No. 23-1063

In the Supreme Court of the United States

HOME DEPOT U.S.A., INC., PETITIONER,

v.

BLUE CROSS BLUE SHIELD ASSOCIATION, ET AL.,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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All parties agree that this Court's precedents bar at least some "prospective waiver[s] of a party's right to pursue statutory remedies for antitrust violations." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985); *see* Blues 2; Subscribers 20-22. The parties—and the courts of appeals—disagree on the scope of that limitation. Because that dispute is well-presented by a class settlement that—all agree—releases a hundred million private plaintiffs' future claims for future antitrust violations, this Court should resolve it.

The Eleventh Circuit holds categorically that "no public policy prohibits prospective releases in antitrust cases." App. 13a. Yet this Court has unequivocally stated that any agreement that would "confer … a partial immunity from civil liability for future [antitrust] violations" contravenes "the antitrust laws." *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955). Neither this Court—nor the Department of Justice—has identified exceptions to that "well-established" rule. U.S. Amicus Br., *Am. Express Co. v. Italian Colors Restaurant*, No. 12-133, 2013 WL 367051, at *20 (U.S. Jan. 29, 2013). And the Third, Fifth, Sixth, and Eighth Circuits faithfully apply it.

Respondents contend, however, that the release here is nonetheless lawful because it covers only future claims "based on the 'identical factual predicates' of the settled claims" and does not release claims for "clearly illegal" conduct. Subscribers 3 (quoting App. 19a); *see* Blues 2. Those novel exceptions are unmoored from the Sherman Act's text (which Respondents do not address) and from this Court's cases (which Respondents brush aside). This deep confusion about whether and when prospective releases of antitrust claims are permissible—to say nothing

of the due process concerns this massive, mandatory class action presents—calls out for review.

I. The Courts of Appeals, Like Respondents, Are Divided.

Respondents deny that a circuit split exists, but the cases speak for themselves.

The Second, Seventh, and Eleventh circuits now "permit[] releases of antitrust claims challenging ongoing conduct," Blues 17, and thus "align with the decision below," Subscribers 39; *see* Pet. 16-18. But in the Third, Fifth, Sixth, and Eighth Circuits, antitrust releases may not bar claims for "events which occur after the execution of the release" when premised on a "continuing conspiracy" that began "prior to the signing of the release." *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 218 & n.9 (3d Cir. 2008); *see also Redel's Inc. v. Gen. Elec. Co.*, 498 F.2d 95, 99 (5th Cir. 1974) (release invalid against claims involving an ongoing price discrimination theory "arising subsequent" to the release); *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 461 (6th Cir. 2011) (expressly splitting with the Seventh Circuit over whether "a mid-conspiracy settlement" can preclude liability for "subsequent actions that further the conspiracy"); *Fox Midwest Theatres, Inc. v. Means*, 221 F.2d 173, 180 (8th Cir. 1955) ("Any contractual provision which [releases] future violations of the anti-trust statutes … permit[s] a restraint of trade.").

Respondents cite no case from the Third, Fifth, Sixth, or Eighth Circuits suggesting a different rule for claims based on "identical factual predicate[s]." Blues 22; Subscribers 33. To the contrary, these circuits refuse to enforce prospective releases even where the claims arose

from the same factual predicate. Beyond referencing a state law prohibition on future releases, *Watson Carpet* held that a "mid-conspiracy" release could not release future antitrust claims for "subsequent actions that further the conspiracy" even though "some of [the] *predicate facts*" occurred before the settlement. 648 F.3d at 460 (emphasis added). *Redel's* enforced a release against price discrimination claims that arose before the release but found the same release "ineffective to bar claims" involving the *same* price discrimination conspiracy "arising subsequent to" the release. 498 F.2d at 99. *Gaines v. Carrollton Tobacco Board of Trade, Inc.*, too, rejected the idea that an alleged release could "waive damages arising from future violations of the antitrust laws" arising out of the same anticompetitive regulation. 386 F.2d 757, 759 (6th Cir. 1967). Thus, even though some of these cases involved "general releases," the courts rejected releases of future antitrust claims even for claims arising out of overlapping factual predicates. *Contra* Subscribers 34-36; Blues 23-25.

The Subscribers—but not the Blues—further frame the majority side of the split as adopting their view that prospective releases of antitrust claims are unlawful only when the challenged conduct is *also* "clearly illegal." *See* Subscribers 33, 35-36, 36 n.9, 38. Respondents themselves thus cannot agree on what rule these cases establish. And neither cites any case from the Third, Fifth, Sixth, or Eighth Circuits adopting their "clearly illegal" exception.

The circuits have plainly "reached different answers" on the scope of the prohibition against prospective waivers of antitrust claims. Blues 22. The Blues deny a circuit split by claiming that release "*enforcement* cases" are irrelevant to settlement "*approval*." Blues 22-23. But illegal

releases should not be approved *or* enforced. True, later litigants *could* challenge an unlawfully broad release of antitrust claims. But requiring them to litigate that gateway issue first—at the cost of a contempt citation from the MDL court—would chill "active enforcement of the antitrust laws by private actions." *Blue Shield of Va. v. McCready*, 457 U.S. 465, 474 (1982).

Finally, Respondents parse illusory factual differences between various cases. They say, for instance, that *Redel's* involved a release in a "pre-suit franchise agreement," not a settlement. Blues 25. *Toledo* interpreted "the terms of a specific release," not "a release in a class settlement." Blues 23. *Gaines* considered whether prior conduct prohibited a later suit, rather than a "settlement release." Subscribers 37. And so on.

But none of these purported distinctions *matter*. The Sherman Act prohibits agreements "in restraint of trade." 15 U.S.C. § 1. That includes class settlement agreements, just as it includes these other agreements.

II. The Decision Below Conflicts with this Court's Precedents.

This Court has never identified exceptions to the "well-established" rule "that parties may not prospectively waive the protections of the antitrust laws." U.S. Amicus Br., *Italian Colors*, 2013 WL 367051, at *20. Respondents nevertheless argue that the decision below is correct because exceptions exist. This Court should grant review to clarify whether that is true.

1. Respondents, like the court below, disregard the text of the antitrust laws. They make no effort to deny an agreement not to enforce the antitrust laws is itself "a

contract 'in restraint of trade.'" *Fox Midwest*, 221 F.2d at 180 (quoting 15 U.S.C. § 1); *see* Pet. 7-8.

Instead, Respondents strain to identify factual differences between this case and this Court's precedents. Blues 18-21; Subscribers 25-32. But the cases speak for themselves. Pet. 21-22. An agreement that confers even "a partial immunity from civil liability for future [antitrust] violations" violates "the antitrust laws." *Lawlor*, 349 U.S. at 329. "Agreement[s]" that operate "as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations" are unlawful. *Mitsubishi*, 473 U.S. at 637 n.19; *Am. Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 236 (2013) (confirming this Court's "desire to prevent 'prospective waiver of a party's *right to pursue* statutory remedies'" (citation omitted)).

These cases identified no exceptions. They cannot be squared with the Eleventh Circuit's proclamation that "no public policy prohibits prospective releases in antitrust cases." App. 13a.

Respondents complain that this Court has addressed this issue only in "sentence fragments." Subscribers 4. But this Court's precedents should not be so readily cast aside, and the Solicitor General agrees they "establish[] that parties may not prospectively waive the protections of the antitrust laws." U.S. Amicus Br., *Italian Colors*, 2013 WL 367051, at *20.[1] Respondents read *Lawlor*,

[1] This Court did not "reject[] the [federal government's] position" on the question presented in *Italian Colors*. Subscribers 31; *see* Blues 21. It held, consistent with that position, that a mandatory arbitration agreement was not a prospective waiver of antitrust claims and read *Mitsubishi* to mean that an "agreement" that *did* "forbid[] the assertion of certain [antitrust] rights" would be unlawful. *Italian Colors*, 570 U.S. at 236.

Mitsubishi, and *Italian Colors* to say *nothing* of relevance here. To the extent Respondents find this Court's cases wanting, that only confirms the need for further guidance.

2. Respondents nevertheless defend the decision below, asserting that the general rule that "parties cannot release future [antitrust] claims" does not apply to "future claims that share an identical factual predicate with the settled litigation." Blues 2; *see* Subscribers 3.

This Court's antitrust cases do not contain this purported exception. Not even the Eleventh Circuit expressly linked its approval of the "prospective release of antitrust claims" to the identical-factual-predicate doctrine. *Compare* App. 13a ("[N]o public policy prohibits prospective releases in antitrust cases."), *with* App. 18a-20a (addressing separately whether the release satisfies the "identical-factual-predicate doctrine").

That is because the identical-factual-predicate doctrine is from the distinct field of res judicata. Pet. 28-29. Antitrust law safeguards competition, and it is no less concerned with *ongoing* restraints than with new ones. The decision below, App. 19a, cited *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996), a non-antitrust case holding that a class action settlement validly released future federal claims because Delaware law "treated the impact of settlement judgments on subsequent litigation … as a question of claim preclusion" and "permit[ed] the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action." *Id.* at 376-77 (citation omitted). That decision says nothing about the antitrust-specific rule in *Lawlor* and its progeny, nor did it identify any exception

to that rule. Indeed, *Lawlor* was crystal clear that releases of antitrust claims raise issues independent from res judicata—because they are agreements that permit anticompetitive conduct. 349 U.S. at 329; Pet. 29.

The identical-factual-predicate doctrine is a separate limit on *all* class action releases. *See In re Lumber Liquidators Chinese-Manufactured Flooring Litig.*, 91 F.4th 174, 183 (4th Cir. 2024) (applying the doctrine to a non-antitrust class action settlement); Pet. 28-29. A release might bar only future claims with identical-factual predicates, but that does not answer the separate question whether that release of future antitrust claims constitutes an unlawful "restraint of trade." *Fox Midwest*, 221 F.2d at 180. And the identical-factual-predicate doctrine would not necessarily bar new antitrust claims arising from new acts furthering continuing anticompetitive practices. "Subsequent conduct, even if it is of the same nature as the conduct complained of in a prior lawsuit, may give rise to an entirely separate cause of action" that is "not precluded" by res judicata. *Kilgoar v. Colbert Cnty. Bd. of Educ.*, 578 F.2d 1033, 1035 (5th Cir. 1978) (citing *Lawlor*).

The Subscribers further contend litigants may release future claims if the continued conduct is not "clearly illegal," by which they mean a claim that is "disputed and disputable" or subject to "credible defenses." Subscribers 3, 21, 24 (cleaned up). But that is true of virtually *every* antitrust claim, at least early in litigation. Even claims challenging the restraints the district court found *per se* illegal here would be waivable, because "genuine disputes" of fact existed on the Blues' defense that they "constituted a single economic enterprise." Subscribers 9. Respondents' "clearly illegal" exception would impose an impossible *ex*

ante burden of proof, especially for rule-of-reason claims, which account for most antitrust claims. Pet. 27-28.

In sum, this Court should grant review and clarify that there are no "identical-factual-predicate" or "clearly illegal" conduct exceptions to this Court's prohibition on prospective releases of antitrust claims.

3. Even if future antitrust claims sharing an identical-factual predicate to litigated claims *could* be released, the release here is far broader.

Respondents conspicuously avoid discussion of the *text* of the release, which bars "all known and unknown claims," including "claims that *arise after the [settlement's] Effective Date*," which "*relat[e] in any way to*" *either* (1) "the factual predicates of" *or* (2) "any issue raised in any of the Subscriber Actions" *or* (3) any new, post-settlement restrictions approved by the settlement committee. App. 197a-99a (emphasis added). The release therefore releases future claims that are merely related to factual predicates. Indeed, almost any claim challenging future anticompetitive conduct by the Blues will be at least arguably "relat[ed] in any way" to a "factual predicate" in one of the dozens of suits consolidated here, any "issue" previously raised in any filing, or any new, post-settlement restriction approved by the committee. *See Altria Grp., Inc. v. Good*, 555 U.S. 70, 85-86 (2008) ("[T]he phrase 'relating to'" only requires proof of a "connection." (citation omitted)).

Despite the text, the Blues deny that the settlement "release[s] new claims" at all. Blues 17, 29. The Subscribers don't repeat the argument, perhaps because the Blues ignore the second two categories of claims released—those "relate[d] in any way" to "any issue" previously

raised and any post-settlement "mechanisms, rules, or regulations … approved through the Monitoring Committee." App. 198a. And the release expressly applies to "claims that *arise after* [its] Effective Date." App. 199a (emphasis added).

The Subscribers, meanwhile, point to language in the settlement's *preamble* stating that the release covers "all claims that … *could be asserted* … based on the allegations" in the actions. App. 177a (emphasis added); *see* Subscribers 23. This language simply confirms the release covers future claims, with no requirement that the claims could have been previously brought.

To that point, neither Respondent denies that this Court's precedent establishes that each act in furtherance of a continuing antitrust conspiracy creates a new claim for relief, even if the nature of the continuing anticompetitive conduct was the same as the pre-settlement conduct. Pet. 22. The Subscribers quibble that *Klehr* and *Zenith* articulated that principle in different contexts. Subscribers 28 n.8. There is no reason a different rule would apply to releases. *See Toledo*, 530 F.3d at 217-18 & n.9 (applying *Zenith* while interpreting a release). And despite Respondents' attempt to downplay the scope of the release here, Blues 27-28; Subscribers 22-23, they concede it releases claims brought to challenge the Blues' "continuing practices," Subscribers 2; *see* Blues 11. The parties therefore agree that the release bars new claims challenging additional acts in furtherance of alleged anticompetitive conspiracy, even if changes in market conditions make those restraints substantially more anticompetitive. Pet. 23.

The release bars *new* claims premised on *new* violations (perhaps predicated on *changed* market conditions). It undeniably grants "partial immunity from civil liability for future [antitrust] violations" by "extinguishing [antitrust] claims which did not even then exist and which could not possibly have been sued upon" before. *Lawlor*, 349 U.S. at 328-29; *see* Pet. 22-24. If *this* release comports with the identical-factual-predicate doctrine as Respondents claim, that doctrine cannot meaningfully limit prospective releases of antitrust claims.

III. Respondents Underscore the Importance of the Question Presented.

Respondents identify no vehicle problem. And they explain that this "historic" case involves "one of the largest antitrust class settlements in history." Subscribers 11 (citation omitted); *see* Blues 11; Pet. 33. A class of over 100 million was forced to forever surrender the statutory right to seek market-wide injunctive relief, despite ongoing potentially anticompetitive behavior. Pet. 32-33.

Respondents nevertheless assert that settlements like this one are approved "regularly" and that overturning the decision below would undermine efforts to settle these cases. Blues 17, 30-31; *see* Subscribers 23, 40. That argument is backwards. The goal of antitrust enforcement is not to settle cases. It is to end anticompetitive practices. Pet. 30-31. If settlements like this one are "routinely approved" in massive class actions that perpetuate critical market failures, Blues i, that is because the incentives to expand releases to justify ever increasing MDL class settlements threaten to overrun the private enforcement Congress provided to protect competition in the markets. And that just underscores the need for review. Pet. 33.

Next, Respondents contend that the overbroad release is unimportant because opt-out class members may seek "individualized" injunctive relief. Blues 13; Subscribers 6. Respondents have never agreed—and the lower courts have never been able to say—what that means. But whatever it means, Respondents do not dispute that Home Depot and other opt-outs are barred from seeking relief that would have the effect of dismantling the Blues' ongoing competitive restraints on a market-wide basis. Pet. 3. They assert that Home Depot could "seek injunctive relief permitting it to receive multiple Blue bids for its own business." Subscribers 6. But no party has yet received any such individualized relief, Blues 13, and the basis on which one might is unclear, given that the Blues maintain that the release forfeits any and all claims arising from a challenge to their "exclusive service areas," Pet. 12-13.

Regardless, granting Home Depot multiple Blue bids does not eliminate the broader restraints hampering competition—it marginally revises the Blue's customer allocation scheme. *Id.* Home Depot and every other subscriber will receive the benefit of a competitive market only if unconstrained Blue-against-Blue bidding is the established norm, rather than a rare, single-employer exception coerced by years of expensive litigation. That is why antitrust law aims to eliminate anticompetitive behavior in *markets*, not for select persons. *Int'l Salt Co. v. United States*, 332 U.S. 392, 401 (1947) (antitrust suits should not just "end specific illegal practices" but "pry open to competition a market that has been closed by defendants' illegal restraints"). Plaintiffs that receive individualized relief might have "won a lawsuit," but because

the competitive restraints remain, they have "lost [the] cause." *Id.*; *see Steves & Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 720 (4th Cir. 2021) (antitrust "remed[ies] that help[] only [the plaintiff] wouldn't promote competition in the [relevant] market"); Pet. 30.

Finally, Respondents ignore the "mandatory nature" of the (b)(2) class here. Pet. 32. "[D]ue process requires at a minimum that" members of a class receive "an opportunity to … 'opt out'" from the class, at least where the claims "predominantly" seek monetary relief. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 & n.3 (1985). There is a "serious possibility" that the same rule applies to class actions predominantly seeking injunctive relief. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011). The Eleventh Circuit should have read the Sherman Act to condemn the settlement rather than bless a potential violation of the due process rights of 100 million class members. This Court should grant review and clarify that the antitrust laws do not permit prospective releases of antitrust claims, rather than let that constitutional cloud linger.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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