No. 17-441

In the Supreme Court of the United States

FERRELLGAS PARTNERS, L.P., ET AL.,
Petitioners,

v.

MORGAN-LARSON, LLC, ET AL.,
Respondents.

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

REPLY BRIEF OF PETITIONERS

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The brief in opposition describes an alternate universe in which the law is crystal clear and this case—which split the *en banc* Eighth Circuit 5-4—is just a humdrum application of law to facts. In reality, lower courts are deeply fractured in their application of the continuing violation doctrine in antitrust law. Most circuits to consider the issue hold that the mere "abatable but unabated inertial consequences" of pre-limitations period conduct do not commence a new limitations period. *See* Pet. 15-19 (collecting cases). But other circuits hold that failing to abate those effects is enough to resuscitate an otherwise time-barred claim. *See id.* at 18. The Eighth Circuit thought the issue important enough to warrant *en banc* review, and then it divided in a way that starkly illustrates how these different positions can dramatically impact the outcome of a case.

This Court need not take our word on it. As amici explain, and as scholarly literature confirms, this division of authority has left the continuing violation doctrine "confusing, incoherent, and inconsistent." DRI Amicus Br. 4 (quoting Elad Peled, *Rethinking the Continuing Violation Doctrine: The Application of Statutes of Limitations to Continuing Tort Claims*, 41 Ohio N.U. L. Rev. 343, 346 (2015)). The lower courts' divergent approaches are irreconcilable. And so Respondents *do not even try*. They do not dispute that the doctrine is a mess. Nor do they dispute that this mess has profound implications for businesses, for consumers, and for courts presiding over antitrust cases.

Instead, Respondents argue that this Court should simply ignore the confusion, *here* at least, be-

cause dicta in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997)—a twenty-year-old RICO case—established a special rule for cases that plaintiffs can frame as "price-fixing conspiracies." But that may be the very best reason to *grant* review, not to deny it: The lower courts' misreading of that dicta has only fueled their confusion, leading courts to draw arbitrary distinctions among different types of antitrust cases—distinctions that this Court never intended, that have no basis in the text of the Clayton Act, and that Respondents do not (and cannot) justify. The Court should not let such consequential and irrational distinctions persist without examination.

Respondents revert to a "cert avoidance" tactic of arguing that the "main complaint [here] boils down to questioning the application of settled law in a factbound situation." Opp. 27. But Respondents had no difficulty appreciating the "exceptional importance" of the case when they (successfully) petitioned for *en banc* review below. Petition for *En Banc* Rehearing 1, *Morgan-Larson, LLC v. Ferrellgas Partners, L.P. (In re Pre -Filled Propane Tank Antitrust Litig.)*, 860 F.3d 1059 (8th Cir. 2017) (No. 15-2789). And the *en banc* Eighth Circuit did not divide 5-4 over a factbound question. That division reflected the *en banc* majority's adoption of an antitrust pleading standard for continuing violation cases that—as the dissent put it—makes it unnecessary to plausibly plead what matters most: the existence of "a live, ongoing conspiracy." Pet. App. 23a (dissent). After all, how else could the complaint here have survived, despite its lack of concrete allegations about the supposed conspiracy within the limitations period, or even the *prices* that the conspiracy allegedly "fixed"?

Under the Eighth Circuit's rule, an enterprising plaintiff's lawyer can reopen a long-settled price-fixing case merely by repeating the allegations that a conspiracy existed at an earlier time, taking care not to *concede* that the conspiracy ended, and alleging that plaintiffs bought the relevant product at undefined "supracompetitive" prices during the limitations period. And *voila!*, the claim is timely. Respondents seek to minimize those implications in this Court, but they conceded in the Eighth Circuit that they could have waited "100 years" before bringing suit on their theory. *See* Pet. 14 & n.7. As the dissent below aptly observed, the Eighth Circuit's decision takes a "sledgehammer" to the statute of limitations and "shatter[s]" it. Pet. App. 32a.

Before the dust settles on that demolition project, this Court should review the Eighth Circuit's decision and resolve the conflict and confusion over the application of the Clayton Act's statute of limitations in this important and recurring context.

I. This Court's Intervention Is Needed To Clarify Confusion And Disagreement Over The Continuing Violation Doctrine

We will not repeat the deep division and confusion in the lower courts over application of continuing-violation theories to the antitrust statute of limitations. The petition explains that split in detail, as did amicus Atlantic Legal Foundation, and Respondents dispute neither its existence nor its depth. *See* Pet. 15-19; ALF Amicus Br. 12-17. Respondents' insistence that the Court should simply ignore that conflict provides no reason to deny review.

A. *Klehr* Does Not Justify The Lower Courts' Violation-Specific Application Of The Doctrine

Respondents argue that resolving the division is not a "[v]alid [b]asis [f]or [r]eview" here (Opp. 17), because *Klehr* already articulated a special rule for antitrust price-fixing cases. *Klehr*, they suggest, shelters this one area of the antitrust field from the confusion that pervades elsewhere.

But *Klehr* was not even an antitrust case, and nothing there suggests that this Court meant to create novel distinctions among different types of antitrust violations for purposes of the statute of limitations analysis. 521 U.S. at 187. To the contrary, the dicta from *Klehr* on which Respondents rely indicates that all continuing violations should be subject to the *same* limitations analysis: It speaks broadly to "the case of a 'continuing violation,'" and offers a price-fixing conspiracy only by way of example ("say, a price-fixing violation"). *Id.* at 189.

Respondents note that a number of lower court decisions have nevertheless understood *Klehr* to establish a rule that is specific to price-fixing cases. Opp. 14-16. True. But others—including some Respondents themselves cite—have not, making the doctrine *more* confused, not less. Consider *Tam Travel, Inc. v. Delta Airlines, Inc. (In re Travel Agent Commission Antitrust Litig.)*, 583 F.3d 896 (6th Cir. 2009), *cert. denied*, 562 U.S. 1134 (2011): The plaintiffs' price-fixing theory there was that the defendant airline had participated in a horizontal conspiracy fixing the commissions airlines would pay to travel agents. *Id.* at 899-900. After acknowledging *Klehr*'s

dicta, the Sixth Circuit correctly drew on cases about diverse alleged antitrust violations—not just price fixing—and applied the majority rule in the circuits that mere "rippling effect[s]" from a pre-limitations period conspiracy are not enough to restart the limitations period, in the absence of other allegations that the conspiracy persisted. *Id.* at 902. Whereas the payments at allegedly price-fixed commission levels would have been sufficient by themselves to survive a motion to dismiss under the *en banc* majority's approach here, the Sixth Circuit there held that dismissal was proper absent allegations sufficient to demonstrate the existence of a live conspiracy. *Id.*

The *en banc* dissent below would have followed the Sixth Circuit's approach. As the dissent correctly understood, *Klehr* was concerned only with a "continuing" conspiracy involving a conventional "illegal price-fixing conspiracy" that was still "alive" at the time of "each sale at the fixed price." Pet. App. 25a (dissent) (quoting 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 338b at 145 (rev. ed. 1995) (*1995 Antitrust Law*)). Indeed, the treatise that *Klehr* relied on explains that "*so long as an illegal price-fixing conspiracy [is] alive*," each sale to a plaintiff can restart the limitations period. *Id.* (emphasis added by dissent) (quoting *1995 Antitrust Law* ¶ 338b at 145 (citing *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 n.15 (1968))).

The *en banc* majority, however, read *Klehr* to effectively hold that pleading sales at supposedly "supracompetitive" prices is enough to plausibly allege not only the overt act (which is what *Klehr* was concerned with) but *also the very existence of the conspiracy* that makes that overt act illegal—an error that Respondents repeat. *See* Opp. 23. That reading

would result in an indefinite prolonging of the limitations period. If no additional allegations are required, plaintiffs will *always* be able to label prices "supracompetitive" and assert that a conspiracy continues—years or even decades "after the 'memories of witnesses have faded or evidence is lost.'" *Klehr*, 521 U.S. at 187 (citation omitted). The Eighth Circuit's rule thus "conflicts with a basic objective—repose—that underlies limitations periods," *id.*, and upsets "a pervasive legislative judgment," *United States v. Kubrick*, 444 U.S. 111, 117 (1979); *see also American Pipe & Constr. Co. v. Utah,* 414 U.S. 538, 554 (1974).

B. Respondents Offer No Other Satisfactory Way To Reconcile The Lower Courts' Approaches

Beyond their misguided invocation of *Klehr*, Respondents make no meaningful attempt to reconcile the *en banc* majority's approach with the rule in most circuits that "profits, *sales* and other benefits accrued as the result of an initial wrongful act are not treated as 'independent acts'" that will restart the limitations period. *Z Techs. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 600 (6th Cir. 2014) (emphasis added).

As the petition explained (at 25), the *en banc* majority sought to distinguish this case on the ground that, "[a]s a *per se* violation, the horizontal restraint has 'manifestly anticompetitive effects, and lack[s] . . . any redeeming virtue.'" Pet. App. 14a (alteration in original) (citation omitted). But the majority never explained why that *merits-based* claim should make it easier to evade a limitations defense *on the pleadings*. Rhetoric about the "supreme evil of anti-

trust" (Opp. 30) cannot be enough. Limitations periods are designed to protect defendants "from incurring liability on stale claims . . . *regardless* of whether liability is eventually established." *Steele v. United States*, 599 F.2d 823, 829 (7th Cir. 1979) (emphasis added). And even if Respondents did have *policy* reasons for a claims-based rule, the language of the Clayton Act refutes it. Though Respondents (like the *en banc* majority) utterly ignore the Act, the controlling text applies to "*[a]ny* action to enforce *any* cause of action under" the antitrust laws. 15 U.S.C. § 15b (emphases added).

Meanwhile, the pernicious effects of the Eighth Circuit's violation-specific approach are on full display here. Drawing arbitrary lines among cases that allege "supracompetitive" price fixing and cases that allege other types of violations only encourages artful pleading. Here, Respondents cloak their complaint in "price-fixing" garb in order to smuggle it into a laxer standard, but they simply do not allege a straightforward price-fixing conspiracy. In fact, there are *no* allegations that Petitioners conspired to fix the price of their propane tanks. While Respondents allege a one-time structural reduction in fill levels in 2008 without a contemporaneous reduction in price, they do not allege that Petitioners *ever* agreed upon a specific price at which they would sell their tanks.[1] Indeed, Respondents conspicuously de-

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[1] Respondents insinuate that a concurring statement of FTC Commissioner Wright shows that the FTC believed Petitioners had engaged in price fixing. But Commissioner Wright merely made the non-controversial point that lowering fill levels could have the "the economic effect of increasing the per

clined to plead what the supposedly "supracompetitive" prices were, or even that those prices were identical or moved in parallel—information that was entirely within Respondents' possession.

II. The Eighth Circuit's 5-4 *En Banc* Decision Underscores The Need For Review

Respondents spend pages defending the plausibility of their complaint (Opp. 18-26), and argue that the *en banc* Eighth Circuit simply divided (5-4) over "the application of settled law in a factbound situation" (Opp. 27). But here again, they ask this Court to stick its head in the sand. What Respondents characterize as a "pleading" issue is a direct product of the Eighth Circuit's watered-down conception of the continuing violation doctrine. If the decision below is allowed to stand, any halfway competent attorney could *always* draft a "price-fixing" complaint that would survive a motion to dismiss—which is typically the critical hurdle in an antitrust case like this one, given the tremendous costs and risks defendants face if they proceed with litigation, no matter how weak the claims. *See* DRI Amicus Br. 11-12.

As Respondents "essentially conceded" below, the Complaint contains no concrete, factual allegations of a "live, ongoing conspiracy during the limitations period." Pet. App. 29a (dissent). To walk back that concession, Respondents distort their Complaint be-

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unit price *if* prices [we]re held constant." Agreement Containing Consent Order as to AmeriGas Partners, L.P. and UGI Corporation, *In re Ferrellgas Partners, L.P.*, FTC Dkt. No. 9360 (Oct. 31, 2014), 2014 WL 5787605, at *4 (concurring statement of Commissioner Joshua D. Wright) (emphasis added). And the "*if*" condition is not even alleged in the complaint post-2008.

yond recognition. For example, the centerpiece "allegation" that Respondents invoke to support the existence of supposedly conspiratorial conduct *within the limitations period* is that, "[t]hrough at least late 2010, AmeriGas Director of National Accounts Ken Janish had conversations *with Blue Rhino employees*" in which those employees allegedly provided "assurances that Blue Rhino would . . . not undercut AmeriGas on price." Pet. App. 86a, 98a-99a (¶¶ 13, 60) (emphasis added). But what the *complaint* actually says is that Janish had "calls and meetings with *AmeriGas executives*"—*i.e.*, other employees *at his own company*—in which he "dismissed concerns that Blue Rhino might undercut AmeriGas on price . . . with words to the effect of, 'I talked to Blue Rhino, and that's not going to happen.'" Pet. App. 86a (¶ 13) (emphasis added).[2]

Lacking concrete, plausible allegations that a conspiracy existed during the limitations period, Respondents are forced to argue that "the Complaint's allegations of continued conspiracy" need not be "independently plausible." Opp. 20. In a feat of misdirection, they spend several pages focusing on alleged events *from 2008*—well outside the limitations period—and then suggest that, under the Eighth Circuit's rule, a conspiracy would be "*presumed* to exist until" the plaintiff pleads that it ended. Opp. 23 (emphasis added) (quoting *United States v. Lewis*, 759 F.2d 1316, 1343 (8th Cir.), *cert. denied*, 474 U.S. 994 (1985)); *see* Opp. 19 ("The Complaint alleges that

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[2] Paragraph 60 of the Consolidated Amended Complaint is even further afield—it makes no reference to price whatsoever. *See* Pet. App. 98a-99a.

the conspiracy did not end . . . .”). But that would turn settled pleading law on its head—creating a default rule that a conspiracy exists *unless the plaintiff disavows* it.[3]

Respondents eventually come to rest on the rule that “continued sales at the conspiratorial price provide plausible evidence that the conspirators are continuing actively to adhere to their agreement.” Opp. 23; *accord id.* at 21. That rule, which is the pleading standard that the Eighth Circuit applied (Pet. App. 27a-29a), is entirely circular. How does one know the conspiracy existed? Because the plaintiff alleges the sales were at a “conspiratorial price.” And how does one know that the price was conspiratorial? Because the plaintiff alleges a conspiracy existed. The Complaint here proves that point: The only information it offers about the price is the unadorned allegation that it was “supracompetitive.” Pet. App. 86a, 105a, 113a (¶¶ 13, 90, 121). If *that* is sufficient to plead a plausible claim under the Eighth Circuit’s rule, then anything is.

Respondents contend that Petitioners “mischaracterize *Twombly*’s pleading standard to *require* allegations of ‘ongoing enforcement or fine-tuning’ to plausibly plead an ongoing conspiracy.” Opp. 22. But, as even Respondents acknowledge, “price-fixing conspiracies are inherently unstable” (*id.* at 23), and therefore unlikely to continue, much less succeed, absent ongoing enforcement or fine-tuning. *See*

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[3] *Criminal* antitrust law, governed by a different statute of limitations (18 U.S.C. § 3282) and different standards, provides no support for such a civil pleading rule.

Z Techs., 753 F.3d at 599. Absent such allegations, it truly is implausible to infer that the prices at which a product continues to be sold remain inflated because of a pre-limitations period agreement.

III. This Case Presents A Question Of Exceptional Importance

There really is no disagreement about the importance of the question presented. Respondents themselves sought *en banc* review on the ground that this case involved an issue of exceptional importance, and in this Court they proclaim that the case involves one of the "most important" applications of the continuing violation doctrine. Opp. 1.

Respondents (and no doubt other plaintiffs' lawyers) also understand that the consequences of the decision below are potentially enormous. That is why, after repeatedly calling this a "straightforward" price-fixing case (*id.* at 1, 13), they change their tune to declare this an "[unu]sual[]"situation in which Petitioners took the "bold" step of "continu[ing] to sell at collusive, supracompetitive prices even after [their] illegal conduct ha[d] been exposed and a settlement . . . reached" (*id.* at 28-29).

What Respondents call "bold," a majority of the circuits applying their ordinary continuing violation doctrine would call "implausible." And yet a bare majority of the *en banc* Eighth Circuit let that claim survive a motion to dismiss under a rule that requires only allegations of an earlier, pre-limitations period conspiracy and "continued sales" at unspecified "conspiratorial prices."

That rule will make cases like this one anything but unusual. It is hard to imagine a past price-fixing settlement that could not be re-opened through a

complaint that simply (1) repeats whatever allegations were offered in the prior suit, (2) alleges that the defendant continued selling its good or service (*i.e.,* did not go out of business), and (3) labels prices during the limitations period "supra-competitive." As amicus DRI explains, allowing such claims to proceed will impose enormous costs not only on defendants but on the public. *See* DRI Amicus Br. 11-12.

Respondents protest that "[i]t is simply untrue that, as a result of the application of the continuing-violation doctrine here, companies will face liability in perpetuity." Opp. 28. But Respondents themselves acknowledged below that, under their understanding of *Klehr* and the rule the Eighth Circuit ultimately adopted, they could have waited a *century* to bring suit. *Supra* at 3. That is more than long enough to completely "shatter" (Pet. App. 32a (dissent)) the Clayton Act's statute of limitations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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