For Opinion See 80 USLW 3442

Supreme Court of the United States.
COMCAST CORPORATION, Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC, Petitioners,
v.
Caroline BEHREND, Stanford Glaberson, Joan Evanchuk-Kind, and Eric Brislawn, Respondents.
No. 11-864.
January 11, 2012.

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

Petition for a Writ of Certiorari

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QUESTION PRESENTED

This Court recently reiterated that district courts must engage in a " 'rigorous analysis' " to ensure that the "party seeking class certification [can] affirmatively demonstrate his compliance" with Rule 23. *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541, 2551 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 161 (1982)). Disavowing an allegedly contrary suggestion in *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156 (1974), *Dukes* emphasized that district courts are required to resolve any "merits question [s]" bearing on class certification, even if the plaintiffs "will surely have to prove [those issues] *again* at trial in order to make out their case on the merits." 131 S. Ct. at 2552 n.6. In this case, however, the Third Circuit repeatedly invoked the disavowed aspect of *Eisen* in declining to consider several "merits arguments" directly relevant to the certification analysis.

The question presented is whether a district court may certify a class action without resolving "merits arguments" that bear on Rule 23's prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3).

***II** PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

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

Pursuant to this Court's Rule 29.6, undersigned counsel state that petitioner Comcast Corporation is the parent company of petitioners Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC, and no other publicly held company owns 10% or more of their stock. Comcast Corporation has no parent company, and no publicly held company owns 10% or more of its stock.

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***1** Petitioners Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC (collectively, "Comcast") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-88a) is reported at 655 F.3d 182. The opinion of the district court (App., *infra*, 89a-188a) is reported at 264 F.R.D. 150; an amended order (App., *infra*, 189a-194a) is unpublished. The order of the court of appeals denying rehearing en banc (*id.* at 195a-196a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2011. A timely petition for rehearing en banc was denied on September 20, 2011. 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 jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 23 is reproduced in the Appendix, *infra*, at 197a-204a.

STATEMENT

A district court may certify a class action under Federal Rule of Civil Procedure 23(b)(3) only if the plaintiff establishes numerosity, commonality, typicality, and adequacy, and, in addition, "the court ***2** finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." In *Wal-Mart Stores, Inc. v. Dukes*, this Court held that "certification is proper only if 'the trial court is satisfied, after a rigorous analysis,' " that the requirements for class certification "have been satisfied' " - an inquiry that "[f]requently" will "entail some overlap with the merits of the plaintiff's underlying claim." 131 S. Ct. 2541, 2551 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982)). Although some courts had "mistakenly" read a statement in *Eisen v. Carlisle & Jacquelin*, 417

U.S. 156 (1974), as adopting a contrary approach, *Dukes* clarified that this statement was "the purest dictum" and "contradicted by [the Court's] other cases," 131 S. Ct. at 2552 n.6. Thus, the Court emphasized, district courts are required to resolve "merits question [s]" bearing on class certification, even if the plaintiffs "will surely have to prove [the issue] *again* at trial in order to make out their case on the merits." *Ibid.*

In this case, however, the Third Circuit affirmed a district court's certification order after expressly declining to consider several "merits" issues necessary to determine whether, as required by Rule 23(b)(3), common questions predominate over individual ones. Declaring that *Dukes* "neither guide[d] nor govern[ed] the dispute before [it]," the Third Circuit instead invoked *Eisen*, which it believed to "preclude any further inquiry" into the merits. App., *infra*, 33a, 41a n.12. The Third Circuit's view that "merits arguments" are "not properly before [the court]" at the class certification stage (*id.* at 19a) cannot be reconciled with this Court's decision in *Dukes* and breaks sharply with the Eighth and Ninth Circuits, which have correctly recognized that such ***3** limitations on review of "merits" issues at the certification stage are no longer supportable after *Dukes.*

This Court should summarily reverse in light of *Dukes*, which leaves no room for lower courts to resuscitate now-extinguished portions of *Eisen.* At minimum, the Court should grant review to clarify whether, and to what extent, lower courts must resolve any issues bearing on class certification, even if those issues might also be relevant to the merits of the plaintiff's claims.

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 subscribers in the Philadelphia area. App., *infra*, 6a; *see also* C.A. J.A. 217 § 32. Claiming that they pay too much for cable, Plaintiffs brought suit in the Eastern District of Pennsylvania. App., *infra*, 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. App., *infra*, 5a.[FN1]

FN1. The operative complaint alleges comparable violations in the Chicago cable market. App., *infra*, 5a-6a. Plaintiffs' counsel also raised similar allegations with respect to the Boston market in a complaint that has now been transferred from the District of Massachusetts to the Eastern District of Pennsylvania. *Id.* at 8a n.5. Resolution of the Chicago and Boston claims has been stayed pending resolution of the Philadelphia claims. *Id.* at 8a & n.5.

According to Plaintiffs, Comcast engaged in "anticompetitive 'clustering.' " App., *infra*, 6a. " 'Clustering' refers to a 'strategy whereby cable [operators] ***4** 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 Tel. Consumer Prot. & Competition Act of 1992*, 22 FCC Rcd. 17791, 17810 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]." App., *infra*, 7a (quoting 22 FCC Rcd. at 17810 n.134) (internal quotation marks omitted). Comcast is alleged to have done 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-5a & n.2.[FN2]

FN2. 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." App., *infra*, 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 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 ***5** 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." App., *infra*, 7a. To prevail on their claims, Plaintiffs are required to prove "(1) a violation of the antitrust laws (here, sections 1 and 2 of the Sherman Act), (2) individual injury resulting from that violation [*i.e.*, so-called 'antitrust impact'], and (3) measurable damages." *Id.* at 15a.

2. The district court certified the class under Rule 23(b)(3) after concluding, as relevant here, "that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members, and that there is a common methodology available to measure and quantify damages on a class-wide basis." App., *infra*, 91a.

Although Plaintiffs offered four theories of antitrust impact, the district court rejected three of those theories in ruling on the motion for class certification. App., *infra*, 122a, 153a, 161a-162a; *see also id.* at 24a. The sole remaining theory is that Comcast's clustering deterred competition from so-called "overbuilders." *Id.* at 91a. Overbuilders are companies 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.* Thus, the district court explained, "[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.

***6** Plaintiffs' theory of antitrust impact depends on three critical propositions: (1) that the Philadelphia DMA is the relevant geographic market in which to analyze Comcast's alleged market power; (2) that Comcast's clustering deterred competition by overbuilders who would otherwise have entered that market; and (3) that the deterred competition resulted in antitrust impact across the entire class. *See, e.g.*, App., *infra*, 97a-99a. Comcast adduced evidence disputing that these propositions are appropriately subject to resolution in a class action.

Comcast argued that Plaintiffs' theory of how individuals were injured - "antitrust impact" - could not be established through class-wide proof because the Philadelphia DMA was not a relevant geographic market for assessing Plaintiffs' claims. Indeed, Comcast noted, the relevant market is much smaller: "[A]n individual can choose only among providers offering video programming services to his household," even if other providers offer services elsewhere in the DMA. App., *infra*, 17a; *see also supra* at 4 n.2 (noting that the DMA is defined by *broadcast*, not cable, television). The district court, however, concluded that class certification was appropriate because the "geographic market definition" offered by Plaintiffs' expert - *i.e.*, the Philadelphia DMA - "is susceptible to proof at trial through available evidence common to the class." App., *infra*, 106a.

Comcast similarly adduced evidence that any deterrence effects on overbuilding would not have been shared on a class-wide basis, particularly since there was no evidence of actual or potential overbuilding in the majority of counties in the Philadelphia DMA. App., *infra*, 25a-26a. Indeed, the

only alleged overbuilder - RCN Telecom Services - was licensed to ***7** overbuild in only five of the eighteen counties in the Philadelphia DMA. *Id.* at 61a-62a & n.16, 82a-83a (Jordan, J., concurring in the judgment in part and dissenting in part). The district court again relied on Plaintiffs' expert to conclude that the "anticompetitive effect of clustering on overbuilder competition is capable of proof at trial through evidence that is common to the class." *Id.* at 144a.

Turning to damages, the district court noted that the model presented by Plaintiffs' expert had been prepared when they were advancing multiple theories of antitrust impact. App., *infra*, 186a. On those assumptions, Plaintiffs' expert had opined that damages could be established using a common model that compared actual cable prices to hypothetical prices that would have prevailed but for Comcast's challenged conduct. Once most of Plaintiffs' theories were rejected by the court, Comcast noted that this purported common model could not be used to establish damages, because (as Plaintiffs' expert conceded) the model did not provide a basis to segregate damages attributable solely to the remaining, accepted theory. *Id.* at 40a; *see also, e.g.*, C.A. J.A. 715-16. The district court nonetheless concluded that the now irrelevant model remained a "common methodology available to measure and quantify damages on a class-wide basis." App., *infra*, 187a.

The district court subsequently issued an amended order confirming its earlier findings that "the appropriate relevant geographic market can be the Philadelphia Designated Marketing Area … and that this geographic market definition is susceptible to proof at trial through available evidence common to the class," that the "antitrust impact, if any, of Comcast's clustering through the challenged swaps ***8** and acquisitions on overbuilder competition is capable of proof at trial through evidence that is common to the class," and that "the model and analyses" provided by Plaintiffs' expert "are common evidence available to measure and quantify damages on a class wide basis." App., *infra*, 190a-191a.

3. A divided panel of the Third Circuit affirmed on interlocutory appeal under Federal Rule of Civil Procedure 23(f). Relying on this Court's decision in *Eisen* and the Third Circuit's own pre-*Dukes* precedent, the majority consistently declined to address the arguments advanced by Comcast, claiming that it was "preclude[d]" from making "any further inquiry" into the merits beyond determining that Plaintiffs "*could* prove [their claims] through common evidence at trial." App., *infra*, 28a, 33a.

a. Although the Third Circuit majority noted the parties' dispute about the "relevant geographic market," it dismissed that dispute as raising "merits arguments" that were not "properly before [the court]." App., *infra*, 19a. Rather, the court believed that the critical issue is whether "the class could establish through common proof that that the relevant geographic market could be the Philadelphia DMA." *Ibid.*

The same was true for Comcast's evidence that any deterrence effects on overbuilding would not be felt on a class-wide basis. Characterizing the issue as "whether Plaintiffs actually have proven antitrust impact," the Third Circuit declined to resolve this "evidentiary" dispute. App., *infra*, 28a. The court instead thought it sufficient that "Comcast's alleged clustering conduct indeed *could have* reduced competition, raised barriers to market entry by an overbuilder, and resulted in higher cable prices to all of ***9** its subscribers in the Philadelphia [DMA]." *Id.* at 29a (emphasis added).

Finally, while the Third Circuit acknowledged 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" (App., *infra*, 34a) it nonetheless insisted 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." *Id.* at 47a. Comcast's "attacks on the merits of the methodology," the

court concluded, "have no place in the class certification inquiry." *Id.* at 48a.

b. Judge Jordan would have vacated the class certification order. App., *infra*, 53a (Jordan, J., concurring in the judgment in part and dissenting in part). Although he "agree[d] with the Majority's conclusion, though not its reasoning, with respect to the question of antitrust impact," he "conclude[d] that damages cannot be proven using evidence common to th[e] entire class." *Ibid.*

On antitrust impact, Judge Jordan disagreed with the majority that it could avoid "defining the relevant geographic market" on the theory that "the task [would] tak[e] [the court] into the merits." App., *infra*, 60a. Instead, he believed that the critical issue was "whether there is some class, in this case defined geographically, that can be shown, through common evidence, to have experienced elevated prices as a result of reduced overbuilding because of Comcast's clustering." *Ibid.* Judge Jordan acknowledged a "compelling argument" that such a class would not include the entirety of the Philadelphia DMA, and expressed some "skepticism" at Plaintiffs' ***10** theory, but he nonetheless concluded that "it was not an abuse of discretion for the District Court to hold that Plaintiffs could show, by common evidence, the antitrust impact of clustering through the Philadelphia DMA." *Id.* at 61a, 63a.

Judge Jordan "part[ed] ways with the Majority entirely, however, when it [came] to class-wide proof of damages." App., *infra*, 65a. "[B]ecause the only surviving theory of antitrust impact is that clustering reduces overbuilding," he noted, the model used by Plaintiffs' expert could establish class-wide proof of damages only by "reflect[ing] the conditions that would have prevailed in the Philadelphia DMA but for the alleged reduction in overbuilding." *Id.* at 69a. The expert "formulated his model at a time when Plaintiffs had four separate theories of antitrust impact," however, and thus he did not "isolate the impact of reduced overbuilding." *Id.* at 69a-70a. For this reason, "not only have Plaintiffs failed to show that damages can be proven using evidence common to the class, they have failed to show … that damages can be proven using any evidence whatsoever - common or otherwise." *Id.* at 73a.

Yet even if Plaintiffs' expert 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." App., *infra*, 81a. The Philadelphia DMA includes 649 franchise areas, and 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 ***11** they may be - are not distributed on anything like a similar basis throughout the DMA." *Id.* at 86a.

REASONS FOR GRANTING THE PETITION

The district court below certified a class estimated by Plaintiffs to include more than two million current and former cable subscribers in the Philadelphia area - larger even than the class invalidated in *Wal-Mart Stores, Inc. v. Dukes*, which this Court regarded as "one of the most expansive class actions ever." 131 S. Ct. 2541, 2547 (2011). Although Comcast identified several respects in which individual issues of antitrust impact and damages would overwhelm any purportedly common issues, thus foreclosing certification under Rule 23(b)(3), the Third Circuit majority affirmed the certification order after concluding that it was foreclosed from considering those issues "at this stage of the litigation." App., *infra*, 32a.

The Third Circuit reached this conclusion based on its view that, under *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), any arguments that could be characterized as addressing the "merits" of Plaintiffs' claims were "not properly before" the court. App., *infra*, 19a. But this reading of *Eisen* was squarely rejected in *Dukes*, which held that district courts *must* resolve any "merits question[s]"

that bear on the "propriety of certification under Rules 23(a) and (b)." 131 S. Ct. at 2552 n.6. Under *Dukes*, the district court was required to engage in a " 'rigorous analysis' " to determine whether Plaintiffs had "*in fact*" satisfied the prerequisites for class certification (*id.* at 2551 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982))) - not, as the Third Circuit viewed the relevant inquiry, whether they "*could* prove [their claims] through common evidence at trial." App., *infra*, 28a.

***12** The Third Circuit's reliance on *Eisen* is flatly inconsistent with *Dukes* and warrants summary reversal. In the alternative, plenary review is warranted because the Third Circuit's decision brings it into conflict with the Eighth and Ninth Circuits on the permissible scope of a district court's inquiry into "merits" issues at the class certification stage. Unlike the decision below, the Eighth and Ninth Circuits have recognized that *Dukes* requires - and *Eisen* does not limit - inquiry into the merits of the plaintiffs claims that bear on certification. Whether in the form of summary reversal or plenary review, this Court's review is warranted.

I. The Third Circuit's Limitations On Review Of "Merits" Issues At The Class Certification Stage Are Inconsistent With This Court's Precedents And Create A Circuit Split

Declaring that *Dukes* "neither guide[d] nor govern[ed] the dispute before [it]," the Third Circuit affirmed a class certification order while expressly refusing to resolve several "merits arguments" that bear on the propriety of certification. App., *infra*, 19a, 41a n.12. This decision cannot be reconciled with *Dukes* and conflicts with post-*Dukes* decisions from the Eighth and Ninth Circuits.

A. To obtain class certification under Rule 23, the plaintiff 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). If this commonality requirement and the others in Rule 23(a) are satisfied, then the ***13** plaintiff may seek certification under Rule 23(b)(3) by proving (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).

1. This Court emphasized in *Dukes* that "Rule 23 does not set forth a mere pleading standard." 131 S. Ct. at 2551. 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. *Ibid.* The district court must make findings that the proponent of class certification has (or has not) carried this burden, which requires the court to engage in a " 'rigorous analysis' " that "[f]requently … will entail some overlap with the merits of the plaintiffs underlying claim." *Ibid.* (quoting *Falcon*, 457 U.S. at 161).

This Court emphasized the "necessity of touching aspects of the merits in order to resolve [the] preliminary matte[r]" of class certification (*Dukes*, 131 S. Ct. at 2552) specifically to dispel confusion that had arisen in the lower courts following *Eisen*. 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).

Most courts of appeals recognized that, notwithstanding *Eisen*, district courts were required by *Falcon* to resolve any factual inquiries bearing on class ***14** 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). But *Eisen*'s dictum nonetheless "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." *In re IPO Sec. Litig.*, 471 F.3d 24, 34 (2d Cir. 2006).

Dukes clarified that these expansive readings of *Eisen* were "mistake [n]." 131 S. Ct. at 2552 n.6. "To the extent the quoted statement goes beyond the permissibility of a merits inquiry for any … pretrial purpose" *other than* shifting the cost of notice, this Court explained, "it is the purest dictum and is contradicted by our other cases." *Ibid.* In particular, the Court emphasized, *Eisen* has no applicability in "determin[ing] the propriety of certification under Rules 23(a) and (b)." *Ibid.* Instead, 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.*

2. *Dukes* applied this approach to the commonality inquiry under Rule 23(a)(2). The plaintiffs there sought to proceed on behalf of a nationwide class of female Wal-Mart employees, arguing that the class had been subjected to discrimination for a common reason: Wal-Mart allegedly " 'operated under a general policy of discrimination.' " *Dukes*, 131 S. Ct. at 2553 (quoting *Falcon*, 457 U.S. at 159 n.15). In support of this claim, the plaintiffs offered statistical evidence of discriminatory impact, as well as anecdotal ***15** evidence of allegedly discriminatory pay and promotion decisions. Yet even though "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." *Id.* at 2552, 2556 (emphasis omitted).

The Court rejected the plaintiffs' statistical evidence, concluding that "regional and national" sex-based disparities were insufficient to establish "uniform, store-by-store disparity" and proved nothing about the "criteria" used by individual managers in making employment decisions. *Dukes*, 131 S. Ct. at 2555-56. "Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity," the Court emphasized, "d[id] not suffice." *Id.* at 2556. The anecdotal evidence "suffer[ed] from the same defects," and also was too sparse to show that "the entire company 'operat[ed] under a general policy of discrimination.' " *Ibid.* (quoting *Falcon*, 457 U.S. at 159 n.15). Concluding that the plaintiffs had provided no "convincing proof" of a "companywide discriminatory pay and promotion policy," this Court held that they had "not established the existence of any common question." *Id.* at 2556-57.

B. The Third Circuit's decision in this case cannot be reconciled with *Dukes*. Citing *Eisen* more than a half-dozen times, the Third Circuit professed itself unable even to consider, much less to resolve, Comcast's challenges to the class certification order because those "merits arguments" were "not properly before" the court. App., *infra*, 19a. Instead, the court limited its inquiry to whether "Plaintiffs had demonstrated by a preponderance of the evidence ***16** that they *could* prove [the relevant issues] through common evidence at trial." *Id.* at 28a.

1. According to the Third Circuit, the governing precedent in this case is not *Dukes* but instead the pre-*Dukes* decision in *In re Hydrogen Peroxide Anti-trust Litigation*, 552 F.3d 305 (3d Cir. 2008). "Nothing in *Hydrogen Peroxide* requires plaintiffs to *prove* their case at the class certification stage," the Third Circuit stated; "[t]o require more contravenes *Eisen*," which purportedly "still precludes any further inquiry" into the merits. App., *infra*, 33a. *Dukes*, however, laid to rest this reading of *Eisen*, holding that courts cannot decline to address the merits of the plaintiffs' claims when they bear on the "propriety of certification." 131 S. Ct. at 2552 n.6.

According to the Third Circuit, *Dukes* "neither

guides nor governs the dispute" in this case. App., *infra*, 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.* That is wrong.

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. *See Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010) ("Rule 23 provides a one-size-fits-all formula for deciding the class-action question"). And in rejecting *Eisen's* dictum, this Court did not remotely suggest that the dictum would still apply outside the discrimination context; indeed, because *Eisen* had involved ***17** alleged violations of the antitrust and securities laws, the Court could simply have distinguished the case on that basis if, as the Third Circuit believed, it had intended to preserve any portion of *Eisen*'s dictum.

Moreover, *Dukes* illustrated its holding by discussing the fraud-on-the-market presumption of reliance in "class action suits for *securities* fraud." 131 S. Ct. at 2552 n.6 (emphasis added). Reliance is an element of private actions for securities fraud, and the individual inquiries necessary to prove reliance would ordinarily defeat class certification. *See, e.g., Basic, Inc. v. Levinson*, 485 U.S. 224, 229-30 (1988). The fraud-on-the-market presumption, however, permits an inference of reliance for "*all* traders who purchase stock in an efficient capital market." *Dukes*, 131 S. Ct. at 2552 n.6 (emphasis added). But while the existence of an efficient market is therefore a critical issue for both certification and the merits, "the plaintiffs seeking 23(b)(3) certification must *prove* that their shares were traded on an efficient market," even though "they will surely have to prove [the issue] *again* at trial to make out their case on the merits." *Ibid.* (first emphasis added).

Nor is it significant that *Dukes* was decided under Rule 23(a)(2)'s commonality requirement. 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). That undoubtedly explains why this Court specifically invoked Rule 23(b)(3) in its fraud-on-the-market example. *See ibid.*

If anything, this case follows *a fortiori* from *Dukes*. This Court noted in *Dukes* that it had "consider[ed] ***18** dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions *predominate*, but in order to determine (as Rule 23(a)(2) requires) whether there *is* '[e]ven a *single* [common] question.' " 131 S. Ct. at 2556 (last emphasis added; alterations in original). That distinction is significant here because, even where there are common issues, the district court must still determine whether individual issues predominate - that is, predominance "is a *more demanding* criterion than the commonality inquiry under Rule 23(a)." *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002) (Sotomayor, J.) (emphasis added); *see also, e.g., Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997) ("[e]ven if Rule 23(a)'s commonality requirement may be satisfied," "the predominance criterion is far more demanding"). Under the Third Circuit's opinion, however, courts cannot resolve "merits" issues bearing on this more demanding inquiry, even though - after *Dukes* - they undoubtedly may do so in addressing commonality. There is no support for this counterintuitive view.[FN3]

> FN3. The Third Circuit 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." App., *infra*, 34a n.10. The Third Circuit's characterization of the four cited articles as

"scholarship" is curious; at least three of them were authored in whole or part by members of the plaintiffs' class-action bar. It is similarly strange to suggest that their views were " uniformly" shared: 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." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof,* 84 N.Y.U. L. Rev. 97, 111, 113 (2009); *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"). The Court cited several of Professor Nagareda's works with approval in *Dukes* (131 S. Ct. at 2551, 2556-57), without reference to those selected by the Third Circuit; in any event, the Third Circuit was not at liberty to elevate the views expressed in "recent scholarship" above the holding of this Court in *Dukes.*

***19** 2. The Third Circuit's application of the predominance requirement further confirms its departure from *Dukes.* Throughout its opinion, the Third Circuit identified disputes among the parties over issues bearing on class certification, while insisting (contrary to *Dukes*) that any attempt to resolve those disputes would "miscontru[e] our role at this stage of the litigation." App., *infra,* 32a.

The Third Circuit acknowledged, for instance, that Plaintiffs' theory depended on their claim that the "relevant geographic market," for purposes of antitrust impact, was the Philadelphia DMA. App., *infra,* 18a-19a. Defining the "relevant geographic market" was thus an essential step in determining whether common issues predominate over individual ones: If, as Comcast maintained, the relevant geographic market is narrower than the class region - and particularly if the market could be defined only based on programming choices available to individual households in different franchise areas - then the question whether Comcast possessed market power in the relevant market could not be resolved on a class-wide basis, and individual inquiries into alleged market power would overwhelm any purportedly common ones.

***20** Thus, although any informed assessment of predominance necessarily would begin with market definition - and whether common proof existed of *any* market - the Third Circuit held that "[d]efining the relevant market … is an issue of the merits." App., *infra,* 18a. "The inquiry before the District Court," it believed, was simply whether "the class *could* establish through common proof that the relevant geographic market *could* be the Philadelphia DMA." *Id.* at 19a (emphases added). It was therefore sufficient, according to the Third Circuit, that "when [the issue is ultimately] addressed on the merits, the class *may* be able to prove through common evidence that the relevant market is the Philadelphia DMA." *Id.* at 23a (emphasis added). Under *Dukes,* however, the court was plainly wrong to dismiss the parties' " dispute[s] [over] whether the District Court properly defined the relevant geographic market" as "merits arguments, which are not properly before [the court]." *Id.* at 19a.

Similarly, the Third Circuit declined to "reach into the record and determine whether Plaintiffs actually have proven antitrust impact" on a class-wide basis. App., *infra,* 28a. Comcast adduced considerable evidence that any alleged deterrence of overbuilder competition could not have established "higher cable prices for the entire class," and therefore that individual issues of antitrust impact would predominate. *Ibid.* The purported overbuilder, RCN, was not licensed to overbuild in thirteen of the eighteen counties in the Philadelphia DMA, and there is no reason to believe that overbuilding in only five

counties would affect prices in the entire DMA, particularly since the evidence showed that Comcast could have offered discounts targeted to overbuilt counties (or, indeed, overbuilt franchise areas within ***21** particular counties). *See id.* at 127a; *see also, e.g.*, C.A. J.A. 3923-25, 3336.

Yet the Third Circuit examined only whether Plaintiffs " *could* prove antitrust impact through common evidence at trial." App., *infra*, 28a. The Third Circuit thus deemed it sufficient that the " antitrust impact Plaintiffs allege is 'plausible in theory' and 'susceptible to proof at trial through available evidence common to the class.' " *Id.* at 30a (quoting *Hydrogen Peroxide*, 552 F.3d at 325).

With respect to damages, the Third Circuit again abdicated its responsibilities under Rule 23. Characterizing the issue as "whether Plaintiffs have provided a method to measure and quantify damages on a class-wide basis," the Third Circuit accepted Plaintiffs' "assur[ance]" that "damages are capable of measurement and will not require labyrinthine individual calculations." App., *infra*, 46a-47a. And this "assur[ance]" was provided only by a "multiple regression analysis" conducted by Plaintiffs' expert, on the basis of theories that were almost entirely rejected below, "to compare actual prices in the Philadelphia DMA to the estimated 'but-for' prices." *Id.* at 37a.

Plaintiffs' expert made *no* effort to determine whether his analysis would permit calculation of class-wide damages when limited to the only remaining theory - deterrence of overbuilding. Thus, as Judge Jordan noted, Plaintiffs' expert "fail[ed] to identify the 'but for' conditions that are relevant to what is now the only impact of Comcast's allegedly anticompetitive conduct." App., *infra*, 71a (Jordan, J., concurring in the judgment in part and dissenting in part). Indeed, Comcast presented evidence, which Judge Jordan credited, that "there remains an intractable***22** problem with any model purporting to calculate damages for all class members collectively" - namely, that those damages could vary widely for the "649 unique franchise areas in the Philadelphia DMA." *Id.* at 81a-82a & n.30.

This sort of individual variance was sufficient to defeat certification in *Dukes*, but the Third Circuit simply dismissed "Comcast's arguments [as] attacks on the merits of the methodology that have no place in the class certification inquiry." App., *infra*, 48a. "We have not reached the stage of determining on the merits," the court insisted, "whether the methodology is a just and reasonable inference or speculative." *Id.* at 47a.

C. The Third Circuit's continued reliance on *Eisen* to circumscribe the scope of its "merits" inquiry at the class certification stage further brings it into conflict with the Eighth and Ninth Circuits, which have concluded after *Dukes* that district courts may - indeed, must - resolve any merits disputes bearing on the certification inquiry.

1. In *Ellis v. Costco Wholesale Corp.*, the district court certified a nationwide class of current and former Costco employees who had allegedly been subject to gender discrimination in promotion decisions. 657 F.3d 970, 977-78 (9th Cir. 2011). The plaintiffs sought to establish commonality under Rule 23(a) by relying on expert evidence of disparities in managerial promotions and positions, which they believed showed a "common pattern and practice" that " affect[ed] the class as a whole." *Id.* at 982-83 (emphasis omitted). Costco, in turn, adduced evidence that any disparities were present only in two regions and therefore could not establish that the "entire class was subject to the same allegedly discriminatory ***23** practice." *Id.* at 983. The district court, however, declined to "examin[e] the merits to decide this issue." *Id.* at 984.

Relying on *Eisen*, the district court asserted that "the merits of the class members' substantive claims were generally irrelevant to its inquiry." 657 F.3d at 981. Thus, like the Third Circuit in this case, the district court concluded that it "should not inquire into the merits of the suit during the certification process." *Ibid.*

The Ninth Circuit vacated and remanded in light of *Dukes*, and it took "this opportunity to clarify the correct standard" for the district court on remand. 657 F.3d at 981. The Ninth Circuit emphasized that "the merits of the class members' substantive claims are often highly relevant when determining whether to certify a class." *Ibid.* For that reason, not only "*may* [a district court] consider the merits to the extent that they overlap with class certification issues," "a district court *must* consider the merits if they overlap with the Rule 23(a) requirements." *Ibid.*

The decision below runs directly contrary to this reasoning. The Ninth Circuit held that the district court was required to decide "[w]hether gender disparities are confined to only two regions of Costco's eight regions" because that inquiry "addresses precisely the question of whether there are common questions of law and fact among the putative class members," even though it *also* bears on the merits of the plaintiffs' claims. 657 F.3d at 983; *see also id.* at 983-94 ("If no such *nationwide* discrimination exists, Plaintiffs would face an exceedingly difficult challenge in proving that there are questions of fact and law common to the *nationwide* class"). Yet the Third Circuit believed it sufficient that Plaintiffs "*could* ***24** prove antitrust impact through common evidence," or "have provided a method to measure and quantify damages on a class-wide basis," without any effort to decide whether the broad geographical area claimed by Plaintiffs was the correct market, whether the overbuilding theory affected that area uniformly, or whether the damages theory offered by Plaintiffs' expert could appropriately be used to prove damages on a class-wide basis. App., *infra*, 28a, 47a.

2. The Third Circuit's decision similarly cannot be reconciled with the Eighth Circuit's opinion in *Bennett v. Nucor Corp.*, 656 F.3d 802 (8th Cir. 2011). Relying on *Dukes*, the Eighth Circuit emphasized that the " 'rigorous analysis' " required by Rule 23 " '[f]requently … will entail some overlap with the merits of the plaintiffs underlying claim.' " *Id.* at 814 (quoting 131 S. Ct. at 2551). For that reason, "the district court may 'resolve disputes going to the factual setting of the case' if necessary to the class certification analysis." *Ibid.* (quoting *Blades v. Monsanto Co.*, 400 F.3d 562, 567 (8th Cir. 2005)).

Applying this framework, the Eighth Circuit affirmed a district court's decision to deny certification of a class of employees alleging discrimination at a manufacturing plant because, the district court found, "employment practices varied substantially across the plant's various production departments." 656 F.3d at 814. The plaintiffs sought to challenge the district court's decision by invoking "statistical and anecdotal evidence" of discrimination. *Id.* at 815. But, the Eighth Circuit noted, this evidence was "insufficient to demonstrate that any disparate treatment or disparate impact present in one department was also common to all the others" given "strong evidence that employment practices varied ***25** significantly from department to department." *Id.* at 815-16.

The Eighth Circuit's focus on whether the evidence before the district court was "insufficient to demonstrate" a particular finding bearing on class certification asks the court to engage in precisely the sort of "merits" inquiry that the Third Circuit believed was "not properly before [it]." App., *infra*, 19a. The Third Circuit's decision cannot be squared with *Bennett*.

***

The Third Circuit's attempt to reanimate the discredited dictum in *Eisen* just months after it was killed and buried by this Court is erroneous and warrants summary reversal. At minimum, this Court should grant review to resolve the conflict between the Third Circuit and the Eighth and Ninth Circuits over the extent to which district courts may address the merits of a plaintiff's claims in determining whether class certification is appropriate.

II. The Question Presented Is Important And Fre-

quently Recurring

As this Court recognized in *Dukes*, the class certification inquiry under Rule 23 "[*f*]*requently* … will entail some overlap with the merits of the plaintiff's underlying claim." 131 S. Ct. at 2551 (emphasis added). Particularly given the importance of the certification decision to class litigation, as well as the number and size of class actions pending across the country, this Court's review is warranted to address the proper scope of a district court's inquiry in these oft-arising circumstances.

***26** A. "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 v. Roper*, 445 U.S. 326, 339 (1980). That is so for obvious reasons: 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 v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *see also* Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, at 15 tbl. 5 (Cornell Law Faculty Working Papers, Paper No. 64, 2009) (average settlement over $100 million in certified 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).' " App., *infra*, 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). "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, ***27***Protecting Competition by Narrowing* Noerr: *A Reply*, 18 Antitrust 77, 78 (2003); *see also* Eisenberg & Miller, *supra*, at 15 tbl. 5 (average settlement over $160 million in certified antitrust class actions).

The certification inquiry, in turn, will frequently overlap with the merits of the plaintiff's claims, as in this case. *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1254, 1257 & n.12 (2002) (collecting cases where inquiry into the merits was determinative); Bartlett H. McGuire, *The Death Knell for* Eisen: *Why the Class Action Analysis Should Include an Assessment of the Merits*, 168 F.R.D. 366, 368 (1996) (same). Given the thousands of class actions filed in the federal courts every year (Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts* app. B (2008)), it is hardly surprising that three courts of appeals have already squarely addressed the proper scope of "merits" inquiries in the aftermath of *Dukes*.

In this respect, "the problems in the Majority's reasoning" below are certain to "have practical repercussions far beyond this case." App., *infra*, 53a n.2 (Jordan, J., concurring in the judgment in part and dissenting in part). The Third Circuit handles a disproportionate percentage of antitrust class litigation: More than one-quarter of antitrust class actions settled in the federal courts between 1993 and 2008 were litigated there, and "the Eastern District of Pennsylvania is the leader in Antitrust" class actions. Eisenberg & Miller, *supra*, at 11. The decision below will therefore have far-reaching implications for antitrust litigation, and resolution of the proper scope of "merits" inquiry at the certification stage ***28** will have even broader implications for class litigation generally.[FN4]

FN4. The decision below will also have

> significant consequences for this case. Plaintiffs' "conservative estimat[e]" of damages in the Philadelphia market alone exceeds $875 million (App., *infra*, 37a) and could (on Plaintiffs' calculation) exceed $1 billion - *before* trebling. *See* C.A. J.A. 3418; *see also* 15 U.S.C. § 15(a) (permitting treble damages). In addition, the Third Circuit's decision "will become a template for resolving similar class certification questions pending in cases involving the Chicago and Boston media markets." App., *infra*, 53a n.2 (Jordan, J., concurring in the judgment in part and dissenting in part). And because clustering is commonplace in the cable industry, "in all likelihood [the Third Circuit's decision] will be cited in other lawsuits against cable television service providers." *Ibid.* Thus, the "enormous potential liability" in this and similar cases is an additional "strong factor" favoring this Court's review. *Fid. Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in the denial of certiorari).

B. Not only does this case present the Court with an opportunity to resolve an issue of great significance to class litigation, it would further allow the Court to continue its longstanding practice of ensuring that lower courts apply procedural rules, including Rule 23, with appropriate rigor.

In *Bell Atlantic Corp. v. Twombly*, for example, this Court emphasized that a "plaintiffs obligation to provide the 'grounds' of his 'entitle[ment] to relief,' " under Rule 8(a)(2), "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 550 U.S. 544, 555 (2007) (alteration in original). The Court therefore rejected its earlier suggestion that a "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which ***29** would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (emphasis added). On a "literal reading," this Court noted, *Conley*'s inquiry would allow a "wholly conclusory statement of claim" to "survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Twombly*, 550 U.S. at 561. But "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not 'show[n]' - 'that the pleader is entitled to relief.' " *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (quoting Fed. R. Civ. P. 8(a)(2)).

Similarly, in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, this Court "again consider[ed] the standard district courts must apply when deciding whether to grant summary judgment" under Rule 56. 475 U.S. 574, 576 (1986). The Court emphasized that, under Rule 56, "the [disputed] issue of fact must be 'genuine,' " which means that the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586.

In these cases, the Court 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." The same reasoning motivated this Court's rejection of *Eisen*'s dicta in *Dukes*: Although it undoubtedly imposes burdens on district courts to examine the merits to see whether the "party seeking class certification" has "affirmatively demonstrate[d] his compliance" with Rule 23, that examination is ***30** required because " Rule 23 does not set forth a mere pleading standard." 131 S. Ct. at 2551. As the Seventh Circuit noted even before *Dukes*, Rule 23 means that "[t]ough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives," to determine whether certification is appropriate. *West v. Prudential Sec, Inc.*, 282 F.3d 935, 938 (7th Cir.

2002). This Court's review is warranted in this case - as in *Twombly*, *Iqbal*, *Matsushita*, and *Dukes* - to ensure that the lower federal courts engage in the inquiries required by procedural rules and this Court's decisions, notwithstanding the purported "concern[s]" of "recent scholarship." App., *infra*, 34a n.10; *see also supra* at 18 n.3.

CONCLUSION

The petition for a writ of certiorari should be granted.

Comcast Corp. v. Behrend
2012 WL 105558 (U.S.) (Appellate Petition, Motion and Filing)

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