No. 11-864

IN THE

Supreme Court of the United States

COMCAST CORPORATION, ET AL.,

Petitioners,

v.

CAROLINE BEHREND, ET AL.,

Respondents.

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

BRIEF FOR PETITIONERS

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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.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, the following are parties to this proceeding:

Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC are petitioners in this Court and were defendants-appellants below.

Stanford Glaberson, Joan Evanchuk-Kind, and Eric Brislawn are respondents in this Court and were plaintiffs-appellees below.

Andrew Behrend, Caroline Cutler, Marc Dambrosio, Michael Kellman, Lawrence Rudman, Kenneth Saffren, Marc Weinberg, and Barbi J. Weinberg were plaintiffs in the district court.

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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BRIEF FOR PETITIONERS

Petitioners Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC (collectively, "Comcast") respectfully submit that the judgment of the court of appeals should be reversed.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-88a) is reported at 655 F.3d 182. The opinion of the district court (Pet. App. 89a-188a) is reported at 264 F.R.D. 150; an amended order (Pet. App. 189a-194a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2011. A timely petition for rehearing was denied on September 20, 2011. *See* Pet. App. 195a-196a. Justice Alito extended the time in which to file a petition for a writ of certiorari to and including January 18, 2012. *See* No. 11A534. The petition was filed on January 11, 2012 and granted on June 25, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED

Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a), provides in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without

> respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The Rules Enabling Act, 28 U.S.C. § 2072, provides in relevant part:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . . .
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right.

Federal Rule of Civil Procedure 23(b) provides in relevant part:

> A class action may be maintained if Rule 23(a) is satisfied and if . . . (3) the court finds 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.

Rule 23 is reproduced in its entirety in the appendix to this brief, *infra*, 1a-8a.

STATEMENT

In this antitrust action, Plaintiffs sought certification of a class that includes more than two million current and former cable television subscribers in the Philadelphia area. Over Comcast's objections, the district court certified the class, and the Third Circuit affirmed the certification order on interlocutory review.

1. Comcast is a media, entertainment, and communications company and a provider of cable services to residential and business customers; Plaintiffs purport to represent a class of more than two million present and former Comcast cable television subscribers in the Philadelphia area. Pet. App. 6a; *see also* J.A. 35a ¶ 32. Claiming that they paid too much for cable, Plaintiffs brought suit in the Eastern District of Pennsylvania. Pet. App. 5a, 7a. They allege that Comcast monopolized Philadelphia's cable market and excluded competition in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2. Pet. App. 5a.[1]

According to Plaintiffs, Comcast engaged in "anticompetitive 'clustering.'" Pet. App. 6a. "'Clustering' refers to a 'strategy whereby cable [operators] concentrate their operations in regional geographic areas by acquiring cable systems in regions where the [operator] already has a significant presence, while giving up other holdings scattered across the country.'" *Ibid.* (quoting *In re Implementation of the Cable Television Consumer Prot. & Competition Act of 1992*, 22 FCC Rcd. 17791, 17809 & n.134 (2007)). As the FCC has acknowledged, clustering is a common practice in the cable industry that can provide various pro-competitive benefits for the markets at issue. *See In re Adelphia Commc'ns Corp.*, 21 FCC Rcd. 8203, 8318 (2006).

Clustering is accomplished "through purchases and sales of cable systems, or by system 'swapping' among [operators]." Pet. App. 7a (quoting 22 FCC

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[1] Similar claims regarding the Chicago and Boston cable markets have been stayed pending resolution of the Philadelphia claims. *See* Pet. App. 8a & n.5.

Rcd. at 17809 n.134) (internal quotation marks omitted). Comcast is alleged to have engaged in both acquisitions and swaps, through which it eventually controlled a 69.5% share of subscribers in the Philadelphia Designated Marketing Area ("DMA"), which includes the city of Philadelphia and surrounding counties. *Id.* at 3a-6a & nn.2, 4.[2]

Although the transactions at issue were vetted and approved by the Federal Communications Commission and federal antitrust authorities, Plaintiffs claim that those transactions were designed to "eliminat[e] competition, rais[e] entry barriers to potential competition, maintai[n] increased prices for cable services at supra-competitive levels, and depriv[e] subscribers of the lower prices that would result from effective competition." Pet. App. 7a. To prevail on their claims, Plaintiffs are required to prove "(1) a violation of the antitrust laws (here, sections 1 and 2

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[2] A DMA is a "specific media research area that is used by Nielsen Media Research to identify television stations whose *broadcast* signals reach a specific area and attract the most viewers," which in turn is "used by all types of companies to target and keep track of advertising." Pet. App. 3a n.1 (quoting *Steak n Shake Co.* v. *Burger King Corp.*, 323 F. Supp. 2d 983, 986 n.2 (E.D. Mo. 2004)) (internal quotation marks omitted; emphasis added). Although Plaintiffs contend that the relevant geographic market is the Philadelphia DMA, *see* Pet. App. 16a, the class definition is limited to Comcast's "Philadelphia cluster," which includes only counties that Plaintiffs allege to be "covered by Comcast's cable franchises or any of its subsidiaries or affiliates," J.A. 34a ¶ 34(a)(2), and thus excludes the "two counties in which Comcast has no presence," Pet. App. 57a n.9 (Jordan, J., dissenting in relevant part). Because these counties "would be excluded from the class regardless of its geographic scope," *ibid.*, and consistent with the approach typically used by the parties and courts below, this brief will refer to the Philadelphia DMA. *See*, *e.g.*, Pet. App. 35a; J.A. 1377a, 1388a.

of the Sherman Act), (2) individual injury resulting from that violation [*i.e.*, so-called 'antitrust impact'], and (3) measurable damages." *Id.* at 15a.

Plaintiffs initially advanced four theories of antitrust impact—and thus four mechanisms by which Comcast's conduct supposedly caused them damages. The district court, however, rejected three of those theories in ruling on the motion for class certification. Pet. App. 122a, 153a, 161a-162a. The sole remaining theory is that Comcast's clustering deterred competition from so-called "overbuilders." *Id.* at 24a-25a. Overbuilders are companies (other than satellite operators) that offer a "competitive alternative where a telecommunications company already operates." *Id.* at 7a. Plaintiffs maintain that, in the absence of clustering, overbuilders would have extended their telecommunications services into areas serviced by Comcast. *Ibid.* Based on the district court's rulings, "[p]roof of antitrust impact . . . 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." *Id.* at 192a-193a.

The parties disputed below whether, or to what extent, Comcast's allegedly anticompetitive clustering deterred overbuilding in the Philadelphia DMA. Only 1.3% of cable customers nationwide are served by an overbuilder. *See* J.A. 40a ¶ 44, 867a & n.31. And Comcast contended that there was no evidence of actual or potential overbuilding in the majority of counties. Pet. App. 25a-26a. Indeed, Comcast noted, the only alleged overbuilder—RCN Telecom Services—had FCC approval to overbuild in only five of the eighteen counties in the Philadelphia DMA. *Id.* at 61a-62a & n.16, 82a-83a (Jordan, J., dissenting in

relevant part); *see also* J.A. 1382a. Although, consistent with that fact, Plaintiffs' expert damages model assumed an "overbuilding factor" in only five counties, *id.* at 1387a-1388a, Plaintiffs nonetheless theorized that the deterrence of overbuilding caused elevated prices throughout the Philadelphia DMA, *see*, *e.g.*, Pet. App. 47a n.15.

The parties debated equally sharply whether, even if alleged deterrence of overbuilding had elevated prices beyond the five counties, the elevation would have been similar throughout the Philadelphia DMA. Comcast argued, for example, that differences among the approximately 650 franchise areas in the Philadelphia DMA made it impossible to determine even county-wide conditions, let alone class-wide conditions, that would have prevailed in the absence of the challenged conduct. *See* Pet. App. 82a-83a (Jordan, J., dissenting in relevant part). Particularly given the wide variation in Comcast's market shares in these franchise areas, Comcast emphasized, Plaintiffs could not assume that the but-for market conditions were uniform across the entire DMA.

2. Because Plaintiffs would be required at trial to prove damages as an element of their claims, Plaintiffs attempted to satisfy Rule 23(b)(3)'s predominance requirement by introducing an expert witness who proposed to calculate damages on a class-wide basis. Their damages expert—James McClave—opined that damages could be established on a class-wide basis by comparing actual cable prices to hypothetical prices that would have prevailed but for Comcast's challenged conduct. J.A. 1377a-1379a; *see also* Pet. App. 35a.

a. Dr. McClave constructed "but-for" prices to compare with Comcast's actual prices in the Philadelphia DMA during the relevant time period by identifying supposedly comparable "benchmark" counties around the country. J.A. 1377a; *see also* Pet. App. 35a-36. He used two data "screens" to select these counties:

- The first screen—"DBS Penetration"—removed counties where the penetration rate (*i.e.*, market share) for direct broadcast satellite ("DBS") and certain other alternatives to cable was lower than the average penetration rate for such providers across all DMAs where Comcast operates. J.A. 1380a-1381a; *see also* Pet. App. 36a. This screen was warranted, he opined, based on Plaintiffs' theory—later rejected by the district court—that the below-average DBS penetration rate in the Philadelphia DMA was the result of Comcast's clustering conduct. *See* J.A. 1380a; *see also* Pet. App. 74a-75a (Jordan, J., dissenting in relevant part).
- The second—"Market Share"—screen eliminated from the "benchmark" sample all counties where Comcast's market share equaled or exceeded 40%. J.A. 1379a-1380a; *see also* Pet. App. 36a. Dr. McClave selected this percentage because it was the "approximate midpoint" of Comcast's estimated 20% share of the Philadelphia DMA in 1998, before the alleged clustering had occurred, and its estimated 60% share from 2003 through 2008. J.A. 1380a; *see also* Pet. App. 77a (Jordan, J., dissenting in relevant part).

Having selected the "benchmark" group of counties, Dr. McClave performed a regression analysis comparing actual prices in the Philadelphia DMA's

counties to estimated "but-for" prices based on data from the "benchmark" counties. J.A. 1382a-1383a, 1394a-1396a tbl. A.2; *see also* Pet. App. 36a-37a. Based on this analysis, he concluded—"conservative[ly]"—that Comcast had overcharged subscribers approximately $875 million across the entire Philadelphia DMA during the class period. J.A. 1387a-1388a; *see also* Pet. App. 37a.

Dr. McClave's "model indicates that the Philadelphia DMA market prices were elevated above the but-for prices in every county-year combination," and thus his damages model results in purported damages for each of the sixteen counties in which Comcast operated in the Philadelphia DMA. J.A. 1382a. He acknowledged, however, that "[i]n this comparison I have assumed that only the five counties that RCN indicated that it planned to enter as an overbuilder would have been overbuilt." *Ibid.*; *see also* J.A. 1389a ("assuming that only five counties in the Philadelphia DMA would have had overbuilding").

b. Drawing on the testimony and expert reports of its own experts—David Teece and Tasneem Chipty—Comcast presented a number of challenges to Plaintiffs' damages model.

At the outset, Comcast noted that Dr. McClave's model had been prepared when Plaintiffs were advancing multiple theories of antitrust impact. Pet. App. 186a. Once most of Plaintiffs' theories were rejected by the district court, however, Comcast emphasized that the model could not be used to establish class-wide damages because (as Dr. McClave conceded) it did not provide a basis for segregating damages attributable solely to the remaining, accepted theory. *Id.* at 40a; *see also* J.A. 189a-190a. In this respect, Comcast argued, Dr. McClave's damag-

es model impermissibly identifies "damages" that "are not the certain result of the wrong." Pet. App. 45a (internal quotation marks omitted).

Comcast also raised several challenges to the screens used by Dr. McClave. The DBS Penetration screen was invalid, Comcast argued, because it assumed that the penetration rate in the Philadelphia DMA should have matched the national average in the absence of Comcast's conduct, even though (in rejecting one theory of antitrust impact) the district court expressly determined that Plaintiffs had failed to link "Comcast's clustering activity in the Philadelphia DMA to reduced DBS penetration rates." Pet. App. 120a; *see also id.* at 37a. And the Market Share screen was inappropriate for several reasons, including because Dr. McClave's 40% DMA-wide estimate was based on averaging Comcast's market share in the franchise areas where it operated with a "zero percent share" in those where it was not present. Pet. App. 79a-80a & n.27 (Jordan, J., dissenting in relevant part); *see also* J.A. 206a-207a, 1063a.

Finally, Comcast disputed the model's factual assumption that uniform "but-for" conditions would have existed throughout the Philadelphia DMA. The Philadelphia DMA encompasses 649 unique cable "franchises," each with its own prices, and the competitive conditions affecting those prices vary substantially across the DMA. *See*, *e.g.*, J.A. 1083a-1087a; *see also* Pet. App. 82a (Jordan, J., dissenting in relevant part). For this reason, Comcast maintained, not only was Dr. McClave's approach impermissible, but also calculating *any* "but-for" conditions for the *entire* DMA is impossible. *Id.* at 85a-86a nn.34 & 35, 88a.

c. The district court certified the class under Rule 23(b)(3). Acknowledging that Dr. McClave's model had been prepared when Plaintiffs were advancing multiple theories of antitrust impact, Pet. App. 186a, the court nonetheless concluded that the model remained valid because Dr. McClave's "selection of the DBS screen" was "merely his method of choosing counties to serve as comparators," rather than an endorsement of the "DBS foreclosure theory" of antitrust impact, and "[a]ny anticompetitive conduct is reflected in the Philadelphia DMA price, not in the selection of the comparison counties," *id.* at 187a. The district court did not address whether the "anticompetitive conduct" that is "reflected in the Philadelphia DMA price" (*ibid.*) would include theories that the court had rejected. Instead, the court simply declared that "there is a common methodology available to measure and quantify damages on a class-wide basis." *Id.* at 91a; *see also id.* at 187a.

3. A divided panel of the Third Circuit affirmed. All three judges agreed that, "[t]o satisfy . . . the predominance requirement, Plaintiffs must establish that the alleged damages are capable of measurement on a class-wide basis using common proof." Pet. App. 34a (majority); *see also id.* at 55a n.5 (dissent). The panel disagreed, however, on whether Plaintiffs had carried this burden.

a. The majority declined to address Comcast's challenges to Plaintiffs' damages model on the ground that "[w]e have not reached the stage of determining on the merits whether the methodology [offered by Plaintiffs] is a just and reasonable inference or speculative," Pet. App. 47a, and that Comcast's "attacks on the merits of the methodology" have "no place in the class certification inquiry," *id.*

at 48a. And while the majority apparently agreed that Dr. McClave's model does not satisfy the standards for admission of expert testimony under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), it examined only whether the model "could evolve to become admissible evidence," Pet. App. 44a n.13, and accepted Plaintiffs' "assur[ances]" to that effect, *id.* at 46a.

b. Judge Jordan, in contrast, would have vacated the class certification order. Pet. App. 53a (Jordan, J., dissenting in relevant part). "Part[ing] ways with the Majority entirely" on the damages issue, Judge Jordan concluded that "Dr. McClave's testimony is incapable of identifying any damages caused by reduced overbuilding in the Philadelphia DMA." *Id.* at 65a-66a. Judge Jordan noted that Dr. McClave's model was not limited to "the only surviving theory of antitrust impact," *i.e.*, "that clustering reduced overbuilding." *Id.* at 69a. And it therefore "produces damages calculations that 'are not the certain result of the wrong.'" *Id*. at 70a (quoting *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931)).

Judge Jordan faulted the majority for declining to address Comcast's "attacks on the merits of [Dr. McClave's] methodology," and for accepting without proof that any errors in the model could be fixed by "modify[ing]" it. Pet. App. 80a n.28 (internal quotation marks omitted). "Plaintiffs have the burden of establishing predominance," he emphasized, "and, until they have actually proffered a model that shows how damages can be calculated on a class-wide basis, they have not met that burden." *Id.* at 81a n.28. As Judge Jordan observed, the majority's "willingness to overlook the debilitating flaws in

Dr. McClave's model in an effort to avoid an 'attack on the merits'" is "precisely the kind [of] talismanic invocation of 'concern for merits-avoidance'" that controlling precedent forbids. *Ibid.* (quoting *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 317 n.17 (3d Cir. 2008)).

Yet even if Dr. McClave were to refine his model, Judge Jordan noted, "there remains an intractable problem with any model purporting to calculate damages for all class members collectively." Pet. App. 81a. The "major factors identified as influencing price . . . vary widely within the franchise areas across the DMA," particularly since "Comcast prices its cable service at the franchise level." *Id.* at 85a. "[N]o model can calculate class-wide damages," therefore, "because any damages—such as they may be—are not distributed on anything like a similar basis throughout the DMA." *Id.* at 86a.

SUMMARY OF ARGUMENT

Because Plaintiffs' damages model does not calculate damages from the sole theory of antitrust impact approved by the district court, and in any event is insufficiently helpful and reliable to be considered in the certification inquiry, Plaintiffs failed to carry their burden of proof under Rule 23. This Court should vacate the certification order.

I. Rule 23(b)(3) permits certification only where the district court "finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." That test cannot be satisfied here because there is no evidence that damages can be established through class-wide proof.

A. Under Section 4 of the Clayton Act, the class members must establish, as an element of their antitrust claims, measurable damages resulting from Comcast's allegedly anticompetitive behavior. As the lower courts recognized, Plaintiffs could satisfy Rule 23(b)(3)'s predominance requirement *only* by showing that they can prove damages on a class-wide basis using common proof.

Plaintiffs' sole effort to satisfy this burden was through Dr. McClave's damages model, but that model did not even *attempt* to measure damages from the only theory of antitrust impact credited by the district court, *i.e.*, that Comcast, by engaging in clustering, had deterred competition from overbuilders. Indeed, Dr. McClave admitted that he could not isolate the amount of damages attributable to any single theory, including the three rejected by the district court. *See* J.A. 189a-190a. Because Plaintiffs' damages model is "incapable of identifying any damages caused by reduced overbuilding in the Philadelphia DMA," Pet. App. 66a (Jordan, J., dissenting in relevant part), Plaintiffs have no evidence *at all* on this critical element of their case for certification.

B. Plaintiffs' inability to adduce class-wide evidence of damages should have been fatal to their request for certification. The Third Circuit nonetheless dismissed Comcast's arguments as premature "[a]t the class certification stage," choosing instead to accept Plaintiffs' "assur[ances]" that damages "are capable of measurement and will not require labyrinthine individual calculations." Pet. App. 46a. The court believed itself limited to this inquiry because Comcast's arguments also relate to the "merits" of Plaintiffs' claims. *Id.* at 47a.

The Third Circuit based its refusal to resolve "merits" questions on *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), but this Court in *Wal-Mart Stores, Inc.* v. *Dukes* rejected that very interpretation of *Eisen* as "mistake[n]" and "contradicted by our other cases." 131 S. Ct. 2541, 2552 n.6 (2011). After *Dukes*, there can be no debate that the Third Circuit was required to resolve, not ignore, any "merits question[s]" bearing on "the propriety of certification under Rules 23(a) and (b)." *Ibid.*

By permitting class certification based solely on Plaintiffs' "assur[ances]," the Third Circuit not only violated Rule 23, but also fundamentally altered the rights of the parties—in direct contravention of the Rules Enabling Act.

C. Where, as in this case, damages calculations would require complicated mini-trials involving a massive number of claims, the question of damages predominates over any common issues in the case. Because Plaintiffs cannot prove damages on a class-wide basis, and because they cannot obtain certification if they are required to provide individualized evidence of damages, the certification order here should be vacated.

II. Even if this Court were to assume that Plaintiffs' model were relevant to proving damages in this case, it nonetheless cannot be invoked in support of class certification because the model fails to satisfy the helpfulness and reliability requirements for expert evidence under Federal Rule of Evidence 702 and *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

A. The district court must consider whether the evidence that the proponent claims could be presented on a class-wide basis would satisfy the require-

ments for admissibility at trial. In the context of expert evidence, in particular, the district court must determine whether the expert's opinion satisfies the standards imposed by Rule 702 and *Daubert*.

The need for scrutiny under Rule 702 and *Daubert* is particularly pronounced given the requirement that district courts resolve factual disputes where necessary to determine whether Rule 23 is satisfied. Just as courts cannot delegate their gatekeeping responsibilities under Rule 23 to the proponent of certification, they also cannot delegate those responsibilities to the proponent's hired experts.

B. Dr. McClave's damages model is neither helpful nor reliable in assessing class-wide damages. He attempted to measure "but-for" prices in the Philadelphia DMA by selecting comparable counties across the country where prices were not affected by the alleged antitrust violations. But the two screens that he used to do so—DBS Penetration and Market Share—select benchmark counties with significantly more competition from satellite providers, as well as a market share for Comcast based on a gross underestimate of its share of the Philadelphia market even before the conduct at issue. These flaws both inflate the "but-for" prices observed by Dr. McClave's model.

And even if these defects could be fixed, there remains an intractable problem with measuring damages across the Philadelphia DMA: The substantial variation in but-for conditions in the region makes the calculation of *any* class-wide prices impossible.

III. Because Rule 23(b)(3)'s predominance requirement is designed to ensure that the class is sufficiency cohesive to warrant collective treatment, the Third Circuit's failure to resolve all arguments bear-

ing on that requirement leaves the parties and courts with no assurance that the certified class will advance Rule 23's efficiency and fairness goals.

ARGUMENT

To satisfy Rule 23, and show that the proposed class is "sufficiently cohesive to warrant adjudication by representation," Plaintiffs were required to prove that common questions in this case predominate over individual ones. *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623 (1997). Yet Plaintiffs' only evidence as to a critical element of their antitrust claims—Dr. McClave's damages model—did not and could not measure damages on a class-wide basis given its utter failure to identify damages attributable to Plaintiffs' remaining theory of antitrust impact or the enormous variations in competitive conditions that bear on the but-for prices for class members. And even ignoring these fatal problems, the model could not establish class-wide damages because it was insufficiently helpful and reliable to satisfy the minimum requirements for expert evidence. Plaintiffs therefore failed to carry their burden under Rule 23, and class treatment is inappropriate. The decision below should be reversed and the certification order vacated.

I. PLAINTIFFS FAILED TO CARRY THEIR BURDEN OF PROVING THAT COMMON QUESTIONS PREDOMINATE.

Class actions are "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). While "[a] class action . . . enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits," of necessity "it leaves the parties' legal

rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion). A class action is "a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980). The procedural nature of a federal class action is statutorily required: The Rules Enabling Act simultaneously authorized this Court to promulgate the Federal Rules of Civil Procedure and mandated that such rules shall not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

Rule 23, adopted in its modern form in 1966 and substantively amended in 2003, provides several requirements for class actions: The class proponent must satisfy each of the four prerequisites of Rule 23(a) and also demonstrate that the case fits into one of the permissible categories of class actions listed in Rule 23(b). As relevant here, Rule 23(a)(2) permits certification only if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2); *see also Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2555 (2011) ("common" questions are those that are susceptible to resolution "on a classwide basis"). Under Rule 23(b)(3), the district court must find (among other things) that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3); *see also Amchem*, 521 U.S. at 623 (predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation").

A. THE DAMAGES MODEL PRESENTED BY PLAINTIFFS FAILED TO MEASURE DAMAGES FROM THE ONLY REMAINING THEORY OF ANTITRUST IMPACT.

Section 4 of the Clayton Act, which grants the private right of action to enforce the antitrust laws, provides that "any person who *shall be injured* in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the *damages by him sustained*." 15 U.S.C. § 15(a) (emphases added). "To prevail in an antitrust action," therefore, "a plaintiff must show both an injury to his business [or property] resulting from the defendants' wrongful actions, and some indication of the amount of the damage done"—that is, *both* the "fact of damage" (*i.e.*, antitrust impact) *and* the "measure of damage." *In re Plywood Antitrust Litig.*, 655 F.2d 627, 635 (5th Cir. 1981); *see also*, *e.g.*, *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 561 (1981) (antitrust plaintiff must "establish cognizable injury attributable to an antitrust violation and some approximation of damage").

Thus, as the courts and parties agreed below, proof of "measurable damages" is an essential element of Plaintiffs' antitrust claims. Pet. App. 15a, 54a n.3 (Jordan, J., dissenting in relevant part), 96a; D.E. 331, at 1 ("element of quantifiable damages"). The authorities are in accord. *See*, *e.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) ("elements of [antitrust] claim" include "measurable damages"); *In re Visa Check / MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001) (Sotomayor, J.) ("required elements of an antitrust claim" include "damages"); *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th

Cir. 1998) ("proof of actual, individual damages" is a "critical element of a plaintiff's antitrust claim").

Because the need to prove individualized damages for each of the two million class members would overwhelm any purportedly common questions in this litigation, the Third Circuit acknowledged that Plaintiffs could satisfy Rule 23(b)(3)'s predominance requirement *only* by "establish[ing] that the alleged damages are capable of measurement on a class-wide basis using common proof." Pet. App. 34a. Plaintiffs did not dispute that proposition in the district court, in the court of appeals, or in this Court. *See*, *e.g.*, D.E. 331, at 5 ("The court must instead find that we have identified *common* proof tending to show class wide impact and damages"); Opp. 13 n.1 (agreeing with Comcast's assertion that "they have to prove that . . . they can establish damages by a common and credible and reliable damages methodology").

During the class certification proceeding, Plaintiffs advanced four separate theories of antitrust impact, including that Comcast (1) deterred competition by potential overbuilders; (2) foreclosed competition from DBS service providers; (3) eliminated "benchmark" competition, on which customers rely to compare the prices charged by market competitors; and (4) increased its bargaining power with content providers, such as networks, thus allowing it to negotiate lower prices for content. *See* Pet. App. 111a-112a. The district court, however, rejected all but the first theory of antitrust injury, leaving overbuilder deterrence as the sole basis on which Plaintiffs could seek damages. *See id.* at 192a-193a; *see also id.* at 9a.

The district court's rejection of three-quarters of the theories by which Plaintiffs claimed the class

members suffered injury has obvious implications for Plaintiffs' damages model. Yet their expert, Dr. McClave, did not change his conclusions to take into account the district court's ruling on antitrust impact. That is because, as Dr. McClave was forced to acknowledge at the class certification hearing, his damages model *cannot* isolate damages attributable to any of the specific conduct originally alleged by Plaintiffs to be unlawful. *See* J.A. 189a-190a. Rather, as Dr. McClave admitted, his model simply "take[s] the alleged anticompetitive conduct as a whole and evaluate[s] the impact from that conduct," *id.* at 189a, rather than "try[ing] to show the impact on the class from just the allegations related to clustering on their own," *id.* at 190a; *see also* Pet. App. 46a ("the model calculates supra-competitive prices regardless of the type of anticompetitive conduct").

Tellingly, "[f]or thirteen of the eighteen counties in the Philadelphia DMA, Dr. McClave's opinion does not even *attempt* to show that there were elevated prices resulting from reduced overbuilding," Pet. App. 71a (Jordan, J., dissenting in relevant part) (emphasis added), because the only alleged overbuilder had "indicated it planned to enter," and compete with Comcast in, only five of the counties, *see* J.A. 1382a. Yet Dr. McClave's model nonetheless calculates damages for *each* of the sixteen DMA counties in which Comcast operated. *See* J.A. 1394a-1396a tbl. A.2. "For the remaining counties," Judge Jordan noted, "this much is certain: the elevated prices identified by Dr. McClave" were "the result of something other than reduced overbuilding." Pet. App. 73a. Thus, "not only have Plaintiffs failed to show that damages can be proven using evidence common to the class, they have failed to show [for these counties] that damages can be proven using

any evidence whatsoever—common or otherwise." *Ibid.*

It is well-established that a damages model cannot provide a reasonable basis for awarding damages by assuming full liability on multiple allegedly anticompetitive acts, only some of which are ultimately found to be unlawful. *See MCI Commc'ns Corp.* v. *AT&T Co.*, 708 F.2d 1081, 1163 (7th Cir. 1983) (requiring new trial on damages where proffered model calculated aggregate damages assuming full liability on twenty-two counts, but liability was established only as to seven counts). That is so because any damages model that does not distinguish "losses resulting from unlawful, as opposed to lawful, competition" cannot be credited. *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F.2d 1338, 1353 (3d Cir. 1975); *see also Concord Boat Corp.* v. *Brunswick Corp.*, 207 F.3d 1039, 1057 (8th Cir. 2000) (same).

Because Dr. McClave made *no* effort to determine whether his analysis would permit calculation of class-wide damages when limited to the only remaining theory of antitrust impact, he "fail[ed] to identify the 'but for' conditions that are relevant to what is now the only impact of Comcast's allegedly anticompetitive conduct." Pet. App. 71a (Jordan, J., dissenting in relevant part); *see also Blue Cross & Blue Shield United* v. *Marshfield Clinic*, 152 F.3d 588, 593 (7th Cir. 1998) (rejecting "[s]tatistical studies that fail to correct for salient factors, not attributable to the defendant's misconduct, that may have caused the harm of which the plaintiff is complaining"). His damages model "no longer fits the case" (Pet. App. 67a n.18 (Jordan, J., dissenting in relevant part)) because it "is incapable of identifying any damages caused by reduced overbuilding in the

Philadelphia DMA." *Id.* at 66a. And that is particularly true because not only did Dr. McClave make no effort to analyze separately the various theories of antitrust impact, "any 'damages' identified by Dr. McClave with respect to th[e] thirteen counties" in which there was no reduced overbuilding are "'not the certain result'" of the allegedly unlawful conduct, and indeed "'may be substantially attributable to lawful competition.'" Pet. App. 73a (Jordan, J., dissenting in relevant part) (quoting *Coleman*, 525 F.2d at 1353).

B. THE THIRD CIRCUIT COULD NOT CURE THE DEFECT IN PLAINTIFFS' PROOF BY DISMISSING COMCAST'S ARGUMENTS AS "MERITS" ISSUES.

The courts below could not possibly conclude that Plaintiffs carried their burden of proving that damages can be established on a class-wide basis for the simple reason that they did not present *any* evidence of damages stemming from their only remaining theory of antitrust impact. This is a failure of proof at the most basic level: Plaintiffs bore the burden of proof on this issue, yet they (through their expert) could not carry it. That should have been the end of the certification inquiry.

The Third Circuit nonetheless declined to consider Comcast's arguments, claiming that "[w]e have not reached the stage of determining on the merits whether the methodology is a just and reasonable inference or speculative." Pet. App. 47a. "At the class certification stage we do not require that Plaintiffs tie each theory of antitrust impact to an exact calculation of damages," the court insisted, "but instead that they assure us that if they can prove antitrust impact, the resulting damages are capable of

measurement and will not require labyrinthine individual calculations." *Id.* at 46a. The Third Circuit's reasoning—that it could decline to address "merits" issues and simply accept Plaintiffs' "assurances" that class-wide proof will be forthcoming—violates bedrock principles of class certification.[3]

1. The plain text of Rule 23(b)(3) permits certification only where the district court "*finds* that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3) (emphasis added). The proponent of certification therefore must adduce sufficient evidence to "convinc[e]" the court that the case can be tried to judgment on predominantly class-wide proof. *Dukes*, 131 S. Ct. at 2552, 2556 (emphasis omitted). As this Court held in *General Telephone Co. of the Southwest* v. *Falcon*, class certification thus requires a "rigorous analysis" to ensure that Rule 23's prerequisites are satisfied. 457 U.S. 147, 160 (1982).

Nothing in Rule 23 provides an exception to its stringent requirements where the issues bearing on certification "entail some overlap with the merits of the plaintiff's underlying claim." *Dukes*, 131 S. Ct. at 2551. To the contrary, this Court has recognized for over thirty years that "the class determination *gen-*

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[3] Plaintiffs' assurances were, in any event, empty. Following the district court's further narrowing of the case in response to Comcast's motion for summary judgment, the court expressly invited Plaintiffs to submit a new damages report tailored to their remaining claims. *See* D.E. 525, at 12:10-19. Plaintiffs, however, declined this invitation and instead filed a "supplemental" report by Dr. McClave based on his "original damages calculations," which continued to claim damages of $875 million. D.E. 512 Ex. 1, at 1, 9.

erally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action,'" and that courts should "probe behind the pleadings" when necessary "before coming to rest on the certification question." *Falcon*, 457 U.S. at 160-61 (quoting *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469 (1978)) (emphasis added).

Even before this Court's most recent guidance on the issue in *Dukes*, the courts of appeals generally recognized that district courts must resolve any factual inquiries bearing on class certification, regardless of whether they overlapped with the merits. *See*, *e.g.*, *Szabo* v. *Bridgeport Machs., Inc.*, 249 F.3d 672, 676-77 (7th Cir. 2001), *cited with approval in Dukes*, 131 S. Ct. at 2552. Some courts, however, had interpreted the Court's decision in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), as requiring a different approach, *see*, *e.g.*, *Caridad* v. *Metro-North Commuter R.R.*, 191 F.3d 283, 291-92 (2d Cir. 1999), *abrogated by In re IPO Sec. Litig.*, 471 F.3d 24, 32-34 (2d Cir. 2006).

In *Eisen*, the Court held that a district court could not examine the merits of the lawsuit in deciding whether to shift the cost of notice to the class. 417 U.S. at 177-78. In dictum, however, the Court remarked: "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be *maintained* as a class action." *Id.* at 177 (emphasis added). This dictum "led some courts to think that in determining whether any Rule 23 requirement is met, a judge may not consider any aspect of the merits," and "led other courts to think that a judge may not do so at least with respect to a prerequisite of

Rule 23 that overlaps with an aspect of the merits of the case." *IPO Sec. Litig.*, 471 F.3d at 33 (discussing *Caridad* and similar cases).

This reading of *Eisen* was undermined, however, by several changes to Rule 23 that were made in 2003, which confirmed that district courts must make a "definitive determination that [its] requirements . . . have been met." *Hydrogen Peroxide*, 552 F.3d at 320. Although Rule 23(c)(1) previously had allowed for "conditional" certification of class actions, this provision was eliminated on the ground that "[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." Fed. R. Civ. P. 23 advisory committee's note, 215 F.R.D. 158, 217 (2003) ("2003 Advisory Committee's Note"). Similarly, while Rule 23(c)(1)(A) once stated that class certification should be decided "as soon as practicable," it now requires only that the certification decision be made "at an early practicable time"—an acknowledgment that "[a]llowing time for limited discovery supporting certification motions may be necessary for sound judicial administration." *Hydrogen Peroxide*, 552 F.3d at 318-19 (ellipsis and internal quotation marks omitted); *see also Gariety* v. *Grant Thornton, LLP*, 368 F.3d 356, 365 (4th Cir. 2004).

Together, these amendments "combine to permit a more extensive inquiry into whether Rule 23 requirements are met" than might previously have been deemed "appropriate" by some courts. *IPO Sec. Litig.*, 471 F.3d at 39. And the consensus view of the courts of appeals after 2003 was therefore that *Eisen* imposed no limitations on review of "merits" issues at the certification stage. *See*, *e.g.*, *Hydrogen Peroxide*, 552 F.3d at 318-19.

2. This Court clarified in *Dukes* that expansive readings of *Eisen* were "mistake[n]." 131 S. Ct. at 2552 n.6. *Dukes* reiterated that the district court must consider and resolve any "merits question" that bears on class certification, even if the plaintiff "will surely have to prove [the issue] *again* at trial in order to make out their case on the merits." *Ibid.*

a. Following this approach, the Court in *Dukes* closely scrutinized—and ultimately rejected—the expert testimony offered in an attempt to satisfy Rule 23(a)'s commonality requirement. After noting that "proof of commonality necessarily overlap[ped] with [the plaintiffs'] merits contention that Wal-Mart engage[d] in a pattern or practice of discrimination," this Court analyzed the plaintiffs' evidence of company-wide discrimination to determine whether it was "convincing," and concluded that it was not. 131 S. Ct. at 2552, 2556 (emphasis omitted).

Dukes reaffirmed that "Rule 23 does not set forth a mere pleading standard," but rather "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to *prove*" that Rule 23's requirements are "*in fact*" satisfied. 131 S. Ct. at 2551 (first emphasis added); *see also*, *e.g.*, *Hydrogen Peroxide*, 552 F.3d at 316 ("[T]he requirements set out in Rule 23 are not mere pleading rules"). And, as the Third Circuit acknowledged below, *Dukes* also "confirmed" that the "rigorous analysis" required by Rule 23 "'[f]requently . . . will entail some overlap with the merits of the plaintiff's underlying claim." Pet. App. 14a n.6 (quoting 131 S. Ct. at 2551).

b. The Third Circuit nevertheless believed that "*Eisen* still prohibits '*a merits inquiry for any other pretrial purpose*.'" Pet. App. 14a n.6 (quoting *Dukes*,

131 S. Ct. at 2552 n.6) (emphasis added). This selective quotation from *Dukes* gets the analysis backwards: The Court squarely held in *Dukes* that *Eisen* has *no* applicability in "determin[ing] the propriety of certification under Rules 23(a) and (b)." 131 S. Ct. at 2552 n.6.

Indeed, the passage from *Dukes* quoted by the Third Circuit expressly cautions the lower courts *against* reading *Eisen* as the Third Circuit did. After noting that the only issue in *Eisen* was the propriety of shifting the costs of notice, as to which no inquiry into the merits is permissible, *Dukes* emphasized that, "[t]o the extent [*Eisen*'s dictum] goes beyond the permissibility of *a merits inquiry for any other pretrial purpose*," "it is the purest dictum and is contradicted by our other cases." 131 S. Ct. at 2552 n.6 (emphasis added). This Court's reference to "any other pretrial purpose" (*ibid.*) limits any future application of *Eisen* to cost-shifting of class notice. *Dukes* could not have been clearer that *Eisen* imposes no limitation on judicial resolution of whether the Rule 23 factors have been satisfied.

Yet the Third Circuit nonetheless expressly invoked and relied upon *Eisen* (no fewer than six times) to justify its crabbed view of the issues properly before it at the certification stage—"[t]o require more" from Plaintiffs, it insisted, would "contraven[e] *Eisen*." Pet. App. 33a. This reasoning cannot be squared with *Dukes*.

c. The Third Circuit, perhaps recognizing that its refusal to resolve Comcast's challenges to Plaintiffs' expert damages model was inconsistent with *Dukes*, said that *Dukes* "neither guides nor governs the dispute" in this case. Pet. App. 41a n.12. In its view, "[t]he factual and legal underpinnings of

[*Dukes*]—which involved a massive discrimination class action and different sections of Rule 23—are clearly distinct from those of this case." *Ibid.* In opposing certiorari, Plaintiffs did not bother to defend this aspect of the Third Circuit's reasoning, and for good reason: It is plainly incorrect.

The Third Circuit never explained why it is significant that *Dukes* arose in the discrimination context. This Court turned to the allegations "[i]n this case" (*Dukes*, 131 S. Ct. at 2552) only *after* clarifying the proper standards under Rule 23; its analysis was not limited to discrimination but instead interpreted Rule 23 generally—as one would expect given this Court's holding in *Falcon* that the "rigorous analysis" it described is required before certifying "*any*" class action. 457 U.S. at 161 (emphasis added); *see also*, *e.g.*, *Shady Grove*, 130 S. Ct. at 1437 ("Rule 23 provides a one-size-fits-all formula for deciding the class-action question").

Nor is it significant that *Dukes* was decided under Rule 23(a)(2)'s commonality requirement, whereas this case involves Rule 23(b)(3). The relevant portion of the opinion—that *Eisen* does not foreclose an inquiry into "the propriety of certification *under Rules 23(a) and (b)*" (*Dukes*, 131 S. Ct. at 2552 n.6 (emphasis added))—applies equally to Rule 23(b)(3). This is unsurprising because the two requirements are related: To conclude that the proponent has satisfied Rule 23(a), the district court must find that "there are questions of law or fact common to the class," and Rule 23(b)(3) certification is appropriate if the district court "finds" (among other things) "that *the* questions of law or fact common to class members predominate over any questions affecting only individual members" (emphasis added). The commonali-

ty inquiry thus bears directly on both requirements: Once the common questions have been identified under Rule 23(a), the court must determine whether they predominate under Rule 23(b)(3). It would make no sense to require a searching inquiry under Rule 23(a) while permitting a more lenient inquiry to satisfy Rule 23(b)(3)'s "far more demanding" requirement. *Amchem*, 521 U.S. at 623-24; *see also*, *e.g.*, *Moore* v. *PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002) (Sotomayor, J.) (predominance is a "more demanding criterion than the commonality inquiry under Rule 23(a)").

3. By declining to address supposed "merits" issues bearing on certification, and instead accepting Plaintiffs' "assur[ances]" on those points, the Third Circuit violated the basic rule that "actual, *not presumed*, conformance" with Rule 23's prerequisites is essential. *Falcon*, 457 U.S. at 160 (emphasis added); *see also*, *e.g.*, *Unger* v. *Amedisys Inc.*, 401 F.3d 316, 321 (5th Cir. 2005) ("The plain text of Rule 23 requires the court to 'find,' not merely assume, the facts favoring class certification").

And the Third Circuit's watered-down approach to class certification is even more problematic because it would relieve the class members of their burden of proving damages at trial, and would deprive Comcast of its right to defend against the class members' claims—in direct violation of the Rules Enabling Act. *See* 28 U.S.C. § 2072(b). Allowing Plaintiffs' claims to be tried as a class action without a means of proving damages on a class-wide basis, and without requiring individual proof of damages, would modify the parties' substantive rights in three separate respects:

First, "allowing gross damages by treating unsubstantiated claims of class members collectively" would "significantly alte[r] substantive rights." *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974). As the Ninth Circuit has explained, such an approach is "clearly prohibited" by the Rules Enabling Act. *Ibid.*; *see also Windham* v. *Am. Brands, Inc.*, 565 F.2d 59, 66 (4th Cir. 1977) ("[g]eneralized" damages evidence is inconsistent with the "mandate of the Rules Enabling Act"). And the Court in *Dukes* signified its agreement with this point when it rejected a "Trial by Formula" variant of the "gross damages" theory. 131 S. Ct. at 2561.

Second, the district court's certification order relieves the class members of the burden of proving an element of their claims because they would be permitted to recover without adducing any proof of individualized damages, even though the only theory of class-wide damages cannot actually establish damages on a class-wide basis. The Rules Enabling Act does not permit certification if it requires eliminating a claim element that would have to be proved in a non-class case. *See Hohider* v. *UPS*, 574 F.3d 169, 196 (3d Cir. 2009) (rejecting certification "[b]ecause the statutorily required inquiry" into a particular element is "incompatible with the requirements of Rule 23," and "because plaintiffs cannot adjudicate their claims and requested relief without it"); *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008) (cautioning against approaches that would "alter defendants' substantive right to pay damages reflective of their actual liability").

Third, the class members' damages similarly "cannot be presumed" because Comcast "ha[s] the right to raise individual defenses against each class

member." *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 191-92 (3d Cir. 2001); *see also Dukes*, 131 S. Ct. at 2561 ("a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims"). Negating a claim element—here damages—is an available defense in most cases, and a class cannot be certified if it requires precluding the defendant from asserting this defense.[4]

C. The Need For Individualized Proof Of Damages Prevents Certification In This Case.

Because Plaintiffs have no class-wide evidence of damages, they would be required to prove that issue on an individualized basis across the nearly two million class members. This "need for . . . individualized inquiries" into damages across the range of Comcast's franchise areas would overwhelm any purportedly common questions in the case, and precludes certification under Rule 23(b)(3). *Bell Atl. Corp.* v. *AT&T Corp.*, 339 F.3d 294, 304 (5th Cir. 2003).

1. As the courts of appeals have acknowledged, certification may be appropriate under Rule 23(b)(3) where common questions of liability predominate, "even when there are some individualized damage issues." *Visa Check*, 280 F.3d at 139; *see also*, *e.g.*, *Arreola* v. *Godinez*, 546 F.3d 788, 801 (7th Cir. 2008) (certification may be appropriate where "there are

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[4] For this reason, the Third Circuit's approach would also contravene Comcast's right, "guaranteed . . . by the Due Process Clause," to "litigate the issues raised," *United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971), which includes the ability "to present every available defense," *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks omitted).

substantial common issues that outweigh the single variable of damages amounts"). For this reason, "the need for individual damages determinations does not, *in and of itself*, require denial of [a] motion for [class] certification." *Ibid.* (emphasis added).

At the same time, the "Herculean task" of calculating individual damages in certain cases "counsels against finding predominance." *Newton*, 259 F.3d at 187; *see also*, *e.g.*, *Ward* v. *Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010) ("individualized damage determinations cut against class certification under Rule 23(b)(3)"); *Broussard*, 155 F.3d at 342-43 (reversing class certification order given "inherently individualized" damages claims). And "where the issue of damages" would "requir[e] separate mini-trial[s] of an overwhelming[ly] large number of individual claims," the "staggering problems of logistics thus created make the damage aspect of [the] case predominate, and render the case unmanageable as a class action." *Windham*, 565 F.2d at 68 (footnotes and internal quotation marks omitted).

In this respect, the element of damages in antitrust cases (or other cases where proof of damages is an element of the plaintiff's claim) is similar to other claim elements that will preclude class certification in the absence of an acceptable method of class-wide proof. This Court explained in *Basic Inc.* v. *Levinson*, for example, that "[r]equiring proof of individualized reliance from each member of the proposed plaintiff class" in a securities-fraud lawsuit "effectively would . . . preven[t] [them] from proceeding with a class action, since individual issues then would have overwhelmed the common ones." 485 U.S. 224, 242 (1988); *see also*, *e.g.*, *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) ("a

fraud class action cannot be certified when individual reliance will be an issue"). Some securities-fraud cases, such as those involving secondary trades on open and developed domestic markets, can proceed as class actions because reliance is presumed as a matter of substantive law. *See Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2184-85 (2011). In the absence of such a presumption (or where the presumption is rebutted), however, individualized questions of reliance prevent certification of fraud claims. *See McLaughlin*, 522 F.3d at 223-25; *see also IPO Sec. Litig.*, 471 F.3d at 43 ("Without the *Basic* presumption, individual questions of reliance would predominate over common questions").

Damages are not presumed in this or any other antitrust case—they must be proven at trial as an element of the plaintiff's claim. Thus, at the class certification stage, the proponent has the burden of proving that individualized damages questions will not predominate over any common questions in the case. This may be accomplished, in appropriate cases, by a viable theory of class-wide damages that is supported by the evidence. In the absence of such a well-founded damages theory, certification will be inappropriate. *See*, *e.g.*, *Broussard*, 155 F.3d at 343 (rejecting "'hypothetical or speculative' evidence, divorced from any actual proof of damages," as a substitute for the requisite "proof of individual damages").

2. In this case, individualized damages inquiries preclude certification in the absence of some class-wide method of proof. Indeed, the Third Circuit concluded, and Plaintiffs did not dispute, that they could obtain certification *only* by "establish[ing] that the alleged damages are capable of measurement on a

class-wide basis using common proof." Pet. App. 34a; *see also*, *e.g.*, *Broussard*, 155 F.3d at 342-43 ("the need for individual proof of damages bars class certification in some antitrust cases"). Having failed to do so, Plaintiffs cannot establish the predominance required for certification. *See supra* at 23 n.3.

On Plaintiffs' estimate, there are two million members of the class certified by the district court. J.A. 35a ¶ 32. If these class members were required to establish damages on an individual basis, and even assuming (quite fancifully) both that it would take only 10 minutes for each class member to do so and that the district court were operating around the clock, it would take more than 38 years to adjudicate all of their claims. Under these circumstances, "this suit raises far too many individual questions to qualify for class action treatment." *Hotel Tel. Charges*, 500 F.2d at 89 (reversing decision granting class certification given individualized damages questions); *see also*, *e.g.*, *Windham*, 565 F.2d at 70 ("The district court estimated . . . that, in the absence of a practical damage formula, determination of individual damages in this case could consume ten years of its time").

The fact that individual damages questions would predominate in this case, in the absence of class-wide proof, is further demonstrated by the complexity of the questions involved. Plaintiffs' theory of antitrust injury is that they paid more for their cable service than they would have paid in a hypothetical, "but-for" world in which Comcast did not (allegedly) deter competition from overbuilders. But to measure the resulting damages, Plaintiffs must construct—as Dr. McClave attempted to do—a "but-for" world. Because they have no evidence that it is possible to do so on a class-wide basis, *see supra*

Part I.A, Plaintiffs could prove their claims only by developing an enormous volume of "but-for" pricing information—at a *minimum* for each of the roughly 650 franchise areas in the Philadelphia DMA. Under these circumstances, Plaintiffs "have clearly failed to demonstrate that common issues of fact predominate over those individual issues of fact that are plainly necessary for any just estimate of the antitrust damages suffered by the class members." *Bell Atl.*, 339 F.3d at 307-08.

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This Court has consistently, and repeatedly, admonished against "adventurous application" of Rule 23. *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999); *see also Dukes*, 131 S. Ct. at 2561 (disapproving "novel" approach to certification). The Third Circuit, however, adopted an approach that would permit class-wide litigation of a critical element of Plaintiffs' claims without any class-wide evidence on that element, instead simply accepting their "assur[ances]" (Pet. App. 46a) that they could adduce such proof. This is not a permissible approach to class certification.

II. PLAINTIFFS DID NOT ADDUCE SUFFICIENTLY HELPFUL AND RELIABLE EVIDENCE THAT CLASS-WIDE QUESTIONS PREDOMINATE OVER INDIVIDUAL ONES.

The preceding discussion establishes that Plaintiffs' failure to adduce any relevant evidence of class-wide damages under their sole remaining legal theory is sufficient, by itself, to warrant reversal of the decision below and vacatur of the certification order. But even if the Court were to assume, as the Third Circuit impermissibly did, that Dr. McClave's damages model could potentially be modified to measure

harm from deterred overbuilding on a class-wide basis, it should nonetheless reverse the decision below.

Where, as here, the proponent of class certification attempts to satisfy its burden of proving that common questions predominate through expert evidence, the court must examine that evidence to determine whether it is sufficiently helpful and reliable for the purpose. And even then, the court must examine the expert evidence in light of the remaining evidentiary materials before it, including competing expert opinions, to decide whether the proponent has carried its burden. If the evidence does not meet the threshold helpfulness and reliability requirements for expert evidence, as Plaintiffs' damages model does not, it cannot satisfy the proponent's burden.

A. Expert Opinion Evidence Admitted In Support Of Class Certification Must Satisfy Rule 702 And *Daubert*.

The "determinations" required by Rule 23 and this Court's precedents "can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established." *IPO Sec. Litig.*, 471 F.3d at 41; *see also*, *e.g.*, *Hydrogen Peroxide*, 552 F.3d at 316-17. This, in turn, means that the court "must receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met." *Id.* at 324; *see also*, *e.g.*, Fed. R. Civ. P. 43(c) ("the court may hear [a motion] on affidavits or may hear it wholly or partly on oral testimony or on depositions").

While a district court has discretion to consider a wide variety of evidentiary submissions in ruling on a certification motion, however, not all submissions

will assist the court in making the requisite findings. As Judge Jordan noted below, "[a] court should be hard pressed to conclude that the elements of a claim are capable of proof through evidence common to a class if the only evidence proffered would not be admissible as proof of anything." Pet. App. 66a n.18. When affidavits, declarations, or expert reports represent to the court and the opposing party that the witness would be capable of testifying as to their contents, therefore, "simple logic" dictates that the court must consider whether that testimony would ultimately be admissible at trial before crediting it in the certification inquiry. *Ibid.*; *see also*, *e.g.*, *Unger*, 401 F.3d at 319 ("findings must be made based on adequate admissible evidence to justify class certification").

In the context of expert opinion testimony such as Dr. McClave's damages model, Federal Rule of Evidence 702 establishes the basic requirements under which an expert "may testify in the form of an opinion or otherwise," subject to the other requirements for admissibility applicable to all evidence. *See*, *e.g.*, *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 141 (1999). And this Court's opinion in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), makes clear that Rule 702 "imposes a special obligation upon a trial judge" (*Kumho Tire*, 526 U.S. at 147) to "ensure that any and all scientific testimony" is "not only relevant, but reliable." 509 U.S. at 589.

In *Dukes*, this Court noted that the district court in that case had "concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings." 131 S. Ct. at 2553-54. While it was unnecessary for the Court to resolve that issue definitively, it "doubt[ed]" that the district

court was correct. *Id.* at 2554. And the Court's "doubt[s]" were well-founded: Certifying a class action without subjecting expert evidence presented in support of certification to the threshold inquiries required by Rule 702 and *Daubert* would "amoun[t] to a delegation of judicial power to the plaintiffs," who could then "obtain class certification just by hiring a competent expert." *West* v. *Prudential Sec., Inc.,* 282 F.3d 935, 938 (7th Cir. 2002).

1. Rule 702's standards regarding when expert witnesses "may testify in the form of an opinion or otherwise" (Fed. R. Evid. 702) does not contain any exception that would limit its applicability to the admission of evidence *at trial*. To the contrary, Rule 702's primary aim—to "make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field," *Kumho Tire*, 526 U.S. at 152—is "equally applicable in the class certification context." *Dukes* v. *Wal-Mart Stores, Inc.*, 603 F.3d 571, 639 (9th Cir. 2010) (en banc) (Ikuta, J., dissenting), *rev'd*, 131 S. Ct. 2541 (2011).

But whether or not Rule 702 would apply of its own force to all pre-trial determinations, the purpose of the certification inquiry is to evaluate the evidence that likely will be presented at trial, which necessarily entails consideration of whether the expert opinions embodied in the reports or testimony could be admitted consistent with Rule 702. For this reason, "when an expert's report or testimony is critical to class certification," the "district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion." *Am. Honda Motor Co.* v. *Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010). "That is," the Sev-

enth Circuit emphasized, "the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants." *Id.* at 816; *see also ibid.* (courts "must . . . resolve any challenge to the reliability of information provided by an expert if that information is relevant to establishing any of the Rule 23 requirements for class certification"); *Sher* v. *Raytheon Co.*, 419 F. App'x 887, 890 (11th Cir. 2011) (agreeing with *American Honda*).

Indeed, it is difficult to see how district courts could *decline* to apply Rule 702 and *Daubert* given their need to determine whether Rule 23's requirements are "*in fact*" satisfied. *Dukes*, 131 S. Ct. at 2551. If, as in this case, the proponent of class certification attempts to satisfy the predominance requirement through expert evidence purportedly establishing a class-wide method of proof, the district court could not "fin[d] that the questions of law or fact common to class members predominate over any questions affecting only individual members" (Fed. R. Civ. P. 23(b)(3)) without asking whether the expert's opinion is sufficiently helpful and reliable. If the opinion fails to satisfy these basic prerequisites for admissibility, then it could not be introduced at trial, and the class members would be left in the same position as if the expert had never been retained—that is, needing to prove their claims on an individualized basis. *See McLaughlin*, 522 F.3d at 229 ("requisite showing" to support "legal theory" used to satisfy Rule 23 is that the proponents "could, at trial, marshal facts sufficient to permit them to rely upon it"). "Requiring a full *Daubert* analysis" is thus a "natural extension of the concept that class certification . . . should be permitted only after a rigorous application of Rule 23's requirements." *In re*

Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 628 (8th Cir. 2011) (Gruender, J., dissenting).[5]

2. Moreover, Rule 702 and *Daubert* are only the *starting* point for a district court's analysis under Rule 23. In addition to "determin[ing]" that the proffered expert evidence satisfies the "evidentiary standard set forth in *Daubert*," district courts must *also* "resolve any factual disputes necessary to determine" whether that evidence—considered in light of the remaining factual record—is sufficient to satisfy Rule 23's prerequisites. *Ellis* v. *Costco Wholesale Corp.*, 657 F.3d 970, 982-83 (9th Cir. 2011); *see also*, *e.g.*, *Dukes*, 131 S. Ct. at 2553-54 (assuming that expert testimony was "properly considered" but finding it insufficiently persuasive to support certification); *IPO Sec. Litig.*, 471 F.3d at 33, 42 (proponent of class certification must do more than put forth "some evidence" that the rule's prerequisites are satisfied).

Indeed, the "suggestio[n] that *Daubert*-worthy expert testimony supporting the proposed aggregate unit should suffice to elicit class certification" is "only

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[5] Creating a circuit split with the Seventh, Ninth, and Eleventh Circuits, the Eighth Circuit held in *Zurn Pex* that something less than a "full *Daubert* inquiry" is warranted "at the class certification stage." 644 F.3d at 612. Yet even the Eighth Circuit, unlike the Third Circuit below, acknowledged that district courts must engage in *at least* a "focused *Daubert* analysis" that "scrutinize[s] the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence." *Id.* at 614. Such a "tailored *Daubert* analysis" (*ibid.*) would be more than adequate to doom Dr. McClave's damages model in this case. *See infra* Part II.B. In any event, the Eighth Circuit's decision to defer application of the full inquiry required by *Daubert* until some later stage of litigation precludes it from making the findings required by Rule 23 and this Court's cases.

a half-step removed" from now-overturned decisions granting "class certification based on allegations in the complaint that track the requirements of Rule 23." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 125-26 (2009). "Certification based simply on the assertions in the complaint or an admissible expert submission exhibits a troubling circularity," as "[t]he legitimacy of aggregation as a procedural matter would stem from the shaping of proof that presupposes the very aggregate unit whose propriety the court is to assess." *Id.* at 126; *see also Ellis*, 657 F.3d at 982 ("to the extent the district court limited its analysis of whether there was commonality to a determination of whether Plaintiffs' evidence on that point was admissible, it did so in error").

Any contrary approach—deeming Rule 23 to be satisfied based on expert opinions that would meet only the baseline requirements imposed by Rule 702 and *Daubert*—would simply "han[d] off to experts" the "decision as to whether the elements of a claim are susceptible to common proof." Kermit Roosevelt III, *Defeating Class Certification in Securities Fraud Actions*, 22 Rev. Litig. 405, 425 (2003); *see also* Heather P. Scribner, *Rigorous Analysis of the Class Certification Expert: The Roles of* Daubert *and the Defendant's Proof*, 28 Rev. Litig. 71, 111 (2008). "A district judge," however, "may not duck hard questions by observing that each side has some support, or that considerations relevant to class certification also may affect the decision on the merits." *West*, 282 F.3d at 938. Instead, "[t]ough questions must be faced and squarely decided" at the certification stage, "if necessary by holding evidentiary hearings and choosing between competing perspectives." *Ibid.*

3. The Third Circuit, for its part, believed that even expert opinions that lack the helpfulness and reliability necessary to satisfy *Daubert* could still be used at the certification stage based on the possibility that they might "be refined" and "evolve" in a way that cures their defects. Pet. App. 44a n.13. Not so.

As an initial matter, the Third Circuit did not undertake any independent inquiry into how the expert testimony might "evolve" or "be refined," Pet. App. 44a n.13, but instead was content to accept Plaintiffs' "assur[ances]" (*id.* at 46a) to that effect. But this is analogous to accepting the allegations in a plaintiff's complaint as sufficient to satisfy Rule 23: By filing a complaint, after all, the filing attorney certifies that "the factual contentions have evidentiary support or . . . will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b)(3); *see also*, *e.g.*, Nagareda, *supra*, at 126. *Dukes* holds, however, that the proponent of certification must go beyond these types of assurances and provide *actual* "*proof*." 131 S. Ct. at 2552 (emphasis added). Plaintiffs failed to do so.

Even worse, the Third Circuit *acknowledged* that it could not tell whether the district court had actually found compliance with Rule 23. Instead, it said only that the district court "*likely* determined that Dr. McClave's model could be refined between the time when class certification was granted and trial so as to comply with *Daubert*." Pet. App. 44a n.13 (emphasis added). As this Court has held, however, "actual, *not presumed*, conformance" with Rule 23's prerequisites is necessary. *Falcon*, 457 U.S. at 160 (emphasis added). By resorting to speculation about the district court's analysis, the Third Circuit im-

permissibly engaged in the type of "presum[ptions]" forbidden by *Falcon*.

In any event, the Third Circuit could not find "actual . . . conformance" with Rule 23's prerequisites without first determining whether it had been presented with helpful and reliable evidence of class-wide damages. "[T]o say that the model might be fixed" is "no better" than saying it is sufficient for Plaintiffs to "have made 'a threshold showing' of predominance or shown a sufficient 'intention to try the case in a manner that satisfied the predominance requirement.'" Pet. App. 80a-81a n.28a (Jordan, J., dissenting in relevant part) (quoting *Hydrogen Peroxide*, 552 F.3d at 321). That is not good enough to satisfy Rule 23. *See Hydrogen Peroxide*, 552 F.3d at 318 ("A party's assurance to the court that it intends or plans to meet the requirements is insufficient"); *Windham*, 565 F.2d at 70 ("where the court finds . . . that there are serious problems now appearing, it should not certify the class merely on the assurance of counsel that some solution will be found").[6]

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[6] This Scarlett O'Hara approach to class certification—"I'll think about it tomorrow," *Gone with the Wind* (1939)—is also inconsistent with Rule 23(c)(1)(B)'s requirement that the certification order "*define* . . . the class claims, issues, or defenses" (emphasis added). This provision, added in 2003, "requires more specific and more deliberate treatment of the class issues, claims, and defenses" than prior practice "usually reflected." *Wachtel ex rel. Jesse* v. *Guardian Life Ins. Co. of Am.*, 453 F.3d 179, 185 (3d Cir. 2006). A "clear and complete statement of the claims, issues, or defenses to be treated on a class basis" is necessary both to "shed light" on whether Rule 23's prerequisites have been satisfied, and also to "aid courts and parties in meeting th[e] critical need" to determine how the case will be tried "by necessitating the full and clear articulation of the litigation's contours at the time of class certification." *Id.* at 186 (in-

[Footnote continued on next page]

B. DR. MCCLAVE'S DAMAGES MODEL DOES NOT SATISFY RULE 702 AND *DAUBERT*.

Dr. McClave's damages model suffers from several methodological problems that preclude it from serving as a "help[ful]" or "reliabl[e]" measure of damages. Fed. R. Evid. 702(a), (d). And even if these methodological problems could somehow be fixed, "there remains an intractable problem with *any* model purporting to calculate damages for all class members collectively," Pet. App. 81a (Jordan, J., dissenting in relevant part)—namely, that significant variations among the franchise areas in the Philadelphia DMA preclude any class-wide evidence of damages.

1. Dr. McClave's DBS Penetration screen included only counties where the DBS penetration rate was at or above the national average, on the theory that the DBS penetration rate in the Philadelphia DMA—which was below the national average—was "constrained by the anticompetitive behavior of Comcast." J.A. 1380a. Although that screen might have been appropriate if "DBS penetration had been [so] constrained," the district court instead found that "Plaintiffs failed to tie 'Comcast's clustering activity in the Philadelphia DMA to reduced DBS penetration.'" Pet. App. 74a (Jordan, J., dissenting in relevant part) (quoting *id.* at 120a). As a result, Judge Jordan emphasized, "there is no evidence in the rec-

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[Footnote continued from previous page]
ternal quotation marks omitted); *see also Hydrogen Peroxide*, 552 F.3d at 319 (noting that the advisory committee's notes to the 2003 amendments "introduc[ed] the concept of a 'trial plan'" to "focu[s] attention on a rigorous evaluation of the likely shape of a trial on the issues" (quoting 2003 Advisory Committee's Note, 215 F.R.D. at 217).

ord suggesting that DBS penetration in the Philadelphia DMA was in any way affected by Comcast's allegedly anticompetitive conduct," and no basis for Dr. McClave to correct for the below-average DBS penetration rate in Philadelphia by selecting as "benchmark" counties only those with higher than average penetration rates. *Id.* at 74a-75a.

As for Dr. McClave's Market Share screen, which eliminated counties in which Comcast had greater than 40% market share, "while Comcast's market share is relevant to the question of whether there has been any reduction in overbuilding, it is not relevant—at least not in isolation—to determining the damages caused by that reduction." Pet. App. 77a (Jordan, J., dissenting in relevant part). "By calculating the appropriate market share screen using only Comcast's average share throughout the Philadelphia DMA," Dr. McClave "ignored any market share that, in the 'but for' hypothetical world, would have been maintained by an incumbent other than Comcast." *Id.* at 79a. But "any market share screen applied to isolate the 'but for' conditions that would have prevailed in the Philadelphia DMA should screen not just for Comcast's share, but for the share of whatever incumbent would have been present but for the clustering." *Id.* at 78a; *see also*, *e.g.*, *Eleven Line, Inc.* v. *N. Tex. State Soccer Ass'n*, 213 F.3d 198, 208-09 (5th Cir. 2000) (expert using benchmark to derive but-for values must prove "reasonable similarity" between the benchmark and the but-for world).

It is undisputed that Comcast's market share *in the franchise areas where it operated* in 1998 substantially exceeded the 20% share that Dr. McClave used as his basis for claiming that 40% was an "approximate midpoint" between Comcast's market

share before and after the challenged conduct. J.A. 1380a; *see also id.* at 206a-207a, 1063a. By including, in his DMA-wide "average" market share, franchise areas where Comcast was not yet present, Dr. McClave "unfairly suppressed the relevant incumbent share and artificially inflated the damages calculation." Pet. App. 79a-80a & n.27 (Jordan, J., dissenting in relevant part).

2. Even assuming that these screening problems could be addressed in "refined" versions of Dr. McClave's damages model, that model cannot be used to prove class-wide damages unless the same "but-for" conditions would have been experienced throughout the entire Philadelphia DMA. If there are no common "but-for" conditions, then different class members—or groups of class members—would need to calculate different "but-for" pricing in order to measure damages, and no element of Plaintiffs' proposed damages proof would be "common" to all class members.

Dr. McClave's damages model proceeds on the assumption that the "price of cable television service in any given franchise area" is affected by the "relative market shares" of competing service providers, including overbuilders, DBS providers, and incumbent cable providers. Pet. App. 81a (Jordan, J., dissenting in relevant part). But "[i]f price does vary with the changes in relative share within a franchise area," Judge Jordan noted, "it is hard to see how th[e] 650 franchise areas" within the Philadelphia DMA "can simply be treated as average for purposes of proving damages." *Id.* at 82a.

Nonetheless, Dr. McClave developed his screens using DMA-wide averages, and also varied his "but-for" prices by county, not by franchise area. *See* J.A.

1380a, 1394a-1396a tbl. A.2. Yet "[t]he record indicates that . . . the 'but for' market shares of overbuilders, DBS providers, and incumbent providers would vary, sometimes significantly, from franchise area to franchise area." Pet. App. 82a (Jordan, J., dissenting in relevant part). And because "Comcast prices its cable service at the franchise level," *id.* at 85a, those variations will result in different "but-for" prices reflecting the different competitive conditions in each franchise area. In particular:

- The alleged overbuilder—RCN—had received FCC approval to overbuild in only five counties within the Philadelphia DMA. *See* Pet. App. 82a-83a (Jordan, J., dissenting in relevant part); *see also* J.A. 820a (showing RCN service areas). But while Dr. McClave's model assumed that clustering deterred overbuilding only in those five counties, *see* J.A. 1382a, his model nonetheless found "damages" in the other counties in which Comcast operated, *see id.* at 1394a-1396a tbl. A.2. Thus, whatever his model was measuring in those counties, it is not damages from deterred overbuilding. And even if RCN had expanded into other areas, "any overbuilding into the other parts of the Philadelphia DMA would . . . have come later than the overbuilding of the five [approved] counties." Pet. App. 83a (Jordan, J., dissenting in relevant part). "[W]hile some franchise areas might have been overbuilt early in the class period," "other franchise areas would likely never have been overbuilt at all or have been overbuilt only later in the class period." *Ibid.*; *see also* J.A. 1084a-1086a.
- As for DBS, Dr. McClave specifically acknowledged that "DBS penetration varies across the

cluster here" and that it was "possible that some of the counties in the Philadelphia DMA in fact have penetration that's above the national median." J.A. 203a; *see also* J.A. 821a. "[N]ot only does DBS penetration vary across the Philadelphia DMA," that is, "but the variation is pronounced enough that some parts of the Philadelphia DMA have above national average DBS penetration despite the fact that the Philadelphia DMA, as a whole, has DBS penetration at only half the national average." Pet. App. 83a (Jordan, J., dissenting in relevant part).

- With respect to incumbent market share, "Comcast's share prior to clustering varied markedly from franchise area to franchise area." Pet. App. 84a (Jordan, J., dissenting in relevant part) (citing J.A. 1063a). "And, where the other two components of market share—DBS penetration and overbuilding—vary from one franchise area to another, it becomes a near mathematical certainty that the remaining portion of the franchise held by incumbent cable providers must likewise vary." *Ibid.* (footnote omitted); *see also* J.A. 1083a-1087a.

As Judge Jordan noted, "[t]he wide variation in the relative market shares evidenced by the record makes it hard to imagine a means of calculating class-wide damages." Pet. App. 85a. "[T]o say that Comcast's 'but for' share of the market throughout the Philadelphia DMA would be, on average, 40%," he noted, "is about as meaningful as saying that 'with one foot on fire and the other on ice, I am, on average, comfortable.'" *Ibid.*

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"The variation in conditions within the nearly 650 franchise areas in the Philadelphia DMA means that the issue of damages is more fractured than a single class can accommodate." Pet. App. 88a (Jordan, J., dissenting in relevant part). The Third Circuit erred both in rejecting "attacks on the merits of . . . Dr. McClave's methodology," and in permitting certification of a class without deciding whether the sole methodology supposedly permitting class-wide proof of damages was "a just and reasonable inference or speculative." Pet. App. 47a-48a. Just as this Court closely scrutinized in *Dukes* whether the plaintiffs had established class-wide discrimination by showing a company-wide policy, and concluded that they had not, 131 S. Ct. at 2553, this Court should conduct the scrutiny of Dr. McClave's opinions that the Third Circuit majority abjured, and conclude (as Judge Jordan did) that Plaintiffs offered no valid evidence in support of their class-wide theory of damages, on which their entire argument under Rule 23(b)(3) rests.

III. THE DECISION BELOW UNDERMINES THE IMPORTANT POLICIES EMBODIED IN RULE 23.

Rule 23 attempts to strike a balance between systemic benefits and individual costs, authorizing certification only where the balance is favorable. It empowers district courts to ensure that the Rule's twin goals—facilitating efficient class relief and protecting the parties and absent class members—are properly advanced, and authorizes (discretionary) appellate review of certification orders to promote certainty and uniformity of decision.

By failing to address arguments supposedly bearing on the "merits" of Plaintiffs' claims, blithely accepting Plaintiffs' "assur[ances]" that they can prove damages on a class-wide basis, and declining to engage in any meaningful evaluation of expert testimony at the certification stage, the Third Circuit failed to discharge its reviewing obligation, and its decision signals an approach to class certification that neither effectively furthers the efficiency goals of Rule 23 nor adequately protects class-action defendants and absent plaintiffs from undue costs.

A. Rule 23(b)(3) was promulgated to "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Fed. R. Civ. P. 23 advisory committee's note, 39 F.R.D. 69, 102-03 (1966) ("1966 Advisory Committee's Note"). The rule expressly requires courts to find predominance "as a condition" of certification, because "[i]t is only where this predominance exists that economies can be achieved by means of the class-action device." *Id.* at 103.

By disclaiming any authority to resolve issues critical to determining whether proposed class-wide proof is viable, however, and by declining to adjudge the relevance, helpfulness, or reliability of evidence introduced to prove those issues, the Third Circuit's approach provides no assurances that class claims certified under Rule 23(b)(3) will actually be provable by (predominately) common evidence. Rule 23 interposes district courts as gatekeepers precisely to forestall the burdens of class-action defense when those burdens are not justified by real systemic benefits. *See*, *e.g.*, 1966 Advisory Committee's Note, 39 F.R.D.

at 103; *see also*, *e.g.*, *Amchem*, 521 U.S. at 615 (requiring a "close look" before class actions are certified to ensure that the rule's "efficiency" and "uniformity" goals are advanced without any undue burden on "procedural fairness" or the "individual autonomy" of plaintiffs "who might prefer to go it alone"). Yet because the Third Circuit's approach is inadequate to distinguish those cases *actually* promising systemic benefits from those without any redeeming value, it is an abdication of judicial responsibility at the class certification stage.

And that defect is especially significant because "[a] district court's ruling on the certification issue is often the most significant decision rendered" in class-action proceedings. *Deposit Guar. Nat'l Bank*, 445 U.S. at 339. Given the potential damages at issue, "class certification creates insurmountable pressure on defendants to settle," regardless of the merits, "whereas individual trials would not." *Castano*, 84 F.3d at 746; *see also* Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 260 tbl. 4 (2010) (average settlement over $100 million in certified federal class actions). As the district court acknowledged below, class certification is thus "'often the defining moment in class actions (for it may sound the death knell of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of the defendants).'" Pet. App. 92a-93a (quoting *In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774, 780 (3d Cir. 2009)) (internal quotation marks omitted).

The importance of class certification is particularly pronounced in antitrust litigation. "Because of the complexity of the issues and the breadth of the

discovery allowed, antitrust cases have become known as 'serpentine labyrinths' in which discovery is a 'bottomless pit.'" 6 James Wm. Moore *et al.*, *Moore's Federal Practice* ¶ 26.46[1] (3d ed. 2011); *see also Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 558-59 (2007) (collecting citations). "The risks associated with antitrust class actions" therefore "dictate that most cases will be on the fast track to settlement shortly after class certification, long before a summary judgment motion or merits adjudication of any kind can play a role." John T. Delacourt, *Protecting Competition by Narrowing* Noerr*: A Reply*, 18 Antitrust 77, 78 (2003); *see also* Eisenberg & Miller, *supra*, at 262 tbl. 5 (average settlement over $160 million in certified antitrust class actions).

Class certification has real costs for plaintiffs as well. Absent plaintiffs who do not opt out of the class will be bound by the judgment and forfeit any right to proceed individually if the named plaintiffs lose. And absent plaintiffs "who might prefer to go it alone" are similarly deprived of "individual autonomy." *Amchem*, 521 U.S. at 615.

The importance of the certification inquiry to both plaintiffs and defendants emphasizes the importance of getting that inquiry *right*. But that is a decidedly unlikely outcome on the Third Circuit's approach, which essentially accepts—in so many words—the plaintiff's "assurance . . . that it intends or plans to meet the requirements" of Rule 23. *Hydrogen Peroxide*, 552 F.3d at 318; *compare* Pet. App. 46a.

B. The Third Circuit believed that permitting "merits" inquiries at the class certification stage "would turn class certification into a trial" and "would run 'dangerously close to stepping on the toes

of the Seventh Amendment.'" Opp. 10 (quoting Pet. App. 33a-34a). But *Dukes* squarely held that plaintiffs must prove any contention bearing on the propriety of certification, even if "they will surely have to prove [the issue] *again* at trial in order to make out their case on the merits." 131 S. Ct. at 2552 n.6. This requirement does not impinge on any Seventh Amendment rights because "any findings for the purpose of class certification 'do not bind the fact-finder on the merits.'" Pet. App. 14a (quoting *Hydrogen Peroxide*, 552 F.3d at 318); *see also IPO Sec. Litig.*, 471 F.3d at 41. No claim is being decided or tried at the certification stage; the denial of a certification motion leaves completely undisturbed the rights of the class members to pursue their individual claims, including (where appropriate) by trying those claims to a jury.

The Third Circuit also claimed that its holding was consistent with the purportedly "unifor[m]" concern about "converting certification decisions into mini trials" that had been expressed before *Dukes* by "recent scholarship." Pet. App. 34a n.10. In contrast to the authors of the articles identified by the court below, most of whom were members of the plaintiffs' class-action bar, other scholars specializing in class actions had praised, as a "welcome step forward," the broad consensus among lower-court decisions holding (consistent with the later opinion in *Dukes*) that *Eisen* does not preclude the "weighing of competing expert submissions." Nagareda, *supra*, at 111, 113; *see also*, *e.g.*, Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 Geo. Wash. L. Rev. 324, 372 (2011) ("the recent shift toward merits scrutiny at the class certification stage is a positive development"). In any event, the "scholarship" cited by the

Third Circuit cannot overrule *Dukes*—even if the authors disagree with it.

This purported concern about mini-trials is particularly misplaced in the context of determining whether expert evidence is sufficiently helpful and reliable to satisfy Rule 702 and *Daubert*. That issue is often (indeed usually) litigated before trial in the context of a motion *in limine* or similar pretrial proceeding, and requires (at most) an evidentiary hearing—*of precisely the sort that the district court held in this case*. The questions might not always be easy—although here they are—but the need to resolve "[t]ough questions" (*West*, 282 F.3d at 938) is no basis for courts to ignore the "rigorous analysis" required by Rule 23 and this Court's precedents, *Falcon*, 457 U.S. at 161.

C. This Court has insisted on faithful application of procedural rules even where doing so would require additional effort by district courts in assessing whether a pleaded cause of action is "plausible" or whether a disputed factual issue is "genuine." *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1950 (2009); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). So, too, the district court must decide whether the "party seeking class certification" has "affirmatively demonstrate[d] his compliance" with Rule 23, because "Rule 23 does not set forth a mere pleading standard." *Dukes*, 131 S. Ct. at 2551.

But the Third Circuit's approach would essentially return to the days when a bare complaint could suffice to satisfy the proponent's burden, permitting certification for any plaintiff who can hire an expert to submit a report, no matter how flawed, at the certification stage. *See* Nagareda, *supra*, at 125-26. If a

bare complaint does not suffice, then an unexamined expert report similarly must be insufficient. And the report of Dr. McClave in this case surely does not, and cannot, suffice to carry Plaintiffs' evidentiary burden. Rule 23 requires "proof" and "findings," *Dukes*, 131 S. Ct. at 2552, 2558-59, not the "assur[ances]" accepted by the Third Circuit, Pet. App. 46a. The decision below cannot stand.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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