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 United States Court Of Appeals For The Tenth Circuit

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae DRI—The Voice of the Defense Bar is an international organization that serves and represents more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of civil litigation defense attorneys, addressing substantive, procedural, and policy issues germane to the defense of civil litigation, and improving the civil justice system. To help accomplish these objectives, DRI participates as *amicus curiae* in carefully selected Supreme Court cases which present issues that are important to civil defense attorneys, their clients, and the conduct of civil litigation.

Achieving fairness in class-action litigation—beginning with the crucial question of whether a proposed class meets the requirements for certification under Federal Rule of Civil Procedure 23—is extraordinarily important to DRI and its members. DRI has filed in this Court a substantial number of *amicus* briefs, including in *Comcast Corp.*

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* DRI—The Voice of the Defense Bar certifies that no counsel for a party authored this brief in whole or part, and that no party or counsel other than DRI, its members, and its counsel, made a monetary contribution intended to fund preparation or submission of this brief. The parties received advance notice of this brief as required by Supreme Court Rule 37.2(a). Petitioner's and Respondents' counsel have lodged with the Clerk letters consenting to the submission of *amicus* briefs.

v. Behrend, 133 S. Ct. 1426 (2013), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), addressing key issues relating to class-action fairness and certification. DRI also has testified before Congress about the compelling and continuing need for class-action fairness, a concern exacerbated by troublesome lower-court developments such as certification of classes encompassing members who have suffered no actual harm. *See The State of Class Action Ten Years After the Enactment of the Class Action Fairness Act*: *Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary* 114th Cong. (2015) (statement of John Parker Sweeney, President, DRI—The Voice of the Defense Bar) ("Sweeney testimony").[2]

Building upon earlier cases, this Court's *Wal-Mart* and *Comcast* decisions articulated or reiterated key principles governing the "rigorous analysis" that a federal district court must conduct in order to determine whether a proposed class satisfies Rule 23's multiple criteria for certification. *Comcast*, 133 S. Ct. at 1433; *Wal-Mart*, 131 S. Ct. at 2551 (quoting *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982)). Many lower courts, however, have ignored, distorted, or misconstrued this Court's class-action precepts, and by so doing, have abridged class-action defendants' substantive and due process rights, and undermined the civil justice system. With increasing frequency, lower courts have allowed plaintiffs to obtain and maintain class certification by

[2] *Available at* http://tinyurl.com/kvmjm5v.

relying upon contrived shortcuts—e.g., statistical sampling-and-extrapolation techniques; evidentiary inferences—that purport to demonstrate classwide injury or damages but actually defy reality. These created-for-litigation artifices flout fundamental class-certification requirements, particularly the need for plaintiffs to demonstrate classwide commonality of legal and factual questions, and as in the present case, the "even more demanding" requirement of establishing that common questions predominate over individualized issues. *Comcast*, 133 S. Ct. at 1432 (discussing Fed. R. Civ. P. 23(a) & (b)(3)). The result is transformation of what is supposed to be a purely procedural mechanism into a strategic scheme for obstructing a company's ability to defend itself by asserting individualized substantive defenses.

Once a district court embraces a statistical model or evidentiary inference to certify a class—and thereby abrogates a defendant's substantive and due process rights to assert defenses as to individual claims—the likelihood of obtaining Rule 23(f) interlocutory review is demonstrably slim. *See* Fed. R. Civ. P. 23(f) advisory comm. note (1998) ("The court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari."). As a result, no matter how unwarranted a class-action plaintiff's claims or erroneous a class-certification order may be, the pressure on a defendant to settle a newly certified class action is enormous. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1206 (2013) (Scalia, J., dissenting) ("Certification of the

class is often, if not usually, the prelude to a substantial settlement by the defendant because the costs and risks of litigating further are so high."); *id.* at 1212 n.9 (2013) (Thomas, J., dissenting) (referring to "*in terrorem* settlement pressures" following class certification); *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) ("Aggregating a great many claims . . . often creates a potential liability so great that the defendant is unwilling to bear the risk, even if it is only a small probability of an adverse judgment."); Fed. R. Civ. P. 23(f) advisory comm. note (1998) ("An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.").

In other words, "[a] court's decision whether to certify a class is often the decisive moment in a class action . . . ." Christopher A. Kitchen, *Interlocutory Appeal of Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f): A Proposal For a New Guideline*, COLUM. BUS. L. REV. 231, 232 (2004). It "can have a life or death impact on the course of class action litigation . . . ." Kenneth S. Gould, 1 J. APP. PRAC. & PROCESS 309, 312 (1999). For this reason, DRI believes it is essential that this Court grant certiorari in cases such as the present appeal in order to further explain or refine Rule 23 class-certification principles, which if applied faithfully by lower courts, may help to achieve some semblance of balance in class-action litigation.

The Dow Chemical Company's petition for a writ of certiorari in this price-fixing case well illustrates the rough justice currently available to class-action

defendants, even in light of *Wal-Mart* and *Comcast*. The Tenth Circuit affirmed certification of a class of industrial chemical purchasers under Rule 23(b)(3) based on two shortcuts: (i) a presumption of classwide antitrust impact (i.e., injury), even though it was undisputed that many class members avoided allegedly collusive price increases through a multitude of individual negotiations with the chemical supplier defendants, and (ii) statistical modeling that purported to calculate aggregate (i.e., classwide) damages by extrapolating an "average" overcharge based on estimates from a sample of sales transactions, rather than by determining the actual overcharges, if any, incurred by individual class members. As a practical matter, class certification cut off Dow's ability to defend itself by raising substantive defenses as to individual injured *or* uninjured class members' claims.

Following class certification, Dow and its co-defendants filed a Rule 23(f) petition for permission to appeal, which as is typical, was denied without explanation. At that point all defendants, except Dow, settled. After a trial—during which the district court refused to decertify the class despite the evidence that many class members engaged in numerous individual price negotiations that resulted in no overcharges (i.e., no economic harm)—the district court entered a treble-damages award exceeding $1 billion. In an opinion that attempts to circumnavigate both *Wal-Mart* and *Comcast*, the Tenth Circuit affirmed. That opinion, however, only deepened the circuit split regarding use of statistical sampling and extrapolation to obtain class certification: The Tenth Circuit interpreted *Wal-*

Mart as permitting extrapolation to establish commonality of damages but not liability, *see* Pet. App. 18a, in contrast to cases like *Jiminez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167 (9th Cir. 2014), *pet. for cert. filed*, No. 14-910 (Jan. 27, 2015), where the Ninth Circuit interpreted *Wal-Mart* and *Comcast* as allowing extrapolation to prove classwide liability but not damages.

DRI is filing this *amicus* brief to urge the Court to grant Dow's certiorari petition and issue an opinion that reinforces, and to the extent necessary clarifies or refines, the principles that district courts must follow when deciding whether a putative class action satisfies the requirements for certification under Rules 23(a)(2) and 23(b)(3). Although the present case arises in the antitrust context, the class-certification issues implicated by the Tenth Circuit's opinion not only are fundamental and recurring, but also broadly relevant to class-action litigants, their counsel, and courts confronted with the challenge of applying Rule 23 in a fair manner.

SUMMARY OF ARGUMENT

Rule 23, in modern form, was added to the Federal Rules of Civil Procedure in 1966 as an optional procedural device for regulating only the "manner and means" by which multiple parties' common "claims are processed." *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407, 408 (2010) (internal quotation marks omitted). Although class actions are intended to be no more than an "ingenious procedural innovation" for achieving judicial economy, *Eubank*, 753 F.3d at 719, "[c]lass action litigation in the twenty-first

century is big business." Saby Goshray, *Hijacked by Statistics, Rescued by Wal-Mart v. Dukes: Probing Commonality and Due Process Concerns in Modern Class Action Litigation*, 44 LOY. U. CHI. L.J. 467, 470 (2012). Today's "[c]lass actions are the brainchildren of the lawyers who specialize in prosecuting such actions." *Eubank*, 753 F.3d at 719. Certification of a class is often the only major hurdle that such specialists need to overcome to achieve a class-action settlement which, following approval, can yield substantial attorney's fees. *Id.* at 720. Almost all certified class actions are settled prior to trial because—as the present appeal demonstrates—the risks of going to trial are too high.

With alarming frequency, lower courts are allowing plaintiffs' counsel to skirt the stringent requirements for class certification under Rules 23(a)(2) and 23(b)(3). District courts are too easily exercising their discretion to find commonality and predominance of fundamental questions such as injury and damages by endorsing statistical magic, which in the nimble hands of a mathematical wizard, seems to make significant differences among class members conveniently disappear. When accepted by a court, such an illusion deprives defendants of their rights to assert individualized defenses.

The Court in *Wal-Mart* and *Comcast* rejected the use of flawed statistical analyses to demonstrate commonality and predominance. Those frequently cited decisions, however, have not deterred lower courts, such as the Tenth Circuit here, from adopting statistical and other shortcuts to certify classes which, in reality, include many uninjured members

whose claims otherwise would be vulnerable to individualized defenses. By abridging defendants' substantive rights, such shortcuts violate the Rules Enabling Act, 28 U.S.C. § 2072(b), as well as obstruct due process.

The Court should grant certiorari to reinforce, clarify, and/or refine, the principles that govern application of Rules 23(a)(2) and 23(b)(3), particularly with regard to use of statistical extrapolations and other class-certification expedients, and thereby correct the wayward course that the lower courts have continued to pursue.

ARGUMENT

THE COURT SHOULD GRANT REVIEW TO REINFORCE, AND TO THE EXTENT NECESSARY CLARIFY OR REFINE, CLASS-CERTIFICATION PRINCIPLES GOVERNING COMMONALITY AND PREDOMINANCE

A. The Court Should Clarify Whether, or Under What Circumstances, a Class Containing Many Members That Have Suffered No Harm Can Satisfy the Requirement For Commonality

Because a class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979), Rule 23 "imposes stringent requirements for certification that in practice exclude most claims." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013). To "ensure[] that the named

plaintiffs are appropriate representatives of the class whose claims they wish to litigate," *Wal-Mart*, 131 S. Ct. at 2550, Rule 23(a) establishes "four threshold requirements applicable to all class actions"—numerosity, commonality, typicality, and adequate representation. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). These class-action prerequisites "effectively limit the class claims to those fairly encompassed by the named plaintiff's claims." *Falcon*, 457 U.S. at 156 (internal quotation marks omitted). They are "crucial . . . to the integrity of the process" because they "test[] the cohesiveness of the class." Goshray, 44 LOY. U. CHI. L.J. at 476.

Commonality is "the rule requiring a plaintiff to show that 'there are questions of law or fact common to the class.'" *Wal-Mart*, 131 S. Ct. at 2550-51 (quoting Fed. R. Civ. P. 23(a)((2)). It "requires the plaintiff to demonstrate that the class members 'have *suffered the same injury*,'" *id.* at 2551 (quoting *Falcon*, 457 U.S. at 157), and that "[t]heir claims must depend upon a common contention . . . capable of *classwide* resolution . . . *in one stroke*." *Id.* at 2551 (emphasis added). This is not "a mere pleading standard"; a "party seeking class certification must affirmatively demonstrate compliance with the Rule—that is, he must be prepared to prove that there are *in fact* . . . common questions of law or fact." *Ibid.* This "is the most fundamental characteristic of class action certification." Goshray, 44 LOY. U. CHI. L.J. at 507.

Here, Dow's certiorari petition indicates that even if the alleged price-fixing conspiracy occurred, "[i]t is undisputed that actual prices were set through

robust price negotiations, and that class members—many large corporations with unquestioned purchasing power—frequently negotiated away *any* increase." Pet. at. 2; *see also id.* at 6, 9-10 (discussing the evidence relating to actual sales transactions). The Tenth Circuit agreed, acknowledging "[i]t is true that some of the plaintiffs may have successfully avoided damages . . . class members experienced varying degrees of injury, with some avoiding injury altogether." Pet. App. 12a. Without *classwide* antitrust impact, there was no "glue" to hold the class together. *Wal-Mart*, 131 S. Ct. at 2552. But instead of vacating class certification—which would have enabled Dow to pursue individualized defenses as to any claims brought by individual purchasers—the Tenth Circuit, like the district court, glossed over reality. Rather than enforcing the plaintiffs' duty "to prove that there are *in fact* . . . common questions," *Comcast*, 133 S. Ct. at 1432, the court of appeals allowed the plaintiffs to satisfy the commonality requirement by invoking the supposedly "prevailing view [that] price-fixing affects all market participants, creating classwide impact even when prices are individually negotiated." Pet. App. 13a.

By affirming certification of a class based on a presumption of classwide injury, the court of appeals opinion essentially relieves plaintiffs of their burden to demonstrate that all class members actually have been injured, and thereby implicates a fundamental concern: To what extent, if any, can a putative class containing many members that have suffered *no injury* satisfy the requirement for commonality, i.e., the requirement that the plaintiffs demonstrate that the members of a putative class "have suffered the

same injury"? *Wal-Mart*, 131 S. Ct. at 2551 (emphasis added).

"Numerous courts have certified plaintiff classes even though the plaintiffs have not been able to use common evidence to show harm to all class members." Joshua P. Davis, Eric L. Cramer, & Caitlin V. May, *The Puzzle of Class Actions with Uninjured Members*, 82 GEO. WASH. L. REV. 858, 859 (2014). Certification of classes where some or even all members have not been harmed, however, is a persistent issue that continues to divide the circuits. *See, e.g.*, *In re Nexium Antitrust Litig.,* 777 F.3d 9, 21 (1st Cir. 2015) (affirming class certification on ground that "a court may proceed with certification" if "prior to judgment, it will be possible to establish a mechanism for distinguishing the injured from the uninjured class members"); *In re Rail Freight Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013) (vacating class certification on ground that the "plaintiffs must . . . show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy"); *see also* Davis, *supra*, at 859 n.1 (collecting cases).[3]

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[3] Indeed, despite this Court's admonition in *Wal-Mart* that commonality "does not mean merely that [class members] have all suffered a violation of the same provision of law," 131 S. Ct. at 2551, there have been an escalating number of "no-injury" class actions alleging violation of a variety of state or federal consumer or financial protection statutes that make "damages" available to claimants without requiring proof of actual harm. *See Sweeney* testimony at 2-7.

The question of whether, or under what circumstances, a putative class containing a significant number of uninjured members can satisfy the Rule 23(a)(2) commonality requirement, and as here, the Rule 23(b)(3) predominance requirement, is a critical issue. It warrants this Court's immediate attention and guidance.[4]

B. The Court Should Clarify Whether Predominance Can Be Established Merely By Presuming Classwide Injury

In addition to satisfying the requirements set forth in Rule 23(a), a class-action plaintiff "must . . . satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Comcast*, 133 S. Ct. at 1432. The provision at issue here, Rule 23(b)(3), was adopted in 1966 as "an adventuresome innovation . . . designed for situations in which class-action treatment is not clearly called for." *Ibid.* (internal quotation marks omitted); *see also Amchem Prods.*,

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[4] The present appeal also implicates the related question of what circumstances warrant *de*certification of a class under Rule 23(c)(1)(C). *See* Pet. at 30-31 (discussing Dow's expert trial testimony relating to plaintiffs' flawed statistical assumption that every chemical purchase transaction involved overcharges); *see generally White v. Nat'l Football League*, 756 F.3d 585, 598 (8th Cir. 2014) ("[S]o important are the Rule 23 class prerequisites that courts often decertify classes *sua sponte,* even at the appellate level, after finding that class litigation is no longer appropriate.").

521 U.S. at 614-18 (discussing Rule 23(b)(3) background).

Rule 23(b)(3) requires that "the questions of law or fact common to class members *predominate* over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3) (emphasis added); *see also Amchem Prods.*, 521 U.S. at 615 (Rule 23(b)(3) is intended to "'achieve economies of time, effort, and expense . . . without sacrificing procedural fairness or bringing about other undesirable results'" (quoting Rule 23(b) advisory comm. note (1966)).

The Tenth Circuit failed to take the "close look" required by Rule 23(b)(3), *id.* at 615, to determine whether common questions predominate over questions affecting only individual class members. Instead, the "[c]lass-wide proof" that the court of appeals relied upon was merely "an inference of classwide impact" in price-fixing cases. Pet. App. 12a, 13a. The court conveniently determined that this debatable *presumption* of classwide price-fixing injury would "override," *id.* at 13a, Dow's undisputed evidence that in reality, numerous individual transactions did not produce overcharges.

Although "the focus of Rule 23(b)(3) is on the predominance of common *questions*," *Amgen Inc.*, 133 S. Ct. at 1195, the Court emphasized in *Wal-Mart* that "'[w]hat matters to class certification . . . is not the raising of common 'questions' . . . but rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the

litigation.'" 131 S. Ct. at 2551 (quoting Richard A. Nagareda, *Class Certification In the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (1999)). "*Dissimilarities* within the proposed class are what have the potential to impede the generation of common answers." *Ibid.* (emphasis added).[5]

Here, the sharp dissimilarities among class members regarding the economic harm, if any, that they incurred precluded a common answer to the question of antitrust impact. In other words, the "common question" of whether the alleged conspiracy created antitrust impact—one of the required elements of a claim for damages under the Clayton Antitrust Act, *see* Pet. App. 5a—was not "capable of classwide resolution . . . in one stroke," *Wal-Mart*, 131 S. Ct. at 2551. But for the court's facile inference to the contrary, the question of antitrust impact, therefore, could not have predominated over impact-related questions "affecting only individual [class] members." Fed. R. Civ. P. 23(b)(3). For this reason, certification under Rule 23(b)(3) was improper.

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[5] *Wal-Mart* was an employee gender discrimination case that had been certified under Federal Rule of Civil Procedure 23(b)(2)—where "the party opposing the class has acted or refused to act on grounds that apply generally to the class." Justice Ginsburg's dissenting opinion questioned whether dissimilarities among class members is an appropriate consideration for determining commonality under Rule 23(a)(2) (and by extension, for certifying a class under Rule 23(b)(2)), but acknowledged that the "'dissimilarities' approach" is "a notion suited to Rule 23(b)(3)." *Wal-Mart*, 131 S. Ct. at 2567 (Ginsburg, J., dissenting).

The Court should grant review and vacate the erroneous class-action judgment in this case. In so doing, the Court should clarify that under Rule 23(b)(3), predominance of common questions capable of resolution through common answers and proof cannot be established through classwide inferences or presumptions that conflict with actual evidence of significant differences among class members.

C. The Court Should Clarify Whether, or Under What Circumstances, Statistical Modeling Can Be Used To Demonstrate Commonality or Predominance Without Abridging a Defendant's Substantive Rights

Dazzling a district court with a seemingly sophisticated statistical analysis is often all it takes for proposed class counsel to gain class certification, and thus, "an opportunity to maximize their attorneys' fees," *Eubank*, 753 F.3d at 720, typically without even having to prove his/her case at trial. *See* Nagareda, 84 N.Y.U. L. REV. at 99 ("With vanishingly rare exception, class certification sets the litigation on the path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial."). Despite the yellow—or red—flags hoisted by this Court in *Wal-Mart* and *Comcast*, lower courts, including the Tenth Circuit here, have continued to approve class certification by relying on flawed or otherwise inappropriate statistical analyses. *See, e.g.*, *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791 (8th Cir. 2014), *pet. for cert. filed*, No. 14-1146 (Mar. 19, 2015); *Jiminez v. Allstate Ins. Co.*, 765 F.3d 1161 (9th Cir. 2014), *pet. for cert. filed*, No.

14-910 (Jan. 27, 2015). Indeed, "the flashpoints today over class certification concern the role of aggregate proof of a statistical or economic nature." Nagareda, 84 N.Y.U. L. REV. at 101.

In *Wal-Mart*, the Court repudiated a "Trial by Formula" statistical sampling-and-extrapolation approach for establishing Rule 23(a)(2) commonality among the disparate members of a large putative class of employees in gender discrimination litigation. *Wal-Mart*, 131 S. Ct. at 2561. The Court indicated that "[b]ecause the Rules Enabling Act forbids interpreting Rule 23 'to abridge, enlarge, or modify any substantive right' . . . a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." *Ibid.* (quoting 28 U.S.C. § 2072(b)).

Comcast, an antitrust case, also rejected class certification based on faulty statistical analyses. The Court held that certification was improper under Rule 23(b)(3) because the plaintiffs' statistical model (devised by one of the same experts who manufactured the plaintiffs' models in the present case) fell "far short of establishing that damages are capable of measurement on a classwide basis." 133 S. Ct. at 1433. For this reason, the Court concluded that the plaintiffs "cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class." *Id.* at 1433. Emphasizing, as it did in *Wal-Mart*, 131 S. Ct. at 2551 n.6, that "inquiry into the merits of the claim" is permissible in connection with a class-certification determination, the Court further explained that "the

model failed to measure damages resulting from the particular antitrust injury on which petitioner's liability in this action is premised." *Comcast*, 133 S. Ct. at 1433.

The Tenth Circuit here went to considerable lengths to try to distinguish both *Wal-Mart* and *Comcast*. *See* Pet. App. 11a-24a. In particular, the court of appeals asserted that reliance on the plaintiffs' statistical models "did not result in 'trial by formula.'" *Id.* at 17a. According to the court, the plaintiffs "did not seek to prove Dow's *liability* through extrapolation"; instead "extrapolation was used only to approximate *damages*," and "*Wal-Mart* does not prohibit certification based on the use of extrapolation to calculate *damages*." *Id.* at 18a (emphasis added). But in *Jiminez v. Allstate Insurance Co.*, the Ninth Circuit held exactly the opposite. It interpreted *Wal-Mart* and *Comcast* as *permitting* use of statistical sampling and extrapolation to prove classwide liability, but *barring* its use to prove classwide damages: "Since *Dukes* and *Comcast* were issued, circuit courts including this one have consistently held that statistical sampling and representative testimony are acceptable ways *to determine liability* so long as the use of these techniques is *not expanded* into the realm of *damages*." 765 F.3d at 1167 (emphasis added).

The Court should grant review to clear up the confusion among these and other courts of appeals, as well as district courts throughout the United States, concerning the use of statistical extrapolation for establishing Rule 23 commonality and

predominance in connection with liability and/or damages. Equally important, the Court should review this case to provide guidance to the lower courts regarding the circumstances under which the use of statistical models to establish commonality and predominance encroaches upon a defendant's substantive and due process rights to defend itself in court.

The Rules Enabling Act states that the "general rules of practice and procedure" prescribed by this Court "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(a), (b). The "validity of a Federal Rule" under § 2072(b) "depends entirely upon whether it regulates *procedure*," and not substantive rights. *Shady Grove*, 559 U.S. at 410. Class actions are intended to serve a strictly procedural purpose. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974) (stating that "efficiency and economy of litigation . . . is a principal purpose of the *procedure*") (emphasis added); *Shady Grove*, 559 U.S. at 408 (upholding validity of Rule 23 under the Rules Enabling Act because "rules allowing multiple claims . . . to be litigated together . . . alter only how the claims are *processed* . . . [a] class action . . . merely enables a federal court to adjudicate claims of multiple parties at once") (emphasis added).

Although Rule 23, on its face, does not violate the Rules Enabling Act, *see Shady Grove*, *ibid.*, the Court emphasized in *Wal-Mart* that the Act "forbids interpreting Rule 23" in a way that abridges a class-action defendant's substantive rights. 131 S. Ct. at 2561; *see also Am. Express Co.*, 133 S. Ct. at 2309-10.

More specifically, the Court cautioned that "a class cannot be certified on the premise" that the defendant "will not be entitled to litigate its statutory defenses to individual claims." *Wal-Mart*, 131 S. Ct. at 2561; *see also Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense.") (internal quotation marks omitted). This means that certification of a class is *improper* under Rules 23(a)(2) and/or 23(b)(3) where, as here, individualized defenses otherwise could be asserted based on significant disparities among putative class members as to injury and/or damages.

Unfortunately, "[i]n this changing landscape for class certification, statistical sampling has taken primacy over due process." Goshray, 44 LOY. U. CHI. L.J. at 469. This case dramatically illustrates the point. As Dow explains in its certiorari petition, once the district court certified the class based in part on a statistical model that estimated aggregate damages, that company's substantive and due process rights to defend itself against individual purchasers that suffered no antitrust impact (i.e., no injury-in-fact), and incurred no economic damages, were extinguished. Thus, the use of statistical sampling and extrapolation effectively converted the class-action procedural mechanism into a substantive-rights abridgement process, which in violation of the Rules Enabling Act and due process, eliminated what otherwise would have been Dow's right to litigate its defenses to any individual purchaser's claims. As a non-settling defendant, Dow literally subjected itself to "Trial by Formula," and the result, which the

Tenth Circuit refused to disturb, was a $1 billion treble damages judgment.

CONCLUSION

For the reasons discussed in this brief and in the petition for a writ of certiorari, the Court should grant review and address the important class-certification issues presented by this appeal.

Respectfully submitted,

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