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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONERS

Plaintiffs do not defend—or even acknowledge—the basis on which the Third Circuit *actually* rejected Comcast's challenges to their damages model: that "attacks on the merits of the methodology" have "no place in the class certification inquiry." Pet. App. 48a. This is undoubtedly because the Third Circuit's repeated invocation of *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), to dismiss questions bearing on certification as "merits" issues (*see* Pet. App. 13a-14a & n.6, 33a-34a & n.10, 49a-50a) is indefensible, given that this reading of *Eisen* was expressly repudiated in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2552 n.6 (2011). Nor do Plaintiffs try to explain how a lower court could believe that *Dukes*—this Court's most recent pronouncement on the contours of Rule 23—"neither guides nor governs the dispute" about class certification. Pet. App. 41a n.12. Having persuaded the Third Circuit not to address the substance of Comcast's challenges, Plaintiffs now find themselves unable to defend the decision below.

Plaintiffs' attempt to divert this Court's attention from the Third Circuit's errors is apparent in their lead argument, which seeks dismissal on the basis of a purported settlement—a contention that Plaintiffs were forced to withdraw after the district court unequivocally found there was *no* settlement.

Plaintiffs' diversionary efforts also include variations on the theme that the Third Circuit's errors should be overlooked because Comcast supposedly forfeited certain arguments. Comcast, however, has consistently and repeatedly objected to class certification on the ground that Dr. McClave's model cannot provide class-wide evidence of damages because

it does not measure Plaintiffs' only remaining theory of antitrust impact and because it suffers from fatal methodological flaws. The Third Circuit characterized these challenges as "merits" arguments to *avoid* deciding them on class certification—legerdemain that would have been unnecessary had the challenges been forfeited.

When they finally get to the substance of Dr. McClave's damages model, Plaintiffs have precious little to say. That is because the flaws in his methodology and the defects in his conclusions are so fundamental that his model cannot possibly carry Plaintiffs' burden to prove that common issues predominate. Fed. R. Civ. P. 23(b)(3). The certification order should have been reversed by the Third Circuit and should be reversed now by this Court.

I. THE PARTIES HAVE NOT SETTLED.

Plaintiffs' lead argument is based on the factual representation (at 21) that the parties have reached a "settlement" of the "entire case," on the basis of which they ask the Court to dismiss the petition.

This representation, however, is false. The district court rejected Plaintiffs' motion to enforce the purported settlement on the ground that the parties have *not* reached any "binding agreement to settle this dispute." D.E. 543, at 15. The "Term Sheet" signed by the parties—which Plaintiffs erroneously call a "settlement"—was "incomplete in significant respects," *id.* at 11; almost half of the terms were "expressly subject to further discussion and negotiation," *id.* at 12; and thus the parties had "merely an 'agreement to agree' that is not capable of being enforced," *id.* at 12-13.

In light of the district court's decision, Plaintiffs have been forced to concede that their lead argument should be withdrawn and that the non-existent "settlement" provides no basis for dismissing the petition. *See* Sept. 26, 2012 Letter.

II. COMCAST PROPERLY PRESERVED ITS CHALLENGES.

As Comcast demonstrated in its principal brief (at 16-49), the district court's predominance finding was erroneous since Plaintiffs failed to prove that the measurable-damages element of their antitrust claims can be established on a class-wide basis, both because Dr. McClave's model does not measure damages based on the only remaining theory of antitrust impact, and because his methodology is unreliable and papers over significant variations among class members.

Plaintiffs seek to avert review of these defects by arguing that Comcast "forfeited" its challenges to them. Yet Comcast argued in its certiorari petition that Plaintiffs had failed to prove predominance for precisely the same reasons that Comcast now continues to assert as grounds for reversal, *compare* Pet. 21-22 *with* Comcast Br. 21, 44, and Plaintiffs did not even *suggest* in their brief in opposition that Comcast had forfeited these arguments by not presenting them to the lower courts. Plaintiffs are therefore precluded from arguing forfeiture at this stage. *See* S. Ct. R. 15.2; *see also*, *e.g.*, *Okla. City* v. *Tuttle*, 471 U.S. 808, 816 (1985). In any event, Plaintiffs' claims of forfeiture are meritless.

A. Plaintiffs' forfeiture arguments proceed from the assumption that Comcast was required not only to tell the district court that Dr. McClave's model was junk and completely unusable in the class certi-

fication analysis—as it repeatedly did—but *also* separately to object to "admission" of Dr. McClave's opinions at the evidentiary hearing, Behrend Br. 24, or to file a motion to strike his reports, *id.* at 33. In resolving a pretrial motion, however, a district court may consider evidence that would not be admissible at trial, Fed. R. Civ. P. 43(c)—including affidavits and expert reports, which are hearsay if offered for the truth of their contents, Fed. R. Evid. 801(c). Of course, such evidence must be admissible *if offered at trial*—for example, by presenting live testimony from the witness who signed the affidavit or report—so that the issue is not whether the district court erred in "admitting" Dr. McClave's reports as a summary of his anticipated testimony, but whether the substance of those reports—Dr. McClave's opinions—constituted class-wide proof that would be admissible when it counts.

In other words, the question before this Court is whether the district court erred in *relying* on Dr. McClave's opinions to conclude that Plaintiffs had proven predominance. The district court has the responsibility of determining whether the proponent of certification has "affirmatively demonstrate[d]" that Rule 23 is, "*in fact*," satisfied. *Dukes*, 131 S. Ct. at 2551. Such a determination cannot be made, or sustained on appeal, if "the only evidence proffered would not be admissible" *at trial* as "proof of anything." Pet. App. 66a n.18 (Jordan, J., dissenting). Comcast made *that* objection, which preserves the issue for appellate review irrespective of whether it could also have moved to strike Plaintiffs' evidence.

See, *e.g.*, *Ellis* v. *Costco Wholesale Corp.*, 657 F.3d 970, 980 n.6 (9th Cir. 2011).[1]

B. Comcast has protested to every judge who would listen that Dr. McClave's hopelessly flawed model is divorced from both the legal theories at issue in this case and reality. Since Comcast is entitled to raise "any argument in support" of its contentions, *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992), Plaintiffs' discussion of the plain-error standard (at 24-31) is a waste of paper and ink.

1. Comcast has consistently challenged Dr. McClave's inability to prove damages attributable specifically to deterred overbuilding ever since the district court first informed the parties that it might "credit at least one, but not all," of Plaintiffs' theories of antitrust impact. C.A. J.A. 1371. Comcast argued in the district court, as it does now, that Dr. McClave's "analysis is unavailing" if "any prong of plaintiff[s'] liability case is not found to support a finding of impact," because he "took all of the conduct, as a whole." *Id.* at 1524. And on appeal, Comcast argued in each of its briefs, during the oral argument, and in seeking rehearing that the district court abused its discretion in relying on Dr. McClave's model because "the model calculates damages based on theories of impact that were excluded by the district court." C.A. Br. ii (capitalization omit-

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[1] Plaintiffs' forfeiture argument would lead to the bizarre result that class certification could be granted based on evidence that would not ultimately be admitted at the class trial—and the failure of proof would leave the absent class members bound by the adverse judgment. *See Gen. Tel. Co. of the Sw.* v. *Falcon*, 457 U.S. 147, 160-61 (1982).

ted); *see also id.* at 37-40; C.A. Reply Br. 17-19; C.A. Tr. 51-52; Rehearing Pet. 9-10.

Tellingly, each of the district court (Pet. App. 186a-187a), the Third Circuit majority (*id.* at 44a-48a), and the Third Circuit dissent (*id.* at 68a-70a) addressed Comcast's argument, never suggesting that it had not adequately been preserved.

2. Comcast has also consistently maintained that Dr. McClave's damages model is so unreliable that it could "not . . . be accepted" in ruling on class certification. C.A. J.A. 1524.

Comcast adduced considerable evidence that "Dr. McClave's methods" are "*flawed*" and that "*no conclusion can be reached from them*," J.A. 1070a, and argued on this basis that the model was "not usable" by the district court, C.A. J.A. 1525. Indeed, although the district court rejected Comcast's argument, *see* Pet. App. 165a-187a, it "*agree*[*d*]" that Dr. McClave's model "ha[d] to have a reliable basis" to be invoked in support of certification, C.A. J.A. 1516-17 (emphasis added).

Before the Third Circuit, Comcast asserted as "error" the district court's decision to "accept bare theory as 'proof,' much less proof sufficient to satisfy" Rule 23(b)(3). Rule 23(f) Pet. 2. Comcast identified the same "fundamental defects" in Dr. McClave's model that it raises here, emphasizing that they "preclude" use of the model in "calculating classwide damages." C.A. Br. 37. It challenged both benchmark screens used by Dr. McClave as "factually unsupported and economically unsound," *id.* at 40, "substantively invalid," *id.* at 42, and based on "unfounded assumptions," *id.* 46; Comcast emphasized that the model "fail[ed] to account for dramatic demographic variations," *id.* at 2, and urged that these

"numerous fundamental defects . . . preclude [the model's] use in calculating classwide damages," *id.* at 37; *see also* C.A. Reply Br. 3, 19-25 (arguing that these defects rendered the analysis "unreliable" and that it was "error for the court to accept that methodology").

Plaintiffs seize on the Third Circuit's statement that Comcast had not "raise[d] th[e] issue" that "*Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), applies at the stage of class certification." Pet. App. 43 n.13. But this claim is factually incorrect, as well as legally irrelevant because "there can be no waiver . . . of the Judge's duty to apply the correct legal standard." *Id.* at 64a n.17 (Jordan, J., dissenting) (quoting *In re Cmty. Bank of N. Va.*, 622 F.3d 275, 302 n.20 (3d Cir. 2010)). The predominance issue was properly presented below, and the Third Circuit had the responsibility to decide that claim using the "proper construction of governing law." *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991).

Moreover, for the proposition that courts have "rejected damages models" for flaws similar to those here, Comcast cited several cases applying *Daubert*. C.A. Br. 46-47 (citing *Craftsman Limousine, Inc.* v. *Ford Motor Co.*, 363 F.3d 761, 777 (8th Cir. 2004), and *Concord Boat Corp.* v. *Brunswick Corp.*, 207 F.3d 1039, 1057 (8th Cir. 2000)). This was sufficient to put the Third Circuit on notice of the basis for Comcast's objection. *See*, *e.g.*, *Mead* v. *Independence Ass'n*, 684 F.3d 226, 232 n.1 (1st Cir. 2012); *cf. Taylor* v. *Illinois*, 484 U.S. 400, 406 n.9 (1988).

The rule that parties must preserve an issue in the lower courts "does not demand the incantation of particular words," let alone particular cases, but in-

stead that the lower courts "be fairly put on notice as to the substance of the issue." *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 469 (2000). As Judge Jordan recognized, the "substance of Comcast's challenge" (Pet. App. 66a n.18) has always been that Dr. McClave's model suffers from fatal methodological flaws and does not fit Plaintiffs' legal theory. The majority itself acknowledged that Comcast had properly presented its "attacks on the merits of the methodology," and its rejection of those arguments was based not on forfeiture but instead on the majority's erroneous conclusion that they "have no place in the class certification inquiry." *Id.* at 48a. Plaintiffs are unable to defend the decision below on its own terms, and their forfeiture dodge fares no better.

III. PLAINTIFFS FAILED TO PROVE THAT COMMON QUESTIONS PREDOMINATE.

Plaintiffs conceded below, and the lower courts agreed, that they could obtain class certification only by "establish[ing] that the alleged damages are capable of measurement on a class-wide basis using common proof." Pet. App. 34a. Plaintiffs relied solely on Dr. McClave's model for that purpose. Yet Comcast has shown, and Plaintiffs do not seriously dispute, that the Third Circuit erred in refusing to review the district court's acceptance of the model, and that error alone warrants reversal. Moreover, Comcast has established that Dr. McClave's methodology is so unreliable and inadequate that the district court abused its discretion in relying on his model to certify the class. Without that model, Plaintiffs have no class-wide evidence of damages and cannot satisfy Rule 23(b)(3)'s predominance requirement.

A. DR. MCCLAVE'S MODEL DOES NOT ISOLATE DAMAGES CAUSED BY THE ONLY REMAINING LIABILITY THEORY.

Before the district court ruled on their motion for class certification, Plaintiffs defended Dr. McClave's model as a reasonable estimate of damages caused by *all four* theories of antitrust impact then being asserted, claiming that "all of the mechanisms of harm" were "included in Dr. McClave's damages analysis." C.A. J.A. 1533. "The fact that Dr. McClave included various screens in his analysis," they insisted, "demonstrates that." *Ibid.*

But after it became clear that the court would not accept all four theories of antitrust impact, *see*, *e.g.*, Pet. App. 192a-193a, Plaintiffs shifted positions entirely to argue, as they do before this Court, that Dr. McClave's "selection of the benchmark counties does not depend on any one ground for liability," Behrend Br. 39. According to Plaintiffs, cable prices within the Philadelphia DMA "reflect the impact of any anticompetitive conduct there," and Dr. McClave simply "isolate[d] the effect of the anticompetitive conduct." *Ibid.* The problem is that Dr. McClave did not do what Plaintiffs now claim.

1. The central premise of Dr. McClave's damages model is that, by identifying "markets or areas that were relatively free of the [effects] of what [he] understood to be the challenged behavior in this case," he could estimate what cable prices would have been in Philadelphia in the absence of that "challenged behavior." J.A. 98a; *see also id.* at 1379a. To have any claim to validity, this approach to measuring damages would have to identify comparison markets that are "'sufficiently comparable'" to the Philadelphia DMA *but for* whatever conduct Plaintiffs allege as

an antitrust violation. *Id.* at 1442a (quoting *id.* at 890a-891a). Otherwise, any lower prices in the comparison markets might be the result of *other differences* between the Philadelphia DMA and those markets. *See* Fed. Judicial Ctr., *Reference Manual on Scientific Evidence* 432 (3d ed. 2011) (damages model must "isolate the loss of value caused by the harmful act and exclude any change . . . arising from other sources"); *see also*, *e.g.*, Economists Br. 14.

Plaintiffs now seek to jettison this essential premise of Dr. McClave's analysis, insisting that he sought only to identify "relatively competitive markets" in some Platonic sense. Behrend Br. 39 (citing J.A. 99a, 208a, 261a). As Plaintiffs' own record citations show, however, Dr. McClave acknowledged that he tried to identify benchmark counties that "resemble what would have been the characteristics of the counties in Philadelphia *but for the allegations in the Complaint*," J.A. 208a (emphasis added); *see also id.* at 99a ("looking for markets that didn't look like" Philadelphia because there was no "challenged behavior"). As Dr. McClave recognized, the issue is not whether prices in Philadelphia are higher than in a more competitive market, but instead the "extent to which cable prices have been elevated, if at all, by *the conduct alleged by Plaintiffs*." *Id.* at 1377a (emphasis added); *see also id.* at 90a-91a, 189a, 193a. That is, merely positing that Philadelphia is not fully competitive in some sense does not establish that this condition is the result of any illegal conduct by Comcast.

For example, Plaintiffs claimed that Comcast's anticompetitive conduct had deterred entry by satellite ("DBS") providers, such as DirecTV. Although satellite potentially competes with cable in every

home in the country, *see Time Warner Entm't Co.* v. *FCC*, 240 F.3d 1126, 1134 (D.C. Cir. 2001), satellite penetration in particular areas may be low based on a host of factors, such as poor line of sight to the satellite. The district court concluded that Plaintiffs' DBS theory could not support class certification. *See* Pet. App. 122a. Yet Dr. McClave *excluded* counties with below-average levels of DBS competition from his "benchmarks" to "test the price effects of constrained DBS penetration in the Philadelphia market." J.A. 1442a. As he explained, "if someone complains that [his] benchmark had high DBS penetration," the "answer is it[']s supposed to" because, "if plaintiffs are right, the challenged behavior has constrained DBS penetration here." *Id.* at 99a; *see also* C.A. J.A. 1533 (arguing that Dr. McClave "took into account the DBS foreclosure claim by including a DBS penetration screen").

"DBS penetration in the Philadelphia DMA," however, "is below the national average," *id.* at 75a (Jordan, J., dissenting), for reasons that—*ex hypothesi*, since the district court excluded this theory—have nothing to do with anticompetitive conduct. Yet Dr. McClave's decision to omit counties with below-average DBS penetration rates, *see* J.A. 1380a-1381a, ensures that some unknown portion of his calculation estimates "damages" that are "not the result of reduced overbuilding," Pet. App. 69a (Jordan, J., dissenting); *see also Blue Cross & Blue Shield United* v. *Marshfield Clinic*, 152 F.3d 588, 593 (7th Cir. 1998). The upshot is that Dr. McClave's model "improperly attributes" price differences between the Philadelphia DMA and the benchmarks to Comcast's allegedly "illegal acts, despite the presence of significant other factors" that bear on cable prices in Phila-

delphia. *MCI Commc'ns Corp.* v. *AT&T Co.*, 708 F.2d 1081, 1162 (7th Cir. 1983).

Correcting this error is not merely a matter of reducing the overall damages amount while still allowing the report as class-wide proof, as Plaintiffs suggest (at 46-47). Dr. McClave manufactured uniformity across the entire Philadelphia DMA by invoking DMA-wide averages and assuming that the same competitive conditions would have prevailed in each franchise area in the absence of the alleged antitrust violations. *See* Comcast Br. 44-49. But the supposition that overbuilding would have occurred on a uniform basis, or at the same time, across the entire region creates such a profound "analytical gap" between Dr. McClave's model and reality that it would render the model unusable *even if* it were limited to a single theory of antitrust impact. *See Gen. Elec. Co.* v. *Joiner*, 522 U.S. 136, 146 (1997); *see also* J.A. 819a-821a. Yet even indulging the fictional world created by Dr. McClave, he needed to show that he could reliably measure the effects of deterred overbuilding alone—a likely impossible task that would have required him to develop a new set of benchmark counties and defend the screens used to select them (or at least to create a new regression model to correct for price differences unrelated to overbuilding). *Cf.* J.A. 1442a. Since Dr. McClave did not do so, Plaintiffs have no evidence with which to defend the certification order.

2. Plaintiffs also object that Comcast's argument rests on the "false notion" that there is a "causal relation" between each of their theories of antitrust impact and Dr. McClave's model, but that Comcast failed to establish such a connection. Behrend Br. 46. This is chutzpah. Dr. McClave purported to

identify and measure higher cable prices in the Philadelphia DMA than in markets supposedly unaffected by the four theories of antitrust impact then pursued by Plaintiffs, and Plaintiffs introduced evidence that each of those theories led to higher prices. Yet they now seek to defend Dr. McClave's model by positing that three-fourths of the antitrust theories on which they brought and prosecuted an $875 million damages claim (pre-trebling) for increased cable prices might—*mirabile dictu*—be *irrelevant* to cable pricing.

By pointing out the basic flaw that Dr. McClave admittedly considered the then-alleged anticompetitive conduct only "as a whole," J.A. 189a-190a, Comcast is not "hoisting itself with its own petard." Behrend Br. 46. Comcast maintains not only that Plaintiffs' theories of antitrust impact are bunk, but that it was *their* burden at the certification stage to establish predominance, and thus *their* burden to show that Dr. McClave's model was capable of measuring damages on a class-wide basis for the only remaining theory of antitrust impact—a burden they wrongly seek to place on Comcast "as a matter of law," *id.* at 45.

If Dr. McClave believed that only one of the theories of antitrust impact had *actually* resulted in increased prices, so that inclusion of the other three theories in his model was harmless error, it was incumbent on Plaintiffs to present *evidence* on that point. They did not, of course, because they were unwilling to let go of their claim that *all* of the four theories resulted in damages. *See* J.A. 768a-769a n.24. There is simply no basis for concluding (and certainly no *evidence* in the record) that the *exact* same counties would have been the appropriate

benchmark, yielding the *exact* same damages amount, when the case was limited to only one of Plaintiffs' theories. The flaws in Plaintiffs' position are so clear that one need not even "delve one yard below" the surface to "blow" their arguments "at the moon." William Shakespeare, *Hamlet* act 3, scene 4.

3. Even Dr. McClave understood that his model would calculate damages for more than just reduced overbuilding: He expressly "assumed that only the five counties that RCN indicated it planned to enter as an overbuilder would have been overbuilt." J.A. 1382a; *see also id.* at 1387a (same). But while Plaintiffs now deny that Dr. McClave made this assumption, Behrend Br. 41, they base their argument on an *entirely new* damages report that was created by Dr. McClave only after this case had been pending *in this Court* for almost four months—and more than two years after the decision they seek to defend. *See id.* at 41-42.

Plaintiffs are forced to rely on Dr. McClave's *post hoc* rationalization because his previous reports and testimony—the materials that were *actually* before the district court when it ruled—admitted that only "five of the 16 [counties where Comcast competed] were overbuilding counties" in his model. J.A. 175a-176a. Indeed, Dr. McClave sought to defend his model as "conservative" because it had not considered potential overbuilding "in a greater number of counties" than "just five." *Id.* at 175a; *see also id.* at 1385a (same).

Yet even if Dr. McClave's new report were consistent with his earlier reports and testimony, that *still* would not be a basis for this Court to consider it. If the Third Circuit had addressed Comcast's argu-

ments, the issue on appeal would have been whether the district court abused its discretion based on the "record before the court at the time of its decision, not events allegedly occurring thereafter." *Mason* v. *Okla. Tpk. Auth.*, 115 F.3d 1442, 1458 n.13 (10th Cir. 1997), *overruled on other grounds by TW Telecom Holdings Inc.* v. *Carolina Internet Ltd.*, 661 F.3d 495 (10th Cir. 2011); *see also*, *e.g.*, *Meilleur* v. *Strong*, 682 F.3d 56, 63 (2d Cir. 2012) ("we must look at the facts before the district court at the time of its decision"). The fact that Plaintiffs are forced to resort to extra-record evidence is simply confirmation that the district court's decision *was* an abuse of discretion based on the actual record before it.

In all events, the post-certification report does not help Plaintiffs. Dr. McClave claims that, while his original model found "higher" damages for the "five counties that RCN indicated it initially planned to overbuild," it also calculated "positive, substantial, and statistically significant" damages from the remaining eleven counties. D.E. 512 Ex. 1, at 9. But this is *precisely* the methodological problem. Dr. McClave found "damages" in counties that his model assumed would *not* be overbuilt, which makes clear that he understood (then, if not now) that his model included "damages" from Plaintiffs' other theories.[2]

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[2] Plaintiffs attempt to bolster their argument (at 42) by invoking their liability expert, Dr. Michael Williams, who claimed that Comcast decreased the "likelihood of over-building" in the entire DMA. J.A. 404a. Comcast has constantly challenged the reliability of Dr. Williams's conclusions, but even taking them at face value the issue here is whether the *price effects* of that overbuilding can be measured on a class-wide basis. Dr. Williams speculated that RCN might have expanded into other portions of the Philadelphia DMA, *see* C.A. J.A. 4306, but he did

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B. DR. MCCLAVE'S MODEL SUFFERS FROM FATAL METHODOLOGICAL FLAWS.

In its opening brief (at 44-49), Comcast demonstrated that Dr. McClave's two screens for identifying benchmark counties rest on serious methodological errors, and that those errors cannot be fixed because "[t]he 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). Plaintiffs *nowhere* attempt to defend Dr. McClave's screens, or respond to the wide variability across the class—undoubtedly because they have nothing more than Dr. McClave's legally inadequate *ipse dixit* to connect his theory with anything resembling the real world. *See Joiner*, 522 U.S. 146.

1. Plaintiffs concede that, with respect to expert opinion evidence, "the competence and reliability of the expert testimony are properly before the court at the time of the certification decision." Behrend Br. 33. They are therefore forced to distance themselves from the Third Circuit's conclusion that certification may be based on expert testimony that is not now, but perhaps "may evolve to become," consistent with Rule 702 and *Daubert*. *Id.* at 34. Indeed, Plaintiffs admit that courts must "resolve evidentiary ob-

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not suggest that this overbuilding would have occurred *uniformly* throughout the class. *See* Comcast Br. 47. In any event, as Dr. Williams acknowledged, Plaintiffs attempted to *measure* damages solely using "Dr. McClave's regression analysis," J.A. 1309a, which (Dr. Williams agreed) had assumed only five overbuilt counties, *see id.* at 472a ("those are the five counties that Dr. McClave used in his damage study").

jections, including under *Daubert*," when those issues bear on the certification inquiry. *Id.* at 32.

Plaintiffs acknowledge that, "[i]n many cases, perhaps most," the proponent of class certification will need to "prov[e] class-wide damages with admissible evidence" in order to show that "class-wide methods of proving damages" would "be available at trial." Behrend Br. 33-34. They suggest, however, that the "preliminary" nature of the class certification inquiry warrants a "lower threshold" for evaluating admissibility than would apply at trial. *Id.* at 36.

Whatever lowered *Daubert* standard Plaintiffs might have in mind—they do not spell it out in their brief—they and other proponents of class certification cannot evade the "rigorous analysis" required by Rule 23. *Gen. Tel. Co. of the Sw.* v. *Falcon*, 457 U.S. 147, 161 (1982). Rule 23(b)(3) demands that the proponent of class certification *prove* that common questions predominate over individual ones, *see Dukes*, 131 S. Ct. at 2551, yet Plaintiffs nowhere explain how the proponent could carry this burden by pointing to expert opinions that could never be presented to a jury. *See* Comcast Br. 38-40; *see also supra* at 5 n.1. If the model "does not directly prove damages on a class-wide basis," then it necessarily cannot help the proponent show that "class-wide methods of proving damages" will *actually* "be available at trial." Behrend Br. 33-34.[3]

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[3] For this reason, it is irrelevant that the "usual concerns" of *Daubert* and Rule 702 arguably "are not present" when the factfinder is the district judge rather than a jury. *Metavante Corp.* v. *Emigrant Sav. Bank*, 619 F.3d 748, 760 (7th Cir. 2010), *quoted in* Behrend Br. 35. The text of Rule 702 does not suggest

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2. Plaintiffs' application of their approach illustrates how far it departs from Rule 23. They do not bother to defend Dr. McClave's screens, arguing instead that "changing or discarding the two screens" in some undefined way would "merely change the benchmark and thus result in a different damages total." Behrend Br. 47.

It is tautological that altering the benchmark sample would likely change the amount of so-called "damages" calculated by Dr. McClave. But this presumes the screens used to determine the benchmark *can* be changed in a manner that satisfies Rule 702 and *Daubert*. And on that issue, the Third Circuit punted: It speculated 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 (emphases added).

Plaintiffs' approach would thus permit class certification based only on the unproven assumption that they could fix each of the problems identified by Comcast. But there would be little point in requiring courts to *find* that Rule 23's prerequisites are satisfied based on actual evidence if the "assurance of

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that it applies differently as between bench and jury trials; it speaks categorically to when an expert "may testify in the form of an opinion or otherwise," Fed. R. Evid. 702. In any event, the class certification inquiry looks to whether "class-wide methods" of proof "will (or will not) be available at trial." Behrend Br. 33-34. That the judge might not be "swayed by dubious scientific testimony" in ruling on class certification (*In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011)) hardly matters when the question is instead about a future trial.

counsel that some solution will be found" (*Windham* v. *Am. Brands, Inc.*, 565 F.2d 59, 70 (4th Cir. 1977) (en banc)) were sufficient to satisfy Rule 23.

Plaintiffs also try to co-opt the report submitted by Comcast's damages expert, Dr. Tasneem Chipty, to show that "damages remain class-wide and substantial." Behrend Br. 47 (emphasis omitted). But Dr. Chipty explained that, after making only two corrections (*viz.*, using actual rather than list prices and accounting for differences in population density), Dr. McClave's model generates negative damages for a substantial portion of the class during much of the class period—a clear sign that the model is not properly measuring *class-wide* damages. *See* J.A. 1068a-1070a. This is not just an issue of "chang[ing]" the "final amount of estimated damages," Pet. App. 49a, but instead of determining whether Dr. McClave's model and methodology can ever *accurately* determine damages for the entire class without assuming away differences in but-for price caused by varying competitive conditions in Comcast's franchise areas.

3. The danger in presuming that Dr. McClave's damages model could be repaired is particularly acute because, as Judge Jordan noted, the "wide variation in the relative market shares" across Comcast's 650 franchise areas in the Philadelphia DMA "makes it hard to imagine a means of calculating class-wide damages." Pet. App. 85a. Dr. McClave's screens used DMA-wide averages, but there is no assurance that they can be changed to account for the "variation in conditions" within the DMA. *Id.* at 88a.

Judge Jordan explained that it would be impossible to make such an adjustment: "This primary flaw in Dr. McClave's methodology—using a single

set of assumptions for the entire Philadelphia DMA—cannot be fixed merely by altering his model." Pet. App. 86a. But even if the Court were to assume, as Plaintiffs do, that Dr. McClave *might* be able to correct his damages model, such a "presum[ption]" would be insufficient to establish "actual . . . conformance" with Rule 23. *Falcon*, 457 U.S. at 160.

C. THE NEED FOR PLAINTIFFS TO PROVE DAMAGES ON AN INDIVIDUALIZED BASIS PRECLUDES CLASS CERTIFICATION.

Plaintiffs insist that the "need to allocate the class-wide damages award among class members does not cause individual issues to predominate." Behrend Br. 49. But the issue here is not whether Plaintiffs can properly divide up a "class-wide damages award" in some later stage of the proceeding, but instead whether damages are *capable* of class-wide proof—and, if not, whether the individual questions raised by that element of the class members' claims predominate over any common questions.

On that point, Plaintiffs assert simultaneously that "'the presence of individualized questions regarding damages does not prevent certification under Rule 23(b)(3),'" and that "[t]he class may properly prove damages on an aggregate basis." Behrend Br. 49 (quoting *Messner* v. *Northshore Univ. HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012)). But Plaintiffs are mistaken in both respects.

1. Plaintiffs appear to advance a categorical rule that individualized damages questions can *never* prevent a district court from finding predominance under Rule 23(b)(3). But they took the opposite position below, asserting that the district court "must . . . find" that they have "identified *common* proof tending to show class wide . . . damages." D.E. 331, at 5;

see also Opp. 13 n.1. And the Third Circuit itself acknowledged that Plaintiffs were required to "establish that the alleged damages are capable of measurement on a class-wide basis using common proof." Pet. App. 34a.

Plaintiffs' sole authority, *Messner*, reasoned that "'the need for individual damages determinations does not, in and of itself, require denial of [a] motion for certification.'" 669 F.3d at 815 (quoting *Arreola* v. *Godinez*, 546 F.3d 788, 801 (7th Cir. 2008)). Assuming, *arguendo*, that this is so, it does not mean that such cases are the rule rather than the exception, and it certainly does not establish that *this* is such a case. Indeed, it is notable that the Seventh Circuit in *Messner* (unlike the Third Circuit here) concluded it would be an "appropriate and limited use of merits evidence at the certification stage" for the defendant "to argue that [an expert's] methodologies were flawed." *Id.* at 823.

The text of Rule 23 does not suggest that courts can ignore damages questions in evaluating predominance; instead, it permits certification only if "the 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). And in many cases where the asserted claims require proof of damages as an element, the need for separate damages determinations for class member would "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); *see also* Comcast Br. 32. Plaintiffs never explain how class-wide adjudication would be appropriate if, as in this case, the resolution of common

issues could not eliminate the need for at least *four decades* of further litigation to resolve the class members' claims. *See id.* at 34.

2. Plaintiffs equally miss the mark in claiming that they are permitted to prove "aggregate damages," and then "allocate" them among class members. The only case cited by Plaintiffs in support of their argument permits an "aggregate damages calculatio[n]," *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 197 (1st Cir. 2009), but only *after* accepting an expert's class-wide damages methodology as "sufficiently reliable," *id.* at 198.

Under Plaintiffs' approach, they would establish a single overcharge amount for each county and year, and then apply that to class members based on residency. But if Comcast is correct that Dr. McClave's damages model does not measure damages from the relevant antitrust impact, or that it is not an acceptable method for proving class-wide damages because of variations within the DMA and individual counties, then this so-called "damages" amount is wrong: It both overstates the extent of Comcast's liability to the class, and averages away the variation in damages among class members. This is precisely what the Rules Enabling Act prohibits: an alteration of the parties' substantive rights under the guise of procedure. *See* Comcast Br. 29-31; *see also*, *e.g.*, *Dukes*, 131 S. Ct. at 2561 (rejecting "Trial by Formula"); *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974) (rejecting "gross damages" approach).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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