No. 18-__

IN THE

Supreme Court of the United States

ZAREMBA FAMILY FARMS, INC.,
a Michigan corporation; ZAREMBA GROUP, L.L.C.,
a Michigan limited liability company;
WALTER ZAREMBA, an individual,

Petitioners,

v.

ENCANA OIL & GAS (USA) INC.,
a Delaware corporation,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

VOLUME I

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QUESTION PRESENTED

The Court of Appeals found there was sufficient evidence that Respondent Encana Oil & Gas (USA) Inc. conspired with Chesapeake Energy to allocate markets and depress the prices paid for oil and gas interests in northern Michigan in October 2010. There was evidence that Petitioners' interests had a value of at least $1,505.15 per acre in May 2010, and that Respondent paid on average $3,055.60 per acre in the relevant area at that same time. But, as a result of Respondent's and Chesapeake's collusion, Petitioners' interests lost significant value and were only worth $35.21 per acre in October 2010.

Petitioners argued that the unlawful anticompetitive scheme between Respondent and Chesapeake deprived them of the opportunity to sell their interests at a fair price in a competitive market.

The Court of Appeals held that Petitioners failed to demonstrate an injury-in-fact because they did not try to lease their oil and gas rights in the market with artificially depressed prices.

Question Presented:

Whether proof of the *fact of damage*—a significant drop in the value of a plaintiff's oil and gas interests—because of an illegal, anticompetitive agreement, is sufficient to establish an injury-in-fact giving rise to a private cause of action under 15 U.S.C. § 15(a), without, as a prerequisite, requiring the antitrust plaintiff to sell its oil and gas interests in an artificially rigged market.

PARTIES TO THE PROCEEDING BELOW

The Petitioners are Zaremba Family Farms, Inc., Zaremba Group, L.L.C., and Walter Zaremba. The Respondent is Encana Oil & Gas (USA) Inc.

CORPORATE DISCLOSURE STATEMENT

Petitioners Zaremba Family Farms, Inc. and Zaremba Group, L.L.C. are not subsidiaries or affiliates of a publicly owned corporation; petitioner Walter Zaremba is an individual.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Zaremba Family Farms, Inc., Zaremba Group, L.L.C., and Walter Zaremba respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The unreported panel opinion of the Court of Appeals is not yet published in the *Federal Appendix* but is available at 2018 WL 2446698, and included in Petitioners' Appendix (Pet. App.) at 1a-21a. The unreported panel decision denying Petitioners' petition for rehearing is included in Pet. App. at 22a. The unreported decision of the district court denying Petitioners' motion for summary judgment and granting in part and denying in part Respondent's motion for summary judgment is available at 2015 WL 12883808, and included in Pet. App. at 23a-42a. The unreported decisions of the district court denying Petitioners' motions for reconsideration are available at 2016 WL 7543187 and 2016 WL 7547688, and included in Pet. App. at 43a-63a and 64a-66a, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on May 31, 2016. A petition for rehearing was denied on June 18, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Sherman Act, 15 U.S.C. §§ 1, *et. seq.* are reproduced in the appendix to this petition. Pet. App. 67a-69a.

STATEMENT

A. Introduction

At some point, justice must prevail for a Michigan family business that lost tens of millions of dollars in an antitrust scheme. Respondent and Chesapeake Energy ("Chesapeake")—two of the largest oil and gas companies in North America—conspired to devalue Petitioners' oil and gas rights by tens of millions of dollars through an illegal agreement to stifle competition in the industry across northern Michigan. The Court of Appeals *agreed* that Petitioners provided evidence of an antitrust violation, but, nevertheless, erred in affirming the district court's grant of summary judgment to Respondent on Petitioners' antitrust claims. The Court of Appeals erroneously created a new, heightened requirement for establishing an injury-in-fact under the antitrust laws—one that conflicts with United States Supreme Court precedent as well as the decisions of other Circuit Courts of Appeal.

The Court of Appeals *agreed* that Petitioners offered sufficient evidence to establish a collusive agreement between Respondent and Chesapeake resulting in a decrease of the going rate for mineral-rights across northern Michigan, including Petitioners' rights in what is known as the "Collingwood play." Pet. App. at 11a-12a. [2018 WL 2446698, at *5]. The Court of Appeals also held that the evidence adduced by Petitioners "tends to exclude the possibility" that Respondent and Chesapeake acted independently in rigging the market. But the Court of Appeals held that, despite such evidence, Petitioners did not establish an injury-in-fact giving rise to a private cause of action because they failed to show that they considered leasing their oil and gas rights in the rigged market, after

Respondent and Chesapeake colluded to drive down prices. Without evidence that Petitioners tried to lease their interests in a market with artificially depressed prices resulting from Respondent's unlawful conspiracy, the Court of the Appeals reasoned, Petitioners could not establish an injury-in-fact under the antitrust laws. The Court of Appeals committed significant legal error and created a new, heightened standard as a prerequisite for antitrust claims to survive summary judgment and proceed to trial.

The Court of Appeals' decision creates a new requirement for establishing an injury-in-fact under 15 U.S.C. § 15(a) that contravenes the policy objectives supporting broad private enforcement of the antitrust laws. *See, e.g.*, *Zenith Radio Cop. v. Hazeltine Research*, 395 U.S. 100, 114 n. 9 (1969) (explaining that the burden of proving the fact of damage "is satisfied by proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage."); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (explaining that "[t]he injury should reflect the anticompetitive effect either of the violation of anticompetitive acts made possible by the violation."); *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 529 (1983) ("The class of persons who may maintain a private damage action under the antitrust laws is broadly defined in §4 of the Clayton Act."). Consistent with this Court's precedents and the policy objectives underlying the broad private enforcement of antitrust laws, the evidence offered by Petitioners at the summary judgment stage showing the devaluation of their oil and gas rights as a direct result of Respondent's and Chesapeake's illegal agreement to stifle competition is sufficient to proceed

to trial on Petitioners' antitrust claims. Requiring an additional showing that Petitioners had to try leasing their interests at artificially depressed prices at the summary judgment stage is inconsistent with this Court's precedents and the policy objectives underlying the antitrust laws.

The Court of Appeals' decision is also contrary to the decisions of other Circuit Courts of Appeal. *See, e.g.*, *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1158 (5th Cir. 1979) (when buyers engage in anticompetitive conduct, "the seller faces a Hobson's choice: he can sell into the rigged market and take the depressed price, or he can refuse to sell at all."); *Chipanno v. Champion Int'l Corp.*, 702 F.2d 827, 831 (9th Cir. 1983) (finding injury-in-fact where plaintiffs with options to purchase timber lands were prevented from selling logs at competitive prices); *Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131, 142 (3d Cir. 2009) (finding injury-in-fact where anticompetitive zoning depressed the value of property on which developer had an option). The Court of Appeals' decision requires a plaintiff harmed by an antitrust scheme (through the devaluation of the plaintiff's land) to suffer *further* damage by attempting to lease its land at a fraction of the value in a rigged market, as a prerequisite to bringing suit under 15 U.S.C. § 15(a). Such rationale is illogical, and it is inconsistent with decisions of other Circuit Courts of Appeal.

The Court of Appeals' decision should be reversed because it creates a new standard for establishing an antitrust injury-in-fact that is not supported by this Court's precedents, contravenes the policy favoring broad private enforcement of the antitrust laws, and conflicts with decisions of other Circuit Courts of Appeal. The Court of Appeals' decision is the only

decision of its kind that requires such a heightened, illogical showing of an injury-in-fact in order to permit an antitrust plaintiff to proceed with a claim at the summary judgment stage.

For these reasons, explained in detail below, the petition for a writ of certiorari should be granted, and the decision of the Court of Appeals should be reversed.

B. Petitioners' Oil and Gas Rights in the Collingwood play

Petitioners hold the mineral rights to a large amount of drillable land in Michigan in an area known as the Collingwood play, lying roughly two miles below the surface in northern Michigan. Pet. App. at 2a. [2018 WL 2446698, at *1]. When "the drilling boom began, oil-company suitors began lining up at their door." *Id.* Among these suitors were Respondent and Chesapeake. *Id.* That is, until Respondent and Chesapeake colluded to rig the market, stop competing with each other, and drive down the prices of oil and gas leases in northern Michigan, and, more specifically, the Collingwood play.

C. In 2010, Respondent and Chesapeake Aggressively Compete Against Each Other for Oil and Gas Holdings in the State of Michigan Including in the Collingwood play

In 2010, Respondent and Chesapeake—two of the largest companies engaged in natural gas exploration and production in North America—aggressively competed against each other for oil and gas holdings in the State of Michigan, including in the Collingwood play. *See* Pet. Supp. App. at 109a-113a [Zarembas' Resp. to

MSJ Ex. 1, Article, Sealed Entry 378]; 115a-116a [Zarembas' Resp. to MSJ Ex. 2, Kneuper Report, p. 19, SE 378]. For example, in a May 2010 state-sponsored auction of land contiguous to the Collingwood play, where the State of Michigan raised $178 million from the sale of oil and gas rights, Chesapeake and Respondent spent 78% and 15%, respectively, of the total dollars spent at the auction. *Id.*; *see also* Pet. Supp. App. at 151a, 152a [Zarembas' Resp. to MSJ Ex. 2, Kneuper Report, Exs 5A and 5B, SE 378]. Petitioners' oil and gas holdings in the Collingwood play are in the same market as the oil and gas holdings sold at the state-sponsored auction, such that prices for holdings in the Collingwood play rise and fall at the same rate. Pet. Supp. App. at 145a-149a. [Zarembas' Resp. to MSJ Ex. 2, Kneuper Report, pp. 44-46, SE 378].

In addition to aggressively competing at the auction, Respondent and Chesapeake continued to compete for oil and gas land holdings from private owners, such as Petitioners. Indeed, prior to the May 2010 auction, Respondent acquired leases to approximately 231,000 acres of land in the Collingwood play, and, in April 2010, Respondent announced successful test results at a test well in the Collingwood play known as the "Pioneer." Pet. Supp. App. at 153a-157a [Zarembas' Resp. to MSJ Ex. 3, PowerPoint, SE 378].

D. Respondent and Chesapeake Compete Vigorously to Buy Petitioner's Oil and Gas Holdings in the Collingwood play for Approximately $3,000 Per Acre

In June 2010, Respondent, through its agent, sent Petitioners the first of a series of proposed letters of intent offering to buy Petitioners' oil and gas interests in the Collingwood play for $2,700 per acre, for 19,208 net mineral acres (with a total of $51.8 million in

bonus money) plus royalties on actual production of product. Pet. Supp. App. at 158a-166a [Resp. to MSJ, Exhibit 6, Email, SE 378].

At the same time, Petitioners also received an offer from Chesapeake's land acquisition agent to purchase their rights for a "bonus" consideration of $3,200 per acre and a six-month drilling commitment. Pet. App. at 71a [Zarembas' Opening Br. on Appeal at p. 3]. The Chesapeake proposal included a non-refundable, up-front payment of approximately $6 million. *Id.* In late June 2010, Chesapeake even sent Petitioners a proposed lease agreement. Pet. App. at 74a-75a [Resp. to MSJ, Ex. 10, Email, Page ID # 6709, SE 378-10].

E. As a Result of their Collusion, Respondent and Chesapeake Stop Competing with Each Other in All of Northern Michigan and Drive Down the Value of Oil and Gas Leases

Despite their aggressive competition with each other for oil and gas rights in northern Michigan, including their initial competition for Petitioners' interests in the Collingwood play, Chesapeake and Respondent suddenly stopped bidding for Petitioners' oil and gas rights at the same time. Pet. App. at 76a-77a. [Resp. to MSJ, Ex. 13, Dzierwa deposition, Page ID #6714, SE 378-13; Resp! to MSJ, Ex. 16, Email, PageID #6718, SE 378-16]; Pet. Supp. App. At 115a-145a [Zarembas' Resp. to MSJ Ex. 2, Kneuper Report, pp. 23-32, SE 378]. At the same time, Chesapeake and Respondent suddenly stopped bidding against each other for oil and gas rights in all of northern Michigan. Pet. Supp. App. at 115a-145a. [Zarembas' Resp. to MSJ Ex. 2, Kneuper Report, pp. 23-32, SE 378]. The reason for this: Respondent and Chesapeake were secretly colluding to suppress lease prices in Michigan.

During the same time they were initially competing for Petitioners' oil and gas interests, top executives at Chesapeake and Respondent were discussing how to lower the prices resulting from their competition for leases in northern Michigan. The following facts overwhelmingly evidence a collusive agreement between Respondent and Chesapeake to stop all competition, rig the market, and drive down prices for oil and gas interests in northern Michigan, including Petitioners' interests in the Collingwood play, as the Court of Appeals correctly found existed by October 2010:

- Email correspondence between Respondent and Encana where top executives stated,
  - "should we throw in 50/50 together here rather than bash each other's brains out on lease buying?" Pet. Supp. App. at 168a. [Resp. to MSJ, Ex. 20, Email, SE 378]
  - "why not go 50/50 in Michigan and save ourselves a billion dollars on lease competition?" Pet. Supp. App. at 170a. [Resp. to MSJ, Ex. 21, Email, SE 378].
  - "We appear to have agreed to a division of work for fee leasing in Michigan with Chesapeake and are currently working on a LOI." Pet. Supp. App. at 173a. [Resp. to MSJ, Ex. 26, Email SE 378].
  - "[t]ime to smoke a peace pipe with [Respondent] on this one [Petitioners' land] if we are bidding each other up." Pet. App. at 82a. [Zarembas' Reply Br. on Appeal at 2].

- "[t]his is a [Chesapeake] area and we will not be bidding." Pet. Supp. App. at 179a. [Resp. to MSJ, Ex. 39, Email, SE 378]
- "Effective immediately, please drop your top lease prices by 50% in all areas. Rescind any offer outside of those parameters that are not signed and in your hands by noon today." Pet. Supp. App. at 182a. [Resp. to MSJ, Ex. 37, Email, SE 378).
- "[Chesapeake] is agreeable to [Respondent] taking" several counties. "[Chesapeake] will work" several other counties. Pet. App. at 81a. [Zarembas' Reply Br. on Appeal at 2].
- "Bottom line: We should be fine with the split of companies they named. . . ." Pet. App. at 81a. [Zarembas' Reply Br. on Appeal at 2].
- "If we like this, let's not compete with Encana on it." Pet. App. at 81a. [Zarembas' Reply Br. on Appeal at 2].

• Internal notes of Respondent included the following:

- Summary of a call between top executives at Respondent and Chesapeake stating that the three "principles" of Respondent's and Chesapeake's agreement were: **"1) Non-Compete; 2) Share data; 3) save billions**." Pet. Supp. App. at 183a. (Resp. to MSJ, Ex. 22, Notes, SE 378) (emphasis added)
- Trying to hide their collusion, top executives at Respondent wrote:"—Both companies take leases so it doesn't look sliced

& diced. Some % still "competitive." Pet. Supp. App. at 183a. [Resp. to MSJ, Ex. 22, Notes, SE 378]

- Respondent and Chesapeake exchanged a draft of an "Area of Mutual Interest" ("AMI") agreement that memorialized the parties' agreement not to compete against each other, including a term that, **"[t]he Parties shall agree not to compete against each other**." Pet. Supp. App. at 185a-192a (emphasis added). [Resp. to MSJ, Exhibit 29, Draft LOI, SE 378].
- Respondent's documentation explicitly spelled out which areas were allocated to Respondent and which to Chesapeake. Pet. Supp. App. at 193a-198a. [Resp. to MSJ, Ex. 4, Email, SE 378]
- Respondent's attorney advised Respondent's executives to keep the parties' collusive agreement verbal, "I would consider whether a different form of communication would be advisable—one that doesn't tell the entire story in a single page, for example maybe an email with just the bullet points and a phone call to communicate the rest of it verbally." Pet. App. at 82a. [Zarembas' Reply Br. on Appeal at 3].
- In July 2010, after Respondent and Chesapeake had been colluding behind the scenes for months, Respondent informed Petitioners that Respondent would not be pursuing the deal with Petitioners. Since then, Respondent has given five different reasons for not pursuing the deal, all of which have been proven to be demonstrably false. Pet. Supp.

App. at 135a-144a. [Zarembas' Resp. to MSJ Ex. 2, Kneuper Report, pp. 34-38, SE 378].

- In accordance with their collusive agreement, Respondent and Chesapeake dramatically slowed down their bidding activity for land offered for sale by the State of Michigan, contiguous to the land in the Collingwood play, in the same pricing market. In stark contrast with the parties' bidding activity at the State's May 2010 auction, Respondent and Chesapeake did not bid for properties in the other's assigned territory at the State's October 2010 auction. Pet. Supp. App. at 181a-182a. [Resp. to MSJ Ex. 37, Email, SE 378]. Petitioners' expert explained that the contrast between the May 2010 and October 2010 auctions is striking: Respondent dropped its prices by 98% and Chesapeake dropped its prices by 90%. Specifically, while Respondent paid an average of $3,055.60 per acre in May 2010, it paid only $41.82 per acre in October 2010. [Pet. Supp. App. at 128a-132a. Resp. to MSJ, Ex. 2, Kneuper Report, pp. 28-31, SE 378].
- The two highest level Chesapeake executives refused to testify and invoked the Fifth Amendment in response to every question at their deposition.
- The two highest level Encana employees invoked the Fifth Amendment in response to every question at their deposition, and, only after Respondent pleaded no contest to anti-trust criminal charges, the executives submitted affidavits in support of their summary judgment papers.

In short, as the Court of Appeals explained, "the 'principles' of [Respondent] and Chesapeake's potential agreement were 'non compete,' 'share data,' and 'save billions.'" Pet. App. at 11a [2018 WL 2446698, at *5]. After this lawsuit began, "explosive allegations emerged in the press: [Respondent] and Chesapeake had purportedly colluded to suppress lease prices in Michigan. Reuters published emails in which the two companies' top executives discussed how they might find a way to avoid 'bidding each other up' in Michigan." Pet. App. at 3a. [*Id.* at *1]. This prompted Petitioners to bring a counterclaim against Respondent for violations of the Sherman Antitrust Act and the Michigan Antitrust Reform Act. *Id.*

F. The District Court Grants Summary Judgment to Respondent on Petitioners' Antitrust Claims

On cross motions for summary judgment, the district court granted summary judgment to Respondent on Petitioners' antitrust claims. The district court explained that "the evidence establishes, without dispute, that no agreement was reached between [Respondent] and Chesapeake." Pet. App. at 33a. [2015 WL 12883808, at *4]. The district court explained further, "[a]t best, there is evidence that Plaintiff and Chesapeake tried to reach an agreement. And there is also evidence of parallel behavior after July 15 from which one could infer an anticompetitive agreement." *Id.* But the district court ultimately determined that Petitioners "have not put forth sufficient evidence to create a genuine issue of material fact on the existence of any agreement," and "the evidence does not exclude, as required by case law, independent action as the logical explanation for [Respondent's] behavior." *Id.*

G. The Court of Appeals for the Sixth Circuit Affirms the District Court's Decision Dismissing Petitioners' Antitrust Claims, But for Different Reasons

On appeal, the Court of Appeals for the Sixth Circuit affirmed the dismissal of Petitioners' antitrust claims on summary judgment. The Court of Appeals explained that there was insufficient evidence to show that Respondent and Chesapeake reached a collusive agreement before their respective deals with Petitioners fell apart. However, the Court of Appeals found sufficient evidence of such a collusive agreement by at least October 2010, before the state-sponsored auction.

As to the latter ongoing price depression theory, contrary to the explanation by the district court, the Court of Appeals explained that the evidence offered by Petitioners at the summary judgment stage "'tends to exclude the possibility' that [Respondent] and Chesapeake acted independently." Pet. App. 12a. [2018 WL 2446698, at *5]. However, the Sixth Circuit explained that this was not enough because Petitioners fail "to connect the companies' alleged collusion to any harm that [Petitioners] suffered." *Id.* According to the Court of Appeals, Petitioners were required to attempt to lease their oil and gas rights for an artificially depressed price in a rigged market in order to sustain an antitrust injury-in-fact. The Court of Appeals explained that, Petitioners "fail to point to evidence suggesting that they even considered leasing their rights after their last communication with Chesapeake in July 2010." *Id.*[1] On this basis, the Court of Appeals affirmed the district court's decision.

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[1] This statement by the Court of Appeals is untrue. As explained by Petitioners in a letter submitted to the Court of

REASONS FOR GRANTING THE PETITION

The petition should be granted for three reasons.

First, the Court of Appeals created a new, heightened standard for establishing an injury-in-fact under the antitrust laws that contravenes this Court's precedents and the policy objectives favoring broad, private enforcement of the antitrust laws.

Second, the Court of Appeals' decision is in conflict with the decisions of other Circuit Courts of Appeal. No other Circuit Court of Appeal has required such heightened proof as required by the Sixth Circuit as a prerequisite for proceeding to trial on an antitrust claim.

Finally, even applying the Court of Appeals' erroneously heightened requirement that Petitioners attempt to lease their oil and gas rights in a rigged market at substantially devalued prices to establish an antitrust injury-in-fact, Petitioners offered sufficient evidence to show such attempts, which was ignored by the Court of Appeals.

Appeals after oral argument, testimony was offered at both the summary judgment stage and at trial detailing Petitioners' unsuccessful attempts to lease their oil and gas interests *after* Respondent's and Chesapeake's collusion. Pet. App. at 84a-85a. [May 4, 2018 letter to COA]. This issue was never raised by Respondent in the district court, nor was it raised by Respondent in the Court of Appeals. It was raised for the first time, *sua sponte*, by the Court of Appeals at oral argument. The Court of Appeals ignored this evidence.

I. THE COURT OF APPEALS CREATED A NEW, HEIGHTENED STANDARD FOR ESTABLISHING AN INJURY-IN-FACT UNDER THE ANTITRUST LAWS, WHICH IS CONTRARY TO THIS COURT'S PRECEDENTS AND THE POLICY OBJECTIVES SUPPORTING BROAD, PRIVATE ENFORCEMENT OF THE ANTITRUST LAWS

The Court should grant this petition for writ of certiorari because the Court of Appeals erred in creating a new, heightened standard for establishing an injury-in-fact. The Court of Appeals' decision contravenes this Court's precedents and the policy objectives favoring broad, private enforcement of the antitrust laws. Contrary to this Court's precedents, the Court of Appeals' decision requires more than the *fact* of injury to survive summary judgment. Specifically, the Court of Appeals' decision holds that evidence of the fact of injury, i.e. the devaluation of Petitioners' oil and gas rights caused by anticompetitive conduct, is insufficient to establish an injury-in-fact.

A. This Court of Appeals' Decision Creates a New Standard for Establishing an Injury-in-Fact in an Antitrust Action, Which is Not Supported by this Court's Precedents

Under 15 U.S.C. § 15(a), "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court. . . ." The words "business or property," as this Court has explained, "refer to commercial interests or enterprises." *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 264 (1972) (citations omitted). The statute broadly allows a

private plaintiff injured by an anticompetitive agreement to bring suit: "Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations without regard to the amount in controversy." *Standard Oil Co.*, 405 U.S. at 266 (citations omitted); *Associated Gen. Contractors of Cal., Inc.*, 459 U.S. at 529 ("The class of persons who may maintain a private damage action under the antitrust laws is broadly defined in §4 of the Clayton Act."); *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) ("The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.").

This Court has explained that, to prove an antitrust injury-in-fact, plaintiffs must establish an injury or threatened injury caused by the defendant's alleged wrongdoing. *Associated Gen. Contractors of Cal.*, 459 U.S. at 535. In other words, there must be an injury that "flows from that which makes defendants' acts unlawful." *Brunswick Corp.*, 429 U.S. at 489. Antitrust plaintiffs are required to show "more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from the illegal conduct." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (citation omitted). As this Court has explained, "[c]oercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions and may be condemned even without proof of its actual market effect." *Associated Gen. Contractors of Cal.*, 459 U.S. at 528 (1983) (citation omitted). Indeed, this Court's cases "have emphasized the central interest in protecting the economic freedom of participants in the relevant market." *Id.* at 538.

This Court's decision in *Zenith Radio Corp.* is instructive of how the Court applies the injury-in-fact element to an antitrust claim. In *Zenith Radio Corp.*, Canadian manufacturers prevented importation of radio and television sets from the United States resulting in the plaintiff being unable to secure a license for American-made goods. 395 U.S. at 115. After bringing an antitrust lawsuit, the case settled with the plaintiff receiving worldwide licenses on patents owned by the Canadian manufacturers. *Id.* The plaintiff then began importing radio and television products to Canada. *Id.* But the plaintiff was promptly notified by the Canadian manufacturers that, in order to continue business in Canada, it would be required to sign a standard license, which did not permit importation from the United States, and that in order to sell in Canada, the plaintiff must also manufacture there. *Id.* This Court found that the plaintiff sufficiently established an injury-in-fact because the Canadian manufacturers' "conduct interfered with and made more difficult the distribution of Zenith product. . . ." *Id.* at 119.

Here, as in *Zenith Radio Corp.*, Petitioners established an injury-in-fact: a devaluation of their oil and gas rights as a direct result of Respondent's and Chesapeake's deal to devalue oil and gas interests in northern Michigan. Specifically, while Respondent paid an average of $3,055.60 per acre in May 2010 in the relevant area—the Collingwood play—it paid only $41.82 per acre in October 2010. [Pet. Supp. App. at 128a-132a. Resp. to MSJ, Ex. 2, Kneuper Report, pp. 28-31, SE 378]. Petitioners were harmed by not being able to lease their property rights in a market where prices were set through fair competition. Thus, Petitioners sufficiently established, at the summary judgment stage, an injury to their "business or

property"—a devaluation of their land interests—as a result of Respondent's conduct "forbidden by the antitrust laws." The Court of Appeals' decision ignores the substantial proof of the *fact of injury* and inappropriately requires Petitioners take the additional step of attempting to lease their oil and gas rights in an artificially depressed market. Such an application of the antitrust laws is contrary to this Court's prior instruction that an antitrust plaintiff satisfies its burden "by . . . proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to *the amount and not the fact of damage*." *Zenith Radio Corp.*, 395 U.S. at 114 n. 9 (emphasis added). In short, requiring Petitioners to take the additional step of attempting to lease their oil and gas rights at a drastically reduced price in an artificially rigged market before bringing suit requires heightened proof to establish an injury-in-fact under 15 U.S.C. § 15(a), and it goes to the *amount* and not the *fact* of damage.

The Court of Appeals misplaced its reliance on a single line, taken out of context, from this Court's decision in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990). *See* Pet. App. at 12a ("As the Supreme Court has held, antitrust plaintiffs are required to show 'that the conspiracy caused *them* an injury for which the antitrust laws provide relief,' not just that the defendant was up to no good.") (emphasis in original). [2018 WL 2446698 at *5].

In *Atlantic Richfield*, this Court decided whether a firm suffered an "injury" under the antitrust laws when its competitors agreed to lower their prices pursuant to a vertical, maximum-price-fixing scheme. *Id.* at 331. Holding that a firm does not establish an injury under such a scenario because it is merely

complaining that it cannot raise its prices (which does not result in reduction to competition), the Court explained that "[a]ntitrust injury does not arise . . . until a private party is adversely affected by an *anticompetitive* aspect of the defendant's conduct[.]" *Id.* at 349 (emphasis in original) (citation omitted). In short, *Atlantic Richfield* stands for the proposition that competitors who complain of *low* fixed prices do not suffer an antitrust injury because competition is *increased*, see, e.g., *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 776–77 (2d Cir. 2016), *not* the proposition cited by the Court of Appeals that requires Petitioners to sell their oil and gas rights at a drastically reduced price in a rigged market as a prerequisite to bringing suit. In other words, nothing in *Atlantic Richfield* contradicts this Court's reasoning in *Zenith Radio Corp.* that inquiry into the *amount of damage* as opposed to the *fact of damage* is inappropriate.

In short, *Atlantic Richfield* is distinguishable. In *Atlantic Richfield*, there was no "anticompetitive injury" because "'cutting prices in order to increase business often is the very essence of competition.'" *Id.* at 338. Unlike *Atlantic Richfield*, however, where, as here, the antitrust plaintiff has established that an agreement to rig the market and devalue oil and gas rights in a geographic area results specifically in the reduction of the value of the plaintiff's land interests, that is exactly the injury-in-fact giving rise to a private cause of action under 15 U.S.C. § 15(a). Indeed, this Court's precedent makes clear that a private antitrust plaintiff establishes an injury-in-fact where there is proof of an injury resulting from the anticompetitive effect of a collusive agreement. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (explaining that "[t]he injury should reflect

the anticompetitive effect either of the violation of anticompetitive acts made possible by the violation.").

Matsushita is also inapposite. In *Matsushita*, the Court explained that "respondents cannot recover for a conspiracy to impose nonprice restraints that have the effect of either raising market price or limiting output. Such restrictions, though harmful to competition, actually *benefit* competitors by making supracompetitive pricing more attractive." 475 U.S. at 583 (emphasis in original). In other words, because the effect of the alleged anticompetitive conduct in *Matsushita* did not harm competitors who were able to charge higher prices, there could be no "antitrust injury" as a matter of law. Again, that is the opposite of what Petitioners showed here. Petitioners established—as the Court of Appeals recognized—evidence sufficient to show Respondent and Chesapeake colluded to decrease the going rate for mineral-rights leases across northern Michigan, *which had a direct impact on and reduction of the value of Petitioners' mineral-rights*. This is a direct injury-in-fact under 15 U.S.C. § 15(a). The Court of Appeals inappropriately requires Petitioners to show that they attempted to lease their oil and gas rights in an artificially rigged market despite recognizing the *fact* of damage that flowed from Respondent's and Chesapeake's collusive agreement, i.e. a devaluation of Petitioners' oil and gas interests. It is undisputed that Petitioners were damaged by a reduction in the value of their oil and gas rights, and it was inappropriate for the Court of Appeals to look past this and require *more* proof as a prerequisite to proceeding to trial.

In short, "the Sherman Act was enacted to assure customers the benefits of price competition, and [the Court's] prior cases have emphasized the central

interest in protecting the economic freedom of participants in the relevant market." *Associated Gen. Contractors of Cal.*, 459 U.S. at 538 (footnote omitted). This is why the burden of proving damage under the antitrust law is satisfied by "proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage." *Zenith Radio Corp.*, 395 U.S. at 114 n. 9 (1969). The Court of Appeals' decision creates a new requirement for an antitrust plaintiff: either lease land interests at an artificially and drastically reduced value in a rigged market resulting from the defendant's collusive agreement or lose the ability to bring an antitrust claim, despite already making a showing of the *fact* of damage (a devaluation of the land interests). Such requirement is illogical, and it is not supported by this Court's precedents. Indeed, the *amount* of damage is for a jury to decide, the district court's only role on summary judgment is to determine the *fact* of damage resulting from collusive conduct. The *fact* of damage is undisputed in this case, as even the Court of Appeals recognized the devaluation of Petitioners' oil and gas rights.

B. The Court of Appeals' Decision Runs Contrary to the Policy Objectives Supporting Broad Private Enforcement of the Antitrust Laws

The Court of Appeals' decision also runs counter to the policy objectives underlying the antitrust laws. There is a "longstanding policy of encouraging vigorous private enforcement of the antitrust laws[.]" *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977) (citing *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968)). This is because the antitrust laws were enacted for "the protection of

competition. . . ." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). Private enforcement of the antitrust laws increases the likelihood that violators of the law will be discouraged and forced to "disgorge the 'fruits of their illegality. . . .'" *Blue Shield of Va. v. McCready*, 457 U.S. 456, 473 n.10 (1982). A private antitrust action is meant to compensate private parties for their injuries as well as punish the violators of the antitrust laws. *See, e.g.*, 2 Phillip E. Areeda, Herbert Hovenkamp & Roger D. Blair, *Antitrust Law*, ¶ 330, at 273 (2d. ed. 2000).

The Court of Appeals' requirement that an antitrust plaintiff must attempt to lease its land interests at a drastically reduced price in an artificially rigged market (despite already establishing a diminution in the value of the plaintiff's land interests caused by the defendant's unlawful conduct) puts the plaintiff in a precarious position: a party whose property has been substantially devalued could only pursue a remedy by leasing it at the artificially depressed prices caused by the defendant's anticompetitive conduct. An injured party who was unwilling to lease its oil and gas rights for a fraction of the price that would exist in a free and competitive market would be left without a remedy and forced to live with the consequences of the reduced property value. In other words, "the seller faces a Hobson's choice: he can sell into the rigged market and take the depressed price, or he can refuse to sell at all." *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1158 (5th Cir. 1979). Requiring the plaintiff to sell into the rigged market, as the Court of Appeals' decision requires in order to prove an injury-in-fact, reduces the likelihood that the plaintiff will want to vigorously pursue an antitrust action. Indeed, requiring the plaintiff to first lose a significant amount of money by selling into an artificially rigged market as a

prerequisite to bringing an antitrust claim—in this case tens of millions of dollars—discourages the private enforcement of the antitrust laws. Conversely, where, as here, proof exists that anticompetitive conduct diminished the price of Petitioners' oil and gas interests, there is incentive to bring an antitrust action. The Court of Appeals' decision harms the intent behind, and policy objectives underlying, the antitrust laws, which were meant to encourage private parties to bring lawsuits to enforce the antitrust laws.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL

The petition for certiorari should also be granted because the Court of Appeals' decision is the only one of its kind, and it conflicts with decisions of other Circuit Courts of Appeal. No other Circuit Court of Appeal requires a certain level of *amount* of damage as a prerequisite to surviving summary judgment in an antitrust action, where there is sufficient proof of the *fact* of damage submitted by the antitrust plaintiff.

For example, in *Chipanno v. Champion Int'l Corp.*, 702 F.2d 827, 829 (9th Cir. 1983), plaintiffs, individuals who had acquired an option to purchase timberland, brought an antitrust action against defendants engaged in the lumbering and milling business, alleging a conspiracy to restrain trade and commerce in timber, logs, and other forest products. The district court dismissed plaintiffs' complaint for, *inter alia*, failing to make a showing that, absent defendants' conduct, they would have found a buyer in time to exercise their option. *Id.* at 830. The Court of Appeals for the Ninth Circuit reversed. The Ninth Circuit explained that the plaintiffs' allegations that they were "prevented from selling the logs to be cut from

timber standing on the property at competitive prices," if proven, would be sufficient to proceed on the antitrust claim. *Id.* In other words, the *fact* of damage was clear, and is was unnecessary for the plaintiffs to prove the *amount* of damage to proceed with their claim.

In another case, *Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131, 142 (3d Cir. 2009), the Court of Appeals for the Third Circuit explained that the devaluation of an option to purchase land is a "classic form of economic injury," albeit not in the context of an antitrust injury-in-fact. The Third Circuit reasoned that, by driving down the value of certain property, the defendant also drove down the value of the plaintiff's option in the property. *Id.* This type of economic harm, the Third Circuit explained, "satisfies the constitutional requirement of injury-in-fact" and "amount[s] to legally cognizable injury-in-fact." *Id.* That is exactly the type of harm that was proven at the summary judgment stage here, harm that is unquestionably an injury-in-fact.

Other Circuit Courts of Appeal have similarly explained the injury-in-fact element in a manner that encompasses the injury to Petitioners' oil and gas rights here. *See, e.g.*, *Andrx Pharmaceuticals, Inc. v. Biovail Corp. Intl.*, 256 F.3d 799, 806 (2001) ("When competitors violate the antitrust laws and another competitor is forced from a market, the latter suffers an injury-in-fact."); *Ross v. Bank of Am., N.A. (USA)*, 524 F.3d 217, 223 (2d Cir. 2008) (finding sufficient allegations of injury-in-fact where cardholders alleged illegal conspiracy subjected cardholders to suppressed competition and deprived them of meaningful choice on critical terms and conditions of their general purpose card accounts).

The decisions from other Circuit Courts of Appeal are in line with the Court's articulation of what is required for proving the *fact* of an antitrust injury-in-fact. Indeed, the antitrust laws are broad enough that a plaintiff need not even be an active participant in the affected market as long as there has been injury to business or property caused by the anticompetitive conduct. *See, e.g.*, *Hayes v. Solomon*, 597 F.2d 958, 973 (5th Cir. 1979) (companies prevented from entering market and competing are proper plaintiffs if they intend and are prepared to enter the business); *O'Bannon v. NCAA*, 802 F.3d 1049, 1069 (9th Cir. 2015) (athletes unable to sell publicity rights "satisfied the requirement of injury in fact and, by extension, the requirement of antitrust injury.").

In short, the Court of Appeals' decision runs contrary to decisions of other Circuit Courts of Appeal. The Court of Appeals' decision is the first of its kind that requires proof of *more damage* at the summary judgment stage, despite recognition of proof establishing the *fact* of damage.

III. EVEN UNDER THE COURT OF APPEALS' HEIGHTENED STANDARD FOR PROVING AN ANTITRUST INJURY-IN-FACT, PETITIONERS OFFERED SUFFICIENT EVIDENCE TO PRECLUDE SUMMARY JUDGMENT IN FAVOR OF RESPONDENT BY SHOWING THAT THEY ATTEMPTED TO LEASE THEIR OIL AND GAS RIGHTS IN A RIGGED MARKET

The Court of Appeals' legal error in contravention of this Court's precedents and in conflict with other Circuit Courts of Appeal is even more egregious in the context of this case. Respondent never moved for

summary judgment in the district court on the basis that Petitioners did not show that they attempted to lease their oil and gas interests in an artificially rigged market. So Petitioners did not respond to what was never briefed or raised by Respondent in the district court. The first time Petitioners' alleged failure to attempt to lease their oil and gas interests in an artificially rigged market became an issue was at oral argument before the Court of Appeals, and it was an issue raised *sua sponte* by the Court of Appeals, not Respondent.

Following oral argument, Petitioners submitted a letter to the Court of Appeals citing all portions of the record—both during the parties' summary judgment briefing and at the subsequent trial on the parties' additional claims—showing in the record where Petitioners unsuccessfully attempted to lease their oil and gas interests in the artificially rigged market after Respondent's and Chesapeake's collusive agreement was in effect. Pet. App. at 84a-85a. [May 4, 2018 letter to COA]. This evidence was ignored by the Court of Appeals. Accordingly, even applying the Court of Appeals' erroneous, heightened legal standard, which requires proof that Petitioners attempted to lease their oil and gas interests *after* Respondent and Chesapeake reached their collusive agreement, Petitioners' antitrust claims should have proceeded to trial because such evidence is in the record.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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