, the district court treated Comcast's motion as a "Motion for Reconsideration" of its May 2, 2007 class certification order and granted it in part, ordering new briefing to address the requirements of *Hydrogen Peroxide*. D.E. 326. "Comcast effectively conceded that there was predominance with respect to the element of an antitrust violation, stipulating that it was contesting only 'the Rule 23(b) issues of predominance of the common issues of (1) antitrust impact and (2) methodology of damages.'" Pet. App. 54a (Jordan, J.). At Comcast's request, the district court set the matter for a hearing. D.E. 379.

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[4] The fact that for five years after the district court certified the Philadelphia class Comcast chose not to pursue settlement illustrates the unlikelihood that certification in itself exerts inordinate pressure on defendants to settle.

[5] Judge Padova later certified a class of cable subscribers from the Chicago area to bring similar claims against Comcast. D.E. 231. Judge Padova stayed the Chicago class's claims, and the Philadelphia class began merits discovery. D.E. 244.

The evidentiary hearing went forward over four days on October 13-15 and 26, 2009. D.E. 407, 409, 411 & 423. The district court permitted the parties to present, and it carefully considered, 32 expert reports relating both to class certification and to merits issues, a great many documents, and excerpts from the depositions of more than a dozen witnesses. *See, e.g.,* D.E. 383-86 & 397-98. The district court also took live testimony from fact and expert witnesses, with each side cross-examining the other's witnesses. J.A. 68a-710a. And Judge Padova himself closely examined the witnesses. *E.g.*, J.A. 100a-01a, 118a-19a, 134a-35a & 415a-21a.

Comcast did not object to the admissibility of any of the expert testimony or reports that Respondents presented in connection with the hearing. *E.g.*, J.A. 72a, 103a, 150a, 346a, 719a, 720a, 816a-50a, 1104a-48a, 1202a-66a & 1304a-497a. Nor did Comcast raise any challenge to the qualifications of Respondents' experts under Rule 702 of the Federal Rules of Evidence or *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 469 (1993). R. 83a ("No objection for this hearing, your Honor.") (as to Dr. James McClave); R. 344a (as to Dr. Michael Williams). Comcast instead took the position that the preponderance of the evidence did not support a finding of predominance of the common issues of (1) antitrust impact and (2) methodology of damages. D.E. 412 at 8 ("Plaintiffs have not met their burden of showing that antitrust impact is capable of being proven at trial by proof common to

the class, or that a reliable methodology exists for proving damages on a classwide basis.").

The evidence that Respondents and Comcast offered – and that Judge Padova admitted without objection by Comcast – included extensive proof that, in the words of the Question Presented, "the case is susceptible to awarding damages on a class-wide basis." Dr. Michael Williams, an economist, testified that, in his opinion, four "non-exclusive mechanisms" had "cause[d] the high prices that we see in the Philadelphia DMA" (J.A. 403a):

- "the withholding of Comcast SportsNet Philadelphia from the satellite providers" and the resulting reduction in "DBS penetration rates throughout the Philadelphia DMA and resulting in Comcast increasing its rates throughout the Philadelphia DMA." J.A. 403a.
- "the connection between increased clustering and decreased likelihood or probability of over-building" and the "relationship between clustering and high prices". J.A. 404a.
- the effect of "clustering on Comcast's bargaining power . . . that provides a powerful incentive and ability for Comcast to increase its rates". J.A. 404a-05a.
- reduction in "benchmark competition". J.A. 406a.

Dr. James McClave, a statistician and econometrician,[6] "provided a damages model based on a common methodology available to measure and quantify damages on a class-wide basis." J.A. 35a; *see* J.A. 131a n.24 ("It is undisputed by the experts that multiple regression analysis is an acceptable and widely recognized statistical tool for measuring antitrust impact."). "His econometric analysis demonstrated that the alleged antitrust impact was class-wide, because the prices were elevated above competitive levels across all class members and for the entire time period." J.A. 35a. "For his methods, Dr. McClave constructed 'but-for' prices against which to compare the prices Comcast charged in the Philadelphia DMA." *Id.* "To construct the 'but-for' prices, he first selected comparable 'benchmark' counties around the country by applying two 'screens' to determine whether the counties represented a level of competition similar to what Comcast would have faced in the Philadelphia market absent its alleged anticompetitive conduct." J.A. 35a-36a.

Comcast questioned the benchmarks that Dr. McClave chose on the ground that "your but-for world does not necessarily resemble what would have happened" in the Philadelphia DMA if Comcast had not engaged in anticompetitive conduct. J.A. 261a. Dr. McClave consistently answered that "[i]n terms of price it does." *Id.*; *see, e.g.,* J.A. 99a (stating that he

[6] J.A. 68a-83a (describing Dr. McClave's credentials).

chose screens to simulate "areas in which there might be, if plaintiffs are right, relatively more competition than there is in Philadelphia"); J.A. 208a ("The question is what would the prices have been in Philadelphia absent the anti-competitive behavior.").

Dr. McClave further explained why, when using a multiple regression analysis, benchmark areas need not "look like" the area of observation (in this case the Philadelphia DMA):

> Q. Now, in order to have a reliable and appropriate estimate of damages, using the methodology that you use, does [sic] the benchmark areas and the areas of observation, need to be identical as to those characteristics?
>
> A. No, that's what a multiple regression analysis is.
>
> Q. If, in fact, the benchmark areas and the areas of observation were identical and the only thing that was different was the collusion and the prices, if they were identical, would you need multiple regression?
>
> A. No. You had two identical areas, one that had collusion and one that didn't, you could just compare the prices.
>
> Q. That's all you –
>
> A. You wouldn't need multiple regression that makes adjustment for this.

> Q. What are these adjustment that are being accounted for on your factors on the right-hands [sic] side of the equal sign? And also, the stuff that is accounted for in the way you define our benchmark area? What are those things doing?
>
> A. They are adjusting for differences between the benchmark and Philadelphia.
>
> Q. Is that the purpose of multiple regression?
>
> A. Absolutely.

J.A. 329a.

After the four-day trial, Judge Padova issued to the parties a series of questions touching on many aspects of the antitrust impact and methodology of damages issues. One of the questions asked "how do we interpret Dr. McClave's damages model if, as we anticipated would occur, we credited at least one but not all of Dr. Williams' four bases for antitrust impact?" J.A. 186.

On November 16, 2009, Judge Padova heard argument to address those questions. D.E. 428.

On January 7, 2010, Judge Padova recertified the Philadelphia class. D.E. 431. He stated that, "[h]aving reviewed Dr. McClave's methodology more closely, we are convinced that our decision not to credit Williams' DBS foreclosure theory of antitrust impact does not impeach Dr. McClave's damages model." Pet.

App. 186a. Judge Padova added that Dr. McClave's "selection of the DBS screen to serve this purpose [of isolating the effect of the anticompetitive conduct on price] is entirely unrelated to Dr. Williams' DBS foreclosure theory." Pet. App. 187a.

He also concluded:

> The experts' opinions raise substantial issues of fact and credibility that we are required to resolve to decide the pending motion. Having rigorously analyzed the expert reports, as well as the testimony presented by the parties during a four-day evidentiary hearing, we conclude that the Class has met its burden to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members, and that there is a common methodology available to measure and quantify damages on a class-wide basis.

Pet. App. 91a (citing *Hydrogen Peroxide*, 552 F.3d at 316).

In its memorandum recertifying the Class, the district court articulated the standards governing the class certification decision, including that:

- "[c]lass certification is only appropriate 'if the trial court is satisfied, after a rigorous analysis,' that each requirement of Rule 23 has been met" (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982));

- "rigorous analysis" requires "'a thorough examination of the factual and legal allegations'" and "the resolution of all legal or factual disputes relevant to Rule 23 by a preponderance of the evidence" (citing *Hydrogen Peroxide,* 552 F.3d at 316);
- "[a]s with other matters relating to Rule 23 requirements, '[e]xpert opinion . . . calls for rigorous analysis'" (citing *Hydrogen Peroxide,* 552 F.3d at 323, 325);
- "a rigorous analysis may require the district court to weigh conflicting expert testimony at the certification stage and determine whether an expert's opinion is persuasive or unpersuasive" (citing *Hydrogen Peroxide*, 552 F.3d at 323, 324); and
- "[t]he court must resolve expert disputes to the extent necessary to determine whether a Rule 23 requirement has been satisfied" (citing *Hydrogen Peroxide*, 552 F.3d at 324).

Pet. App. 92a-96a.

The district court's Amended Order of January 13, 2010 "reaffirm[ed] and hereby incorporate[d]" its findings "that the Rule 23(a) requirements of numerosity, commonality, typicality and adequacy had been satisfied by the Class and that the Class satisfied the Rule 23(b)(3) requirement of superiority." Pet. App. 190a. But the Amended Order did narrow the scope of the class's antitrust impact proof. It provided

that "[p]roof of antitrust impact relative to such claims shall be limited to the theory that Comcast engaged in anticompetitive clustering conduct, the effect of which was to deter the entry of overbuilders in the Philadelphia DMA." Pet. App. 192a-93a.

On appeal, Comcast did not contend that Judge Padova erred in admitting the expert opinions of Dr. McClave under *Daubert*. Pet. App. 43a n.13 (noting that "'in neither the District Court nor before us' did Comcast raise this issue") (quoting 66a n.18 (Jordan, J., dissenting)). It instead argued that Judge Padova clearly erred or abused his discretion. Pet. App. 66a n.18. Nor did Comcast complain that Dr. McClave's model used an "Overbuilt Counties Screen". Pet. App. 47a n.15 (pointing out that "the Concurrence-Dissent . . . raises multiple arguments against Dr. McClave's damages model not addressed by Comcast's experts at the District Court level nor advanced by Comcast on appeal"); Pet. App. 73a n.23 ("The Majority notes that this particular problem with Dr. McClave's damages theory was not identified by Comcast, but we ought note [sic] overlook significant problems with the class certification simply because they are ones we have identified rather than ones to which our attention has been directed.") (Jordan, J., dissenting).

The court of appeals affirmed the recertification order on August 23, 2011. Applying *Hydrogen Peroxide*, the majority explained that to certify a class the "district court must conduct a 'rigorous analysis' of the evidence and arguments in making the class certification decision." Pet. App. 13a. "The analysis

requires 'a thorough examination of the factual and legal allegations' and 'may include a preliminary inquiry into the merits.'" *Id.* (quoting *Hydrogen Peroxide*, 552 F.3d at 317).

The court of appeals noted that Respondents "bear the burden of establishing each element of Rule 23 by a preponderance of the evidence." Pet. App. 14a. For Rule 23(b)(3), the majority explained, Respondents needed to prove that the class qualifies as "sufficiently cohesive to warrant adjudication by representation." Pet. App. 15a (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)).

All members of the court of appeals panel agreed that Judge Padova had properly found that class plaintiffs could prove antitrust impact on all class members using evidence common to the class. Pet. App. 27a-34a & 56a-64a.

The majority also held that Judge Padova did not clearly err or abuse his discretion in ruling that, through the extensive expert testimony of Dr. McClave, plaintiffs had "provided a damages model based on a common methodology available to measure and quantify damages on a class-wide basis." Pet. App. 35a. The majority noted that "Comcast does not contest that the Court performed the 'rigorous analysis' required by *Hydrogen Peroxide*." *Id.* Even if the majority had overruled the district court's findings regarding Dr. McClave's methodology, the majority noted that "only the final amount of estimated damages would change," *not* the fact that plaintiffs could

prove damages through common proof on a class-wide basis. Pet. App. 48a-49a.

The majority rejected Comcast's abuse of discretion and clearly erroneous attacks, which Comcast now recasts as admissibility issues. Comcast's main complaint in this Court – a complaint that adopts an argument "against Dr. McClave's damages model not addressed by Comcast's experts at the District Court level nor advanced by Comcast on appeal", Pet. App. 47a n.15 – prompted the majority to respond:

> This concern misses the central theory of Plaintiffs' case: by deterring the entry of overbuilders through clustering, Comcast allegedly maintained higher prices across the *entire market area*. Dr. McClave's damages model appropriately reflected a "but-for" world by accounting for overbuilding only in the five counties where RCN attempted to overbuild, and his resulting calculations showed that – taking the limited actual overbuilding into account – "the Philadelphia DMA market prices were elevated above the but-for prices in every county-year combination."

Id. (emphasis in original).[7]

[7] In a footnote, the majority also pointed out that Comcast had twice forfeited any *Daubert* complaint by failing to raise it both in the district court and on appeal. Pet. App. 43a n.13. The majority went on, in dicta, to construe the Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), "to

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Comcast filed a petition for writ of certiorari in this Court. The petition asked "whether a district court may certify a class without resolving 'merits arguments' that bear on Rule 23's prerequisites for certification". Cert. Pet. at i. Neither in the petition nor in its reply brief did Comcast mention *Daubert* or raise any question of admissibility.

By early 2012, the parties completed briefing on Comcast's motion for summary judgment and presented oral argument on the motion to Judge Padova. The district court issued its opinion granting the motion in part and denying it in part on April 12, 2012. D.E. 475. In summary, Judge Padova sustained Respondents' "section 1 rule of reason claim, based upon the theory that Comcast's creation of the Philadelphia cluster through its acquisition of competing cable companies and its swapping of cable assets constituted a horizontal allocation of markets" and the "section 2 monopolization claim . . . and attempted monopolization claim, which contend that Comcast acted with predation in creating its anti-RCN targeted discounts". J.A. 812a-13a.

On May 8, 2012, Dr. McClave, at the district court's invitation, filed a supplemental report on damages. Dr. McClave there pointed out, contrary to

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require a district court to evaluate whether an expert is presenting a model which could evolve to become admissible evidence, and not requiring a district court to determine if a model is perfect at the certification stage." *Id.*

the conclusion Judge Jordan reached (on a point Comcast did not raise), that he did not "assume[ ] that elevated prices resulting from reduced overbuilding would be present in only five of the eighteen Philadelphia counties" Pet. App. 72a (Jordan, J.), and concluded:

> The damage percentages vary by year and by county; in general, they are higher for the five counties that RCN indicated it initially planned to overbuild than in the other 11 counties in the DMA. This results not from economic theory, but from the effect on price [that] overbuilding actually had in the benchmark markets. While the damage estimates are lower in the non-overbuilt counties, they are still positive, substantial, and statistically significant. This is consistent with Class Plaintiffs' allegations that Comcast's clustering behavior led to the challenged anticompetitive behavior (horizontal market allocation and/or deterring overbuilding, including RCN's overbuilding plans), which in turn led to supracompetitive prices throughout the Philadelphia DMA.

D.E. 512 Ex. 1 at 9.

The supplemental report also provided an "alternative estimate [that] involves the effect of removing the DBS screen in defining the competitive benchmark." D.E. 512 Ex. 1 at 10. Dr. McClave said:

> If the jury were to disagree with me (and Judge Padova and the majority opinion in the Third Circuit) about using the DBS

> screen as a means to locate competitive markets, then my damages methodology can still be utilized. The effect of expanding the benchmark by dropping the DBS screen is to reduce the damage estimate to $548 million. The reduction in damages is attributable to the inclusion of less competitive markets in the benchmark after the DBS screen is removed, thereby increasing but-for prices and lowering damages. However, damages remain substantial and statistically significant.

Id.

On May 9, 2012, Judge Padova specially set the case for trial on September 5, 2012. D.E. 500.

On June 8, 2012, Comcast for the first time moved to exclude Dr. McClave's opinions under *Daubert*. D.E. 511.

On June 11, 2012, after a day-long mediation under the supervision of the district court, counsel for class plaintiffs and Comcast signed an Outline of Proposed Settlement Key Terms. The parties confirmed the agreement on June 12 and by letter of June 13 asked Judge Padova to remove the case from the September 5 trial docket in light of the pending settlement. D.E. 515.

This Court granted Comcast's petition for writ of certiorari on June 25, 2012. Two days later, Comcast informed Respondents that it would not proceed to finalize the settlement. On June 29, Respondents

filed a motion to enforce the settlement. D.E. 514 & 515. Comcast opposed the motion, D.E. 524, and Respondents filed a reply in support of the motion, D.E. 528. On July 31, Judge Padova vacated pending deadlines, including the trial setting. D.E. 531. Judge Padova held a hearing on the motion to enforce the settlement on August 21. D.E. 540. The motion remains pending in the district court.

SUMMARY OF ARGUMENT

The parties' pending settlement supports dismissal of the writ as improvidently granted. Dismissing the writ would further the policy of encouraging settlements. The settlement also materially changes the nature of the Question Presented in that in the context of a settlement class concerns about the ability of the class to prove their claims on a class-wide basis at trial on the merits become less important.

Comcast failed to raise the admissibility issues it now advocates in this Court, rendering the plain error test the appropriate standard of review in this case. Applying the plain error standard would substantially alter the Court's analysis of the Question Presented such that an answer to the Question Presented would give lower courts scant guidance on addressing admissibility issues in the great majority of cases in which parties opposing admission of evidence for purposes of a class certification motion will have preserved objections to admission of the

evidence. Comcast also failed to show plain error under current law, which does not plainly or obviously require admissible evidence. Comcast's procedural defaults support dismissal of the writ as improvidently granted or, alternatively, summary affirmance.

In the event the Court reaches the merits despite the parties' pending settlement and Comcast's failure to preserve its claims of error, Respondents answer the Question Presented with a narrow and cautious "yes" that emphasizes the abstract and hypothetical nature of the question in this case and the importance of according district courts broad discretion in how they handle admissibility issues, including under *Daubert*, in connection with a motion for class certification.

That answer would not affect the outcome of this appeal. The evidence that the district court admitted and credited without objection by Comcast would meet any applicable test for admission and validly show, on a class-wide basis, that all class members suffered measurable damages. The admissibility arguments that Comcast has for the first time adopted in its brief on the merits before this Court suffer from logical flaws and lapses that would have become obvious in the district court had Comcast made the arguments there in a timely fashion. The completely new complaint that the Respondents' damages model assumes only some class members suffered damages as a result of overbuilding simply misreads the evidence. The argument that the damages model

assumes that lawful conduct caused some of the damages also does not withstand scrutiny. The model in fact shows that Comcast's anticompetitive behavior produced all of the class-wide damages. And another totally new argument posits, wrongly, that calculating damages on a class-wide basis makes individual issues predominate and certification under Rule 23(b)(3) inappropriate.

ARGUMENT

I. THE PARTIES' SETTLEMENT SUPPORTS DISMISSAL OF THE WRIT AS IMPROVIDENTLY GRANTED

The settlement of a case generally moots it. *E.g., U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 29 (1994) (addressing "mootness by reason of settlement" and holding it "does not justify vacatur of a judgment under review"). Here, the parties settled the entire case, including any dispute over recertification of the Philadelphia class, before the Court granted Comcast's petition for writ of certiorari.

Although Comcast now opposes it, the pending settlement counsels restraint here. As the Court has noted, "public policy wisely encourages settlements". *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215 (1994); *see Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 407 (1992) ("To the extent that litigants are allowed to avoid their solemn commitments, the motivation for particular settlements will be compromised,

and the reliability of the entire process will suffer.") (Stevens, J., dissenting). The policy favoring voluntary settlement agreements "'is especially strong in class actions and other complex cases . . . because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by federal courts.'" *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 311 (3d Cir. 2011) (en banc) (quoting *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010)). Allowing the settlement to take its course in the district court will further the goal of fostering settlements and holding parties to their bargains.

The pending settlement at all events materially alters the question before the Court. "Settlement is relevant to a class certification." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619 (1997). In the context of a settlement, "a district court need not inquire whether the case, if tried, would present intractable management problems, *see* Fed. R. Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial." *Id.* at 620. The Second Circuit recently held that settlement obviates concerns about a class's ability to prove an element of its claim on a class-wide basis. *See In re Am. Int'l Group, Inc. Sec. Litig.*, 689 F.3d 229, 241 (2d Cir. 2012) (holding that district court erred in ruling that settlement class, unlike non-settlement class, "must satisfy the fraud-on-the-market presumption in order to demonstrate predominance"); *see also Sullivan v. DB Investments*, 667 F.3d at 303-04 (holding that under *Amchem* problems with varying state treatments of indirect purchaser

claims did not prevent certification of settlement class). In similar circumstances, the Court has for prudential reasons dismissed writs as improvidently granted. *See TICOR Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1994) (per curiam) (dismissing writ in class action where, "as matters have developed it is not clear that our resolution of the constitutional question will make any difference even to these litigants", who "had reached a settlement designed to moot the petition, which now awaits the approval of the district court"); *Taggart v. Weinacker's, Inc.*, 397 U.S. 223, 224-25 (1970) (per curiam) ("While the changed circumstances do not necessarily make the controversy moot, they are such that, if known at the time the petition for a writ of certiorari was acted upon, we would not have granted it.").

The Court should dismiss the writ as improvidently granted.

II. IN THE COURTS BELOW, COMCAST DID NOT MAKE THE ARGUMENTS IT NOW ADVOCATES, AND THEREFORE THE COURT SHOULD DISMISS THE WRIT AS IMPROVIDENTLY GRANTED OR SUMMARILY AFFIRM THE JUDGMENT OF THE COURT OF APPEALS

A. Comcast's Forfeiture of any Admissibility (and *Daubert*) Challenges to Dr. McClave's Expert Reports and Testimony Alters the Standard of Review for the Question Presented

Comcast chose not to object to admission of Dr. McClave's expert reports and testimony on any ground – including for lack of relevance under Rule 402 and for failure to comply with the test for expert testimony under Rule 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). The lack of a timely objection normally forfeits any complaint on appeal, as this Court deems a party that fails to preserve error to have "*forfeited* the claim of error". *Puckett v. United States*, 556 U.S. 129, 138 (2009) (applying plain error test to failure to object to breach of plea agreement) (emphasis in original).

Rule 103 of the Federal Rules of Evidence demands, as a prerequisite to complaint on appeal, timely objection to the evidence.[8] And lower courts

[8] Rule 103 provides, in relevant part:

(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence

(Continued on following page)

recognize the Court's requirement that parties preserve error under Rule 103 and treat "[f]ailure to raise a *Daubert* challenge at trial" as a forfeiture of "the right to raise objections to the substance of expert testimony post-trial." *Skydive Ariz., Inc. v. Quattrocchi*, 673 F.3d 1105, 1113 (9th Cir. 2012) (rejecting challenge to expert's testimony on damages); *see Macsenti v. Becker*, 237 F.3d 1223, 1233-34 (10th Cir. 2001) (holding that *Daubert* objection to expert testimony at close of trial evidence came too late to preserve error); *C.B. Fleet Co., Inc. v. SmithKline Beecham Consumer Healthcare, L.P.*, 131 F.3d 430, 437 (4th Cir. 1997) (rejecting post-trial *Daubert* objection "under the guise of a challenge to the substantive sufficiency of this evidence"); *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1066-67 (9th Cir. 1996) (declining to entertain on appeal *Daubert* challenge that party presented "in the guise of an insufficiency-of-the-evidence argument").

The failure to object to admission of evidence calls for application of a standard different from the normal abuse of discretion test that governs under

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only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context

Fed. R. Evid. 103(a)(1).

Daubert. *See General Electric Co. v. Joiner*, 522 U.S. 136, 141-43 (1997) (holding that abuse of discretion standard applies to review of *Daubert* rulings). Instead, Comcast must show plain error. *See, e.g., Wallace v. McGlothan*, 606 F.3d 410, 421 (7th Cir. 2010) (holding that failure to object that experts' "testimony was unreliable" under *Daubert* "forfeited" the issue, "and we can only review for plain error"); *Goebel v. Denver & Rio Grande Western R.R. Co.*, 215 F.3d 1083, 1089 n.2 (10th Cir. 2000) ("If there is no objection to the expert testimony, the opposing party waives [forfeits] appellate review absent plain error.").

The Court explained the plain error rule in *Puckett v. United States*, 556 U.S. 129, 134 (2009), as follows:

> If a litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue. If he fails to do so in a timely manner, his claim for relief from the error is forfeited. "No procedural principle is more familiar to this Court than that a . . . right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States,* 321 U.S. 414, 444, 64 S.Ct. 660, 88 L.Ed. 834 (1944).
>
> If an error is not properly preserved, appellate-court authority to remedy the error (by reversing the judgment, for example, or

> ordering a new trial) is strictly circumscribed. There is good reason for this; "anyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal." *United States v. Padilla,* 415 F.3d 211, 224 (C.A.1 2005) (en banc) (Boudin, C.J., concurring).
>
> This limitation on appellate-court authority serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them. That court is ordinarily in the best position to determine the relevant facts and adjudicate the dispute. In the case of an actual or invited procedural error, the district court can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome. And of course the contemporaneous-objection rule prevents a litigant from "'sandbagging'" the court – remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor. *Cf. Wainwright v. Sykes,* 433 U.S. 72, 89, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); see also *United States v. Vonn,* 535 U.S. 55, 72, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002).

See, e.g., Kenneth S. Broun, *McCormick on Evidence* § 55 (6th ed. 2010) ("A failure to assert an objection promptly and specifically is a waiver.") (footnote omitted).

"Plain error is a stringently limited standard of review, especially in the civil context, and must result in a miscarriage of justice in order to compel reversal." *Lopez v. Tyson Foods, Inc.*, ___ F.3d ___, 2012 WL 3792545, at *4 (8th Cir. Sept. 4, 2012) (quoting *Schaub v. VonWald*, 638 F.3d 905, 925 (8th Cir. 2011)). To show plain error, Comcast must prove error that "is plain, affects substantial rights, and 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Jimenez v. Wood County, Tex.*, 660 F.3d 841, 845 (5th Cir. 2011) (en banc) (quoting *United States v. Mondragon-Santiago*, 564 F.3d 357, 361 (5th Cir. 2009)).

Comcast petitioned for review of the question "whether a district court may certify a class action without resolving 'merits arguments' that bear on Rule 23's prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3)." Cert. Pet. at i. Comcast did not mention *Daubert* or make any complaint about admission of evidence. And, after relisting the case several times, the Court granted review not on the question of "resolving 'merits arguments'" but on one involving the need, or not, for "admissible" proof. That Comcast never raised a complaint in the district court, the court of appeals, or in this Court before the day the Court granted review on a question Comcast never posed should come as no surprise. On appeal, Comcast must live with the consequences of forfeiting arguments in the courts below.

Comcast's forfeiture of *Daubert* and any other admissibility objections to Dr. McClave's testimony – like the parties' pending settlement – materially changes the circumstances from those under which the Court granted review. If Comcast had preserved error, the abuse of discretion standard would apply, both to the decision to recertify, *see Califano v. Yamasaki*, 442 U.S. 682, 703 (1979) (noting that "most issues arising under Rule 23 . . . [are] committed in the first instance to the discretion of the district court"), and to rulings on admissibility of Dr. McClave's opinion evidence, *see Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379 (2008) ("'A district court is accorded wide discretion in determining the admissibility of evidence under the Federal Rules.'") (quoting *United States v. Abel*, 469 U.S. 45, 54 (1984)). And the material change in the nature of the question before the Court – a question that in any event essentially relates to dicta in the court of appeals decision – would have the effect of guiding lower courts on the appropriate test to apply under Rule 23 to the rare cases in which the complaining party failed to preserve objections to admissibility, under *Daubert* and otherwise. Such "changed circumstances" warrant dismissal of the writ as improvidently granted. *Taggart v. Weinacker's, Inc.*, 397 U.S. at 224 (dismissing writ).

B. Comcast Has Failed to Show Plain Error "Under Current Law"

Comcast's failure to preserve its claim of error in the admission of Dr. McClave's opinion evidence also supports summary affirmance of the court of appeals' judgment. As the Court noted in *Johnson v. United States*, 520 U.S. 461, 467 (1997) (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)), the plain error rule treats "plain" as "'synonymous with 'clear' or, equivalently, 'obvious.'" "'At a minimum,' *Olano* concluded, the error must be plain 'under current law.'" *Id.* (quoting *Olano*, 507 U.S. at 734). And in *Johnson* the Court held that "current law" means "by the time of appellate consideration". *Id.* at 468.

But the law on whether Rule 23 requires "admissible" evidence on class-wide damages has not changed in this Court. The Court has never announced the answer to the question it posed in granting Comcast's petition – whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis. Indeed, in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554 (2011), the Court expressly chose not to decide whether a district court may properly certify a class in the absence of expert evidence admissible under *Daubert*. It would have made little sense for the Court to grant review in this case if it believed it had already resolved the "admissible evidence" question. In the absence of an intervening

change in the law, Comcast fails the first prong of the plain error test. *See Jimenez*, 660 F.3d at 847 & n.10 (rejecting plain error challenge that "does not rise to the level of obviousness" where "there has been no change in controlling law since the time of trial"); *see also United States v. Gaudin*, 515 U.S. 506, 526 & 527 (1995) (Rehnquist, C.J., concurring) (pointing out that "it is certainly subject to dispute whether the error in this case was 'clear under current law' " while noting that "the Government has not argued here that the error in this case was either harmless or not plain" and that the Court "does not review" the court of appeals decision for "plain error"). The Court should therefore summarily affirm the judgment of the court of appeals.

III. IF THE COURT REACHES THE QUESTION PRESENTED NOTWITHSTANDING THE PARTIES' PENDING SETTLEMENT AND COMCAST'S FAILURE TO PRESERVE ERROR, THE DISTRICT COURT'S RECERTIFICATION ORDER EASILY MET EVERY APPLICABLE STANDARD UNDER RULE 23(b)(3)

This case does not provide an appropriate legal posture or factual setting for the Court to give a definitive answer to the Question Presented. As Respondents have shown, Comcast never made – and therefore forfeited – any *Daubert* or other challenge to the admissibility of Respondents' expert evidence on class-wide damages. Thus, unlike the situation in

most class action cases, the plain error standard, rather than the usual abuse of discretion and clearly erroneous tests, governs here. And, despite Comcast's failure to object to admission of Dr. McClave's analysis, Judge Padova adhered faithfully to rigorous requirements that the Third Circuit mandated in *Hydrogen Peroxide* and as a result did not commit error, plain or otherwise, under *Daubert* or any other test, by admitting and crediting Dr. McClave's damages model as a means for establishing damages on a class-wide basis. The unpreserved error and the pending (but disputed) settlement combine with the district court's lack of error to make this case an inapt vehicle for ruling on the Question Presented.

In the event the Court nonetheless reaches the Question Presented in this case, Respondents would answer it as follows.

A. District Courts Need Not Make Final Rulings on Admissibility of Evidence, Including Expert Evidence, to Show that the Case Is Susceptible to Awarding Damages on a Class-Wide Basis Before Granting or Denying Class Certification in Rule 23(b)(3) Cases

Respondents agree, as a general matter, that a district court should resolve evidentiary objections, including under *Daubert*, that the opposing party timely makes, well presents, and properly preserves when the evidence bears critically on an issue the court must decide before granting or denying class

certification, whether or not the evidence or issue also overlaps with the merits. If a court relies on expert testimony as the basis for determining that trial of the merits on a class basis can generate common answers, the competence and reliability of the expert testimony are properly before the court at the time of the certification decision. And if the district court is confronted with a well-presented motion to strike an expert's report as inadmissible on *Daubert* grounds, then that court must resolve whether the report could be admitted even if the subject of the report overlaps with the ultimate merits of the case.[9]

But context matters. At trial, the admissibility of expert evidence may turn not only on *Daubert* issues but also on questions – including relevance, cumulative nature of the evidence, and failure to make timely disclosure – that have nothing to do with class certification. And the *Daubert* question before the court at the class certification stage differs from the one it must answer under *Daubert* at trial. If a party offers expert evidence in order to show (or negate) the feasibility of showing class-wide damages at trial using common proof, the evidence need not prove (or disprove) class-wide damages and instead needs to show only that, more likely than not, class-wide

[9] That rule fully accords with the district court's analysis, findings, and conclusions, all of which carefully applied the rigorous analysis and factual determinations that *Hydrogen Peroxide* called for.

methods of proving damages will (or will not) be available at trial. In many cases, perhaps most, the best way to make the showing will consist of proving class-wide damages with admissible evidence, whether expert or non-expert. Although not required, this would most of the time put any issues about the availability of class-wide proof at trial to rest. But it is at least conceivable and reasonable to expect that, in many cases, a district court may properly admit expert evidence that complies with *Daubert* but that itself does not directly prove damages on a class-wide basis. That is perhaps what the majority in the court of appeals alluded to when it spoke, in dicta (because of Comcast's failure to preserve its claim of error), of the possibility that evidence may evolve to become admissible at trial.

None of this implies rigidity. The normally deferential review of *Daubert* rulings applies with particular force in the context of pre-trial proceedings like class certification. *See Joiner*, 522 U.S. at 143 (rejecting court of appeals "overly 'stringent' review" of district court's ruling under *Daubert* because "it failed to give the trial court the deference that is the hallmark of abuse-of-discretion review"). The Court in *Joiner* emphasized that the importance of a *Daubert* ruling to the outcome of a case did not justify "a more searching standard of review." *Id.* (discussing ruling on expert testimony in context of an "outcome determinative" setting). And the Seventh Circuit has noted

that "the usual concerns of the rule – keeping unreliable expert testimony from the jury – are not present in such a [non-jury] setting, and our review must take this factor into consideration." *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 760 (7th Cir. 2010) (citing *Attorney Gen'l of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 779 (10th Cir. 2009)). The Eighth Circuit confirmed the premise:

> The main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony. That interest is not implicated at the class certification stage where the judge is the decision maker.

In re Zurn Pex Plumbing Prods. Liability Litig., 644 F.3d 604, 613 (8th Cir. 2011), *cert. pending*, No. 11-740 (U.S.). Other courts of appeals agree. *Whitehouse Hotel Ltd. P'ship v. Comm'r*, 615 F.3d 321, 330 (5th Cir. 2010) (noting that "the importance of the trial court's gatekeeper role is significantly diminished in bench trials, as in this instance, because, there being no jury, there is no risk of tainting the trial by exposing a jury to unreliable evidence") (citing *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000)); *United States v. Brown*, 415 F.3d 1257, 1268 (11th Cir. 2005) ("Those barriers [to opinion testimony] are even more relaxed in a bench trial situation, where the judge is serving as factfinder and were are not concerned about 'dumping a barrage of questionable scientific

evidence on a jury.'") (quoting *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1310 (11th Cir. 1999)).

Indeed, the Court itself has stressed "that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable" under *Daubert*. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999). And applying a lower threshold for consideration of information that appears relevant to a preliminary proceeding happens often at the district court level. *See, e.g., Mullins v. City of New York*, 626 F.3d 47, 51-52 (2d Cir. 2010) ("The admissibility of hearsay under the Federal Rules of Evidence goes to weight, not preclusion, at the preliminary injunction phase.") (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). A one-size-fits-all approach to class certification would thus conflict with the flexibility that the Court accords to district courts even in the context of trials.

The question of admissibility of evidence to prove damages on a class-wide basis will not arise at all in many class actions. These include cases in which plaintiffs seek purely injunctive relief or declaratory relief on behalf of a class. *See Dukes*, 131 S. Ct. at 2557 ("The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted – the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'") (quoting

Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. Rev. 97, 132 (2009)). Other examples consist of cases in which a finding of liability automatically entitles class members to minimum statutory damages. *See Principles of the Law of Aggregate Litigation* § 2.03 comment c (discussing "the amenability of statutory damages to ready calculation").

But Comcast never raised the issue of admissibility until after the Court granted review in this case. That default renders the question abstract, hypothetical, and inappropriate for resolution here. And, in any event, as Respondents demonstrate below, an affirmative answer would not have affected the outcome in the trial court or in the court of appeals.

B. Dr. McClave's Expert Reports and Testimony Validly Show That All Class Members Suffered Damages from Comcast's Anticompetitive Clustering Conduct and Preclude a Finding of Plain Error

Comcast must demonstrate that Judge Padova plainly erred in accepting Dr. McClave's methodology

as a plausible way to show damages on a class-wide basis.[10] It has failed to meet its burden.[11]

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[10] The Court has historically required less precision in proof of the *quantum* of damages in antitrust cases than it does in evidence of a violation and a causal connection between the violation and individual injury. As the Court has recognized, "[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981) The standard for proving the amount of damages is thus less stringent than that required for proving the fact of damage, and after injury and causation have been shown, "'[t]he constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery' for a proven invasion of the plaintiff's rights." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946) (quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 565 (1931)); *see, e.g.,* ABA Section of Antitrust Law, *Antitrust Law Developments* 782 (7th ed. 2012); Herbert Hovenkamp, *A Primer on Antitrust Damages* 24 (2011) (noting that "[c]omputation of damages often involves more speculation than determining that a particular act is anticompetitive" and that the "Court has responded to these difficulties by setting a relatively high standard for proof of the *fact* of an antitrust violation and resulting injury, but a lower standard for proof of the amount of damages") (available at http://ssrn.com/abstract=1685919) (emphasis in original).

Nor must Respondents negate other possible causes of their damages. As the Court stated in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969), "[i]t is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4." "[T]he jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly." *Bigelow*, 327 U.S. 251, 264-65.

[11] Comcast could not carry its burden under the abuse of discretion test either.

1. Dr. McClave demonstrated that clustering raised prices to supra-competitive levels throughout the Philadelphia DMA

Judge Padova found as a matter of fact "that the McClave model is a common methodology available to measure and quantify damages on a class-wide basis." Pet. App. 187a; *see* Pet. App. 50a ("Plaintiffs have provided a common methodology to measure and quantify damages. The District Court acted within its discretion in so finding.") (footnote omitted). The district court concluded, rightly, that Philadelphia DMA prices reflect the impact of any anticompetitive conduct there and that Dr. McClave's methodology compares those Philadelphia prices to Comcast's own prices in more competitive markets to isolate the effect of the anticompetitive conduct in the Philadelphia DMA.[12] And Dr. McClave has stated consistently that his selection of the benchmark counties does not depend on any one ground for liability and that he used screens to identify proxies for relatively competitive markets. J.A. 99a, 208a & 261a. His use of "relatively competitive markets" as a "yardstick" benchmark in conjunction with standard econometric methodology to compute damages resulting from

[12] "The task is therefore to construct the but-for plaintiff in a way that justifies an inference that the difference between the plaintiff's but-for and actual experiences is attributable only to the effects of the violation." ABA Section of Antitrust Law, *Proving Antitrust Damages: Legal and Economic Issues* 57 (2d ed. 2010).

Comcast's anticompetitive conduct in the Philadelphia DMA accords with standard econometric practice.[13]

Yet Comcast aims to defeat the finding by raising in this Court a point that it did not assert below – the idea that Dr. McClave's model reflects damages from deterrence of overbuilding in only five of the 16 counties within Comcast's Philadelphia DMA footprint. Br. at 20.[14] The Court normally does not consider an argument that "makes its first appearance here in this Court in the briefs on the merits". *Ohio*

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[13] As Professor Hovenkamp points out about the yardstick method for computing damages:

> The ideal conspiracy for the yardstick approach is a local cartel where a nearby market can be found which has the same basic cost structure. Adjustments must probably be made for differences in taxes and regulatory fees, costs of transportation, and different wage and salary rates. However, if these differences can be isolated and quantified, an expert economist or accountant should be able to produce a 'reconstructed' price that would have prevailed in the cartelized market if it had the same level of competition as exists in the yardstick market.

Herbert Hovenkamp, *A Primer on Antitrust Damages* 31 (2011) (available at http://ssrn.com/abstract=1685919).

[14] Although Comcast does not note its failure to raise the argument before Judge Padova or the court of appeals, it can hardly deny the fact. The originator of the argument, the dissenting judge on the court of appeals panel, conceded "that this particular problem with Dr. McClave's damages theory was not identified by Comcast". Pet. App. 73a n.23 (Jordan, J., dissenting in part).

Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 738 & 739 (1998). The Court should not do it here either. Comcast's failure to raise the issue in the district court deprived Respondents of the ability to answer it – as indeed they did in 2012, after Comcast urged the dissenting judge's point on remand of the case from the court of appeals in the context of an actual *Daubert* motion. *See Ohio Forestry*, 523 U.S. at 739 (explaining that "we cannot consider" new claims that would have changed opposing party's analysis and therefore "are not fairly presented here").

But even if Comcast had timely presented this new argument, it would have failed because – unsurprisingly for an issue the parties did not litigate or even suspect existed – it rests on inaccurate inferences from Dr. McClave's reports. Contrary to Comcast's new argument, Dr. McClave did *not* "assume[ ] that elevated prices from reduced overbuilding could be present only in the five counties 'that RCN indicated it planned to enter", and the model did *not* "identify elevated prices from reduced overbuilding only in those counties." Pet. App. 72a (Jordan, J., dissenting). As Dr. McClave explained after remand, damages in his model "are higher for the five counties that RCN indicated it initially planned to overbuild than in the other 11 counties in the DMA." D.E. 512 Ex. 1 at 9. And he added that, "[w]hile the damages estimates are lower in the non-overbuild counties, they are still positive, substantial, and statistically significant" and are "consistent with Class Plaintiffs' allegations that Comcast's clustering behavior led to

the challenged anticompetitive behavior (horizontal market allocation and/or deterring overbuilding, including RCN's overbuilding plans), which in turn led to supracompetitive prices *throughout the Philadelphia DMA*." *Id.* (emphasis added).

Dr. McClave's post-remand explanation meshes exactly with Dr. Williams's testimony (on how lowering the *likelihood* of overbuilding through clustering affects prices) to Judge Padova in November 2009. As Dr. Williams explained at the time:

> So, the second mechanism [that connects Comcast market power to higher prices in the Philadelphia DMA] is the connection between increased clustering and *decreased likelihood or probability* of over-building. My reports lay out several mechanisms, several models under which this can happen, that are consistent with the economics literature on *relationship between clustering and high prices and demonstrate that the likelihood of over-building falls as the clustering increases*.

J.A. 404a (emphasis added).

Judge Padova plainly understood Dr. McClave's and Dr. Williams's analyses and opinions and found that Comcast's "conduct designed to deter the entry of overbuilders in the Philadelphia DMA" reduced competition not only in "these five counties" but also had antitrust "impact in the entire eighteen county DMA." Pet. App. 144a-45a (rejecting criticisms by Dr. Teece). Comcast's late adoption of a new argument

fails on the merits and under any standard. Judge Padova did not err in finding "that the McClave model is a common methodology available to measure and quantify damages on a class-wide basis." Pet. App. 187a.

2. The district court's exclusion of conduct it deemed non-actionable does not undercut Dr. McClave's conclusion that supra-competitive prices damaged all class members

Judge Padova found that his decision not to credit Dr. Williams's DBS foreclosure theory of antitrust impact "does not impeach Dr. McClave's damage model." Pet. App. 186a. He explained that Dr. McClave's "selection of the DBS screen to serve this purpose is entirely unrelated to Dr. Williams' DBS foreclosure theory." Pet. App. 187a. Judge Padova continued:

> It was merely [Dr. McClave's] method of choosing counties to serve as comparators. ***Any anticompetitive conduct is reflected in the Philadelphia DMA price, not in the selection of comparison counties.*** Thus, whether or not we accepted all of Dr. Williams' theories of antitrust impact is inapposite to Dr. McClave's method of choosing benchmarks. Because we have determined that the national average DBS penetration rate for Comcast markets is a valid screen, we concluded that the McClave model is a

> common methodology available to measure and quantify damages on a class-wide basis.

Id. (emphasis added). Judge Padova not only addressed the soundness of Dr. McClave's methodology but also specifically found that it passed the test.

The ruling makes sense. Correlation does not equal causation.[15] Dr. McClave's finding of a *correlation* between higher DBS penetration rates and lower prices does not necessarily mean that the former *caused* the latter. As Dr. McClave testified before Judge Padova:

> I was looking for markets in which DBS penetration was relatively high and in which Comcast's share of the market was relatively low. *As proxies for areas in which there might be, if plaintiffs are right, relatively more competition than there is in Philadelphia.*

J.A. 99a (emphasis added). And, when Comcast questioned the benchmarks that Dr. McClave chose on the ground that "your but-for world does not necessarily resemble what would have happened" in the Philadelphia DMA if Comcast had not engaged in anticompetitive conduct, Dr. McClave consistently answered that "[i]n terms of price it does." R. 261; *see, e.g.,* J.A. 208a ("The question is what would the prices have been in Philadelphia absent the anti-competitive

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[15] *E.g., Davis v. Time Warner Cable*, 651 F.3d 664, 677 (7th Cir. 2011) (noting that "correlation is not the equivalent of causation").

behavior."); *id.* ("I think what we're all really looking for is the but-for prices.").

Comcast's contrary position hinges on the false notion that Dr. McClave's model inflexibly depends on the existence of a causal relation between each of Dr. Williams's four "mechanisms" of antitrust impact and the damages he estimated. The inaccuracy of that idea defeats Comcast's position.

Dr. McClave made abundantly clear that his model did not assume or require a causal nexus with Dr. Williams's mechanisms. That position reflects the norm for damages experts. "The damages expert using the but-for approach does not usually testify separately about the causal relation between damages and the harmful act, although variations may occur where there are issues about the directness of the causal link." Federal Judicial Center, *Reference Manual on Scientific Evidence*, "Reference Guide on Estimation of Economic Damages" at 432 (3d ed. 2011). Judge Padova's rejection of three of the "mechanisms" could affect the accuracy of Dr. McClave's model only if Comcast showed, as a matter of law, that a causal connection in fact existed.

Comcast did no such thing. It in fact argued and endeavored to prove *the opposite*. Through its lawyers and experts, Comcast over and over again urged and offered evidence to show that *none* of the three mechanisms had any effect on prices within the Philadelphia DMA – leaving only deterrence of overbuilding to explain the supra-competitive prices in the

Philadelphia DMA. Comcast's Dr. Teece, for example, insisted that "I don't think there's any evidence that that competition [from DBS providers] would have caused Comcast to lower prices anywhere." J.A. 562a. Judge Padova may have credited Comcast's views on the absence of any causal connection between Dr. Williams's three unsuccessful mechanisms and higher prices in the Philadelphia DMA. Pet. App. 122a-23a (noting that "data on DBS penetration rates in Philadelphia" showed "higher than average growth during the class period" and "'indicates that [Comcast] did not anticompetitively foreclose DBS providers from competing effectively in the Philadelphia DMA'") (quoting Dr. Teece); Pet. App. 149a ("Dr. Williams has not provided adequate support for his theory that clustering eliminates benchmarking opportunities"); Pet. App. 161a (stating that "the criticisms of Dr. Williams' bargaining power model are aptly drawn").

Comcast thus plays Hamlet, hoisting itself with its own petard. The trier of fact could accept Comcast's claims that three of the four mechanisms *did not* result in higher prices while at the same time concluding that the remaining mechanism – clustering's deterrence of overbuilding – *did* have that affect and still properly use Dr. McClave's analysis to compute class-wide damages. Comcast itself provided the means for the trier of fact to do so.

The inaccuracy of Comcast's assumption of a causal link between the four mechanisms of Dr. Williams and the damages model of Dr. McClave exposes a deeper flaw in Comcast's position. As Dr. McClave has

explained, even if he removes the DBS screen from his model (and thus inappropriately skews the but-for world in favor of Comcast), class-wide "damages remain substantial and statistically significant" at $548 million. D.E. 512 Ex. 1 at 10. That surely counts as "measurable damages".

Nor would changing or discarding the two screens that Comcast criticizes render Dr. McClave's damages model unsuitable for proving damages on a class-wide basis using common proof. It would merely change the benchmark and thus result in a different damages total. In fact, ***damages remain class-wide and substantial even using the allegedly flawed econometric model, with a nationwide benchmark and average prices, that Comcast's own expert Dr. Chipty proposed*** (after correcting for obvious errors in Dr. Chipty's model, such as including $0 prices and excluding improper components). Pet. App. 177a n.51. Evidence that Comcast's own expert presented thus makes clear that Respondents *can* prove damages on a class-wide basis using common proof. Pet. App. 48a-49a ("Even if we were to overrule as clearly erroneous the District Court's findings on all four contested pieces of Dr. McClave's methodology – i.e., modify both of Dr. McClave's screens, add population density as a variable and incorporate Dr. Chipty's method for calculating discounts – only the final amount of estimated damages would change.").

The cases that Comcast cites do not support its position. All of them involved damages models that,

unlike Dr. McClave's, explicitly tied damages to specific theories. As he testified, Judge Padova found, and the court of appeals majority concluded, "Dr. McClave's damages methodology does not suffer from the defects present in those cases because it constructs a competitive 'but-for' world that includes lawful competition, not a hypothetical one bereft of both lawful and unlawful competition." Pet. App. 47a-48a (distinguishing *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056-57 (8th Cir. 2000) and *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1352-53 (3d Cir. 1975)).[16]

[16] *Concord Boat* involved a "Cournot model" that did not take account of the effects of lawful competition by third-parties. *Concord Boat*, 207 F.3d at 1056, 1057 (noting failure of damages model to consider effect of "the recall of [third-party] OMC's Cobra engine and the problems associated with the Volvo/OMC merger" and defendant's loss of market share to competitors). In *Coleman Motors*, sales projections by an independent Dodge dealership included "sales lost as a result of the factory dealerships' lawful competition." *Coleman Motors*, 525 F.2d at 1352. And *MCI Comm'ns v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1165-66 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983), dealt with a profit projection that failed to account for price erosion that would have resulted from lawful price competition by AT&T and third parties.

3. The purported need to allocate the class-wide damages award among class members does not cause individual issues to predominate

Comcast seems to suggest that Rule 23(b)(3) and the Rules Enabling Act require Respondents to prove everything – including the amount of individual class members' damages – in one trial. *See* Br. for Pets. at 29 (claiming that allowing "tri[al] as a class action . . . without requiring individual proof of damages" would alter "substantive rights"). Comcast never raised that point before its brief in this Court. Regardless, as the current *Manual for Complex Litigation* instructs, "the court may consider trying common issues first, preserving individual issues for later determination." *Manual for Complex Litigation, Fourth* § 21.5 (2004). "It is well established that the presence of individualized questions regarding damages does not prevent certification under Rule 23(b)(3)." *Messner v. Northshore University Healthsystem*, 669 F.3d 802, 815 (7th Cir. 2012) (citing *Dukes*). The class may properly prove damages on an aggregate basis. *See* 3 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 10:7 (2002) ("Class proof of damages, either by an aggregate lump sum award to the class as a whole or by application of mechanical formulae or statistical methods to individual class members claims, has received approval in several antitrust cases.") (footnote omitted). And a verdict in this case for Respondents "effectively will dictate that claimants receive retrospective relief in the form of damages and will determine the method for distribution of damages to individual claimants (e.g., based on a

formula keyed to an estimate of the per-unit increase in price attributable to the [unlawful] agreement)." Am. Law Institute, *Principles of the Law of Aggregate Litigation* § 2.03 ill. 12 (2010); *see id.* comment c ("When the nature of the injury suffered by claimants stems from their relationship both to the defendant and to each other through a market mechanism, as in much litigation concerning economic injuries, a finding of liability often will determine that the remedy for any given claimant should take the form of damages to be calculated by reference to some underlying benchmark reflecting the claimant's position within the relevant market."); *In re Pharm. Industry Av. Wholesale Price Litig.*, 582 F.3d 156, 197-99 (1st Cir. 2009) (discussing and affirming aggregate damages award after trial on merits to two classes of drug purchasers under state unfair business practices law).

The cases that Comcast cites involved very different circumstances. The first, *In re Hotel Tel. Charges Litig.*, 500 F.2d 86 (9th Cir. 1974), involved state deceptive trade practices and federal antitrust claims against dozens of hotel chains for imposing excessive surcharges at hundreds of hotels and motels nationwide on millions of customers for their telephone calls. The plaintiffs in that case could not prove even liability on a common basis, much less impact and damages. Much the same problems plagued the plaintiffs in *Windham v. Am. Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977), in which the court of appeals affirmed denial of class certification, *see id.* at 66 (noting that district court "referred to the multiplicity of claimants who might be involved, the complexity

of their claims as they would relate to injury and damages, and the highly individualized character the proof of injury and damages would assume, making necessary a mini-trial in all the individual claims, probably with a separate jury").

Nor did Comcast raise the need to allocate damages among class members as a ground for denying class certification in the courts below. It therefore forfeited the point.

CONCLUSION

The Court should dismiss the writ as improvidently granted or, alternatively, affirm the judgment of the court of appeals.

Respectfully submitted,

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