NO. 14-577

In the
Supreme Court of the United States

CARPENTER CO., ET AL.,

PETITIONERS,

v.

ACE FOAM, INC., ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

AND

GREG BEASTROM, ET AL., INDIVIDUALLY AND ON BEHALF ALL OTHERS SIMILARLY SITUATED,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amici and their members represent a diverse array of businesses and business interests across the United States. *Amici* regularly advocate for the interests of their members in federal and state courts throughout the country in cases of national concern. They support the petition in this case because they have a strong interest in ensuring that the lower courts comply with this Court's class action precedents, including undertaking the rigorous analysis required by Federal Rule of Civil Procedure 23 before permitting a case to proceed as a class action.

The Chamber of Commerce of the United States of America. The Chamber is the world's largest business federation, representing three hundred thousand direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations. Its members include companies and organizations of every size, in every industry sector, and from every region of the country. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of concern to the nation's business community. The Chamber has filed *amicus curiae* briefs in several of

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[1] Pursuant to Sup. Ct. R. 37.2(a), *amici* timely notified the parties in writing of their intent to file this brief. All parties consented through correspondence that accompanies this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

this Court's recent class action cases, including *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

The National Association of Manufacturers. The National Association of Manufacturers is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private sector research and development. The National Association of Manufacturers is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

The class certification requirements of Federal Rule of Civil Procedure 23 are not mere conveniences for streamlining litigation, but crucial safeguards grounded in fundamental notions of due process. *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008). Before the named plaintiffs in any case may take advantage of the class-action device, they must prove that the putative class members' claims present at least one "common question[]" that, if adjudicated on a classwide basis, "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). In addition, the named plaintiffs must satisfy the "even more demanding" requirement of proving that common questions "predominate" over individual ones. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). Failing to enforce these essential requirements risks abridging the substantive rights of both defendants and absent class members in violation of the Rules Enabling Act. *See* 28 U.S.C. § 2072(b).

The courts below improperly relaxed the requirements for class certification in at least two respects: *First*, the Sixth Circuit affirmed the district court's certification decision, even though the certified class includes a significant number of individuals who were not injured by any defendant's conduct and, therefore, do not have standing under Article III of the U.S. Constitution. *Second*, the Sixth Circuit approved class certification on the theory that

an aggregate damages model—one that calculates average damages for the class as a whole—satisfies Rule 23's predominance requirement.

As the petition explains, the lower courts' decisions in this case not only violate this Court's precedents, including its recent decision in *Comcast*, but they also deepen entrenched divisions in lower court authority over the requirements for class certification. The fact that certain lower courts continue to disobey this Court's precedents calls for immediate corrective measures. That is especially important in this case, for the district court certified two multidistrict antitrust classes that together include potentially hundreds of millions of class members and seek billions of dollars in treble damages. If the decision is allowed to stand, the minimum requirements for Article III standing and Rule 23's essential safeguards will be significantly eroded. This case thus presents an excellent opportunity for the Court to resolve existing splits in lower court authority, to address ongoing abuses in class-action litigation by enforcing its precedents, and to restore proper constitutional limits on lawsuits involving individuals who have suffered no injury.

ARGUMENT

I. The Court Should Grant Review To Clarify That The Class Action Device Cannot Be Used To Circumvent Article III's Standing Requirements.

Rule 23 protects the rights of both defendants and absent class members by ensuring that the innovation of aggregating claims and dispensing with individual litigation is deployed only when it is consistent with the rights of all concerned. *See Taylor*, 553 U.S. at 901 (Rule 23's "procedural protections" are "grounded in due process"). Those safeguards are important because, as recent empirical analysis shows, while some class actions "achieve laudable results," a significant majority provide little (if any) benefit to absent class members. Mayer Brown LLP, *Do Class Actions Benefit Class Members?: An Empirical Analysis of Class Actions* 2 (U.S. Chamber Institute for Legal Reform Dec. 11, 2013) (analyzing 149 putative class actions filed in 2009 and concluding: "The hard evidence shows that class actions do not provide class members with anything close to the benefits claimed by their proponents, although they can (and do) enrich attorneys").

Recognizing that 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), this Court has held that aggregating individual claims for resolution in one stroke is impermissible if it endangers either the right of absent class members

to press their distinct interests or the right of defendants "to present every available defense." *Cf. Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). Plaintiffs must "affirmatively demonstrate" their compliance with Rule 23 to be entitled to litigate their claims through the procedural device of a class action. *Comcast*, 133 S. Ct. at 1432 (quoting *Wal-Mart*, 131 S. Ct. at 2551). That is especially important in the context of Rule 23(b)(3), the "most adventuresome" class certification provision. *Amchem*, 521 U.S. at 614 (internal quotation marks omitted). Rule 23(b)(3) imposes special "procedural safeguards," including the requirement that courts take a "close look" to ensure that common issues predominate over individual ones. *Comcast*, 133 S. Ct. at 1432.

Rule 23(b)(3)'s "demanding" requirement that common questions predominate over individual ones, *Amchem*, 521 U.S. at 623–24, works in tandem with Rule 23(a)'s commonality requirement to ensure that "proposed classes are sufficiently cohesive to warrant adjudication by representation," *id.* at 623. The requisite cohesion exists when all class members "possess the same interest and *suffer the same injury*." *East Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (emphasis added; internal quotation marks omitted); *see also Wal-Mart*, 131 S. Ct. at 2551 ("[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury'") (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). The need to prove predominance by establishing a common, classwide injury protects both defendants and

consumers by ensuring "sufficient unity so that absent class members can fairly be bound by decisions of class representatives." *Amchem*, 521 U.S. at 620–21; *see also Comcast*, 133 S. Ct. at 1434 (plaintiff must offer "a theory of liability that is . . . capable of classwide proof").

It follows that for a class to be certified, each member must have Article III standing—that is, each class member must have suffered an injury in fact that is traceable to a defendant and likely to be redressed by a favorable decision. *See, e.g.*, *Amchem*, 521 U.S. at 612–13 ("Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act"). The named plaintiffs and absent class members cannot have suffered the "same" injury, as this Court's precedents dictate, if some class members suffered no injury at all. Moreover, certifying a class that includes uninjured individuals loses sight of the Rules Enabling Act, which requires courts to interpret Rule 23 in a manner that does not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). A plaintiff who never suffered any injury could not satisfy the essential injury-in-fact requirement for Article III standing, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), could not state a claim under substantive antitrust law, *see, e.g.*, *Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 n.8 (1990) (the "antitrust injury requirement cannot be met by broad allegations of harm to the 'market' as an abstract entity"), and could not pursue a claim through individual litigation.

Nonetheless, as the petition explains, the decision below joins the Third, Seventh, and Tenth Circuits—in square conflict with decisions from the Second, Eighth, Ninth, and D.C. Circuits—in concluding that a class comprising non-injured individuals may be certified under Rule 23. *See, e.g.*, Pet. 16–20 (citing cases and describing circuit split). In particular, the district court relied on precedent from the Seventh Circuit, which broadly proclaims that "as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied." *Kohen v. Pacific Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009); *see also* Pet. App. 49a (citing *Kohen*, 571 F.3d at 677)).

For its part, the Sixth Circuit brushed aside the standing issue, viewing it as a mere pleading requirement and asserting that because the district court invoked the proper standard for class certification it did not abuse its discretion. *See* Pet. App. 5a; *but see Lujan*, 504 U.S. at 561; *Wal*-Mart, 131 S. Ct. at 2551 ("Rule 23 does not set forth a mere pleading standard"); *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014) (plaintiff seeking class certification "must actually prove" that Rule 23's requirements are satisfied). In fact, the district court did not apply the proper standard at all. Instead, it concluded that as long as the class definition is not so broad that it covers individuals who "could not have been injured by the defendant's conduct," Pet. App. 49a (quoting *Kohen*, 571 F.3d at 677), a case can proceed as a class action even if the class includes individuals who did not suffer any injury in fact. *See, e.g.*, Pet. App. 50a–61a

(concluding that antitrust impact in this case can be assumed based on "inferences drawn from market structure," pricing behavior, and statistical evidence).

The lower courts' troubling approach to class certification—allowing some class members to proceed with claims they do not possess on the assumption that some *other* class members have been injured—impermissibly enlarges class members' substantive rights, *see* 28 U.S.C. § 2072(b), and ignores basic Article III standing requirements. Moreover, there can be no question that the decision below is not a one-off error that is unlikely to be repeated. To the contrary, the issue of class member standing is a recurring and exceptionally important issue that desperately needs this Court's guidance.

Although the Court has thus far declined to grant certiorari to resolve this entrenched circuit split, *see BP Exploration & Prod. Inc. v. Lake Eugenie Land & Develop., Inc.*, --- S. Ct. ---, 2014 WL 3841261 (Dec. 8, 2014), there is no reason to allow the conflict in lower court authority to percolate. Instead, the Court should take the opportunity presented by this case to establish a single, nationally uniform rule that a district court may not certify a class that contains numerous members who lack any injury caused by a defendant.

II. The Court Should Grant Review To Enforce It *Comcast* Decision And To Affirm The Relevance Of Individualized Damages Issues To Rule 23's Predominance Requirement.

The Court should also grant review because the decision below violates *Comcast* and deepens splits in lower court authority over the meaning of that decision. In *Comcast*, this Court clarified that a plaintiff's damages case must be consistent with its liability case, and that courts must conduct a "rigorous analysis" to ensure that any model purporting to establish damages measures only those damages attributable to the theory on which liability is alleged. *See* 133 S. Ct. at 1433. For that reason, aggregate damages models that determine the average impact to the average class member are impermissible. Those types of models sweep away individualized damages issues and transform Rule 23's "procedural . . . device into its own source of substantive right." Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 Cal. L. Rev. 1573, 1597 (2007).

Despite this Court's clear instructions, however, there remains widespread reluctance in the lower courts to comply. Many lower courts have seemingly rejected *Comcast*'s holding that individualized damages issues can overwhelm common questions and defeat predominance. *See, e.g.*, Pet. 24–26 (citing cases). Instead, they appear to have embraced the views advanced by *Comcast*'s dissenters. *See, e.g.*, *In re Whirlpool Corp. Front-Loading Washer Prods.*

Liab. Litig., 722 F.3d 838, 860–61 (6th Cir. 2013), *cert. denied* 134 S. Ct. 1277 (2014); *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1258 (10th Cir. 2014); *In re High-Tech Emp. Antitrust Litig.*, 289 F.R.D. 555, 582 (N.D. Cal. 2013); *Cason-Merenda v. VHS of Michigan, Inc.*, No. 06-15601, 2014 WL 905828, at *3 (E.D. Mich. Mar. 7, 2014). Correcting the lower courts' repeated failure to follow this Court's opinions is reason alone to grant review.

In any event, there can be no reasonable dispute that lower courts are in considerable disarray over the meaning of *Comcast*. A search of the Westlaw legal database reveals that as of December 2014—less than two years after *Comcast*—Westlaw has designated sixty-one cases as negative citing authority either flat out disagreeing with, declining to extend, or distinguishing *Comcast*. A recent law review comment dubs this phenomenon the "post-*Comcast* chaos" where "[c]ircuit splits are building on circuit splits." Alex Parkinson, Comcast Corp. v. Behrend *and Chaos on the Ground*, 81 U. Chi. L. Rev. 1213, 1214 (2014) ("The question that hundreds of judges, practitioners, and clerks face—What does *Comcast* stand for?—remains decidedly unanswered."). This Court's review is necessary not just to bring clarity to the important Rule 23 certification requirements, but also to bring discipline to the splintering authority on the requirements necessary to protect the rights of both defendants and absent class members in litigation involving sprawling and only loosely connected classes.

III. The Court Should Grant Review Because The Questions Presented Are Recurring And Extraordinarily Important.

The Court should also grant review because the questions presented are important, recurring ones that are of great constitutional and practical significance. Nationwide class actions, like this one, often seek damages in the billions of dollars, even though many class members have never suffered any actual harm. As a result, there is an urgent need for uniform rules and further guidance that can be provided only by this Court.

First, in light of the large number of lower courts that have failed to comply with this Court's precedents, the entrenched circuit splits on standing and damages issues have spawned a serious problem of forum-shopping. Indeed, commentators opposed to this Court's decisions have urged plaintiffs to "avoid some of the worst federal case law by filing in circuits that are most receptive to class actions." Robert H. Klonoff, *The Decline of Class Actions*, 90 Wash. U. L. Rev. 729, 823 (2013).

Whether a nationwide class can be certified should not turn on the forum court's location. Opportunistic forum shopping places asymmetrical burdens on defendants, including *amici*'s members. "Permissive" rules of personal jurisdiction threaten many businesses with exposure to lawsuits in courts throughout the Nation. Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 Cornell L. Rev. 481, 483, 491–93 (2011). And any product that a business sells on any substantial scale may give rise to one or another allegation by one or another

purchaser, who may then purport to enlist all other purchasers of that same product, without distinction, as fellow members of a theoretical class. Those consequences are profoundly concerning to *amici* and their membership.

Second, by easing the path to certification, the lower court's approach effectively predetermines a case's ultimate outcome. As this Court has often recognized, certification "may increase the defendant's potential damages liability and litigation costs" to the point "that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011); *see also* Fed. R. Civ. P. 23(f) advisory committee notes, 1998 Amendments (defendants may "settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"). Although nominally a threshold question, "[w]ith vanishingly rare exception[s], class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009); *see also* Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 9 (Fed. Judicial Ctr. 2010). In fact, a "study of certified class actions in federal court in a two-year period (2005 to 2007) found that all 30 such actions had been settled." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2010) (citing Emery G. Lee III, *et al.*, *Impact of the Class Action Fairness Act on Federal Courts* 2, 11 (Fed. Judicial Ctr. 2008)).

The stakes are particularly high in antitrust cases. Antitrust class actions are "arguably the most complex action[s]" to litigate, *In re Motorsports Mechan. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000), because they often involve "voluminous documentary and testimonial evidence, extensive discovery, complicated legal, factual, and technical (particularly economic) questions, numerous parties and attorneys, and substantial sums of money." Manual for Complex Litigation § 30 (4th ed. 2004); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007) (discussing the high costs of discovery in antitrust cases). The sheer complexity of antitrust litigation creates ample opportunities for plaintiffs to impose staggering costs on defendants and thereby exert powerful settlement pressure.

Third, although class actions always "present opportunities for abuse," *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 171 (1989), the likelihood of abuse is particularly great in cases, like this one, where the district court has certified a sprawling class that includes large numbers of uninjured persons. The resulting economic distortions harm not only defendants but also consumers, who often end up bearing the costs of litigation and litigation avoidance in the form of higher prices. *Cf.* Joseph A. Grudfest, *Why Disimplify?*, 108 Harv. L. Rev. 727, 732 (1995). More broadly, consumer class action abuse can lead to a legal environment that chills the investment, entrepreneurship, and capital needed for job creation. In short, class action abuse can often shortchange consumers while damaging the businesses that drive this country's economic engine.

It is therefore important for the Court to grant certiorari to ensure that proper constitutional standing requirements are applied in the class action context. Now more than ever, "[i]n an era of frequent litigation [and] class actions . . . courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011). And courts must take care to ensure that Rule 23's essential requirements are satisfied. Because the courts below did not properly discharge these responsibilities, this Court should grant review to correct their errors, enforce its earlier decisions, and bring clarity to this important area of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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