No.

In the Supreme Court of the United States

VISA INC.; VISA U.S.A. INC.; VISA INTERNATIONAL SERVICE ASSOCIATION; PLUS SYSTEM, INC.; MASTERCARD INC.; MASTERCARD INTERNATIONAL INC., PETITIONERS

v.

NATIONAL ATM COUNCIL, INC., ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court validly certifies a class under Federal Rule of Civil Procedure 23(b)(3) where it deems the proposed method through which plaintiffs intend to prove classwide antitrust impact to be "colorable" and where it defers "material factual dispute[s]" on classwide impact to the merits.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Visa Inc.; Visa U.S.A. Inc.; Visa International Service Association; Plus System, Inc.; Mastercard Inc.; and Mastercard International, Inc.

Petitioners Visa Inc. and Mastercard Inc. have no parent company, and no publicly held company owns 10% or more of their stock.

Petitioners Visa U.S.A. Inc.; Visa International Service Association; and Plus System, Inc., are wholly owned by petitioner Visa Inc.

Petitioner Mastercard International Inc. is wholly owned by petitioner Mastercard Inc.

Respondents are National ATM Council, Inc.; ATMs of the South, Inc.; Business Resource Group, Inc.; Wash Water Solutions, Inc.; ATM Bankcard Services, Inc.; Selman Telecommunications Investment Group, LLC; Turnkey ATM Solutions, LLC; Trinity Holdings Ltd, Inc.; Just ATMs USA, Inc.; 901 Financial Services LLC; Andrew Mackmin; Barbara Inglis; Sam Osborn; Peter Burke; Kent Harrison; Marin P. Heiskell; and Bryan Byrnes.

RELATED PROCEEDINGS

United States District Court (D.D.C.):

National ATM Council, Inc. v. *Visa Inc.*,
Civ. No. 11-1803, 2021 WL 4099451 (Aug. 4, 2021)

National ATM Council, Inc. v. *Visa Inc.*,
7 F. Supp. 3d 51 (D.D.C. 2013)

United States Court of Appeals (D.C. Cir.):

National ATM Council, Inc. v. *Visa Inc.*,
No. 21-7109, 2023 WL 6319404 (Sept. 27, 2023)

National ATM Council, Inc. v. *Visa Inc.*,
No. 21-7109, 2023 WL 4743013 (July 25, 2023)

Osborn v. *Visa Inc.*,
797 F.3d 1057 (D.C. Cir. 2015)

United States Supreme Court:

Visa Inc. v. *Osborn*,
579 U.S. 940, cert. dismissed, 580 U.S. 993 (2016)

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Rule involved 2
Statement 3
A. Background 5
B. Facts and procedural history 7
Reasons for granting the petition 12
A. The decision below deepens the confusion among the courts of appeals 13
B. The decision below is incorrect 24
C. The Court's review is warranted 29
Conclusion 33
Appendix A 1a
Appendix B 26a
Appendix C 42a

TABLE OF AUTHORITIES

Cases:

Amchem Products Inc. v. *Windsor*, 521 U.S. 591 (1997) 6
American Express Co. v. *Italian Colors Restaurant*, 570 U.S. 228 (2013) 5
Amgen v. *Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455 (2013) 5, 6
Blades v. *Monsanto Co.*, 400 F.3d 562 (8th Cir. 2005) 19
Blair v. *Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir. 1999) 30
Brown v. *Electrolux Home Products, Inc.*, 817 F.3d 1225 (11th Cir. 2016) 17, 18, 24, 28, 29
Chavez v. *Plan Benefit Services, Inc.*, 957 F.3d. 542 (5th Cir. 2020) 30-32

Page

Cases—continued:

Comcast Corp. v. *Behrend*,
569 U.S. 27 (2013) 5-7, 25, 26, 29, 30
Hydrogen Peroxide Antitrust Litigation,
In re, 552 F.3d 305 (3d Cir. 2009) 16
Initial Public Offerings Securities Litigation, *In re*:
227 F.R.D. 65 (S.D.N.Y. 2004) 14
471 F.3d 24 (2d Cir. 2006)..... 14, 15, 24, 29
Kurtz v. *Costco Wholesale Corp.*,
768 Fed. Appx. 39 (2d Cir. 2019)..... 15
Lamictal Direct Purchaser Antitrust Litigation, *In re*:
2018 WL 6567709 (D.N.J. Dec. 12, 2018)..... 15
957 F.3d 184 (3d Cir. 2020).....15, 16, 23, 25, 29
Medical & Chiropractic Clinic, Inc. v. *Oppenheim*,
981 F.3d 983 (11th Cir. 2020) 30
Microsoft Corp. v. *Baker*, 582 U.S. 23 (2017) 30
Olean Wholesale Grocery Cooperation, Inc.
v. *Bumble Bee Foods LLC*:
993 F.3d 774 (9th Cir. 2021) 20
31 F.4th 651 (9th Cir.),
cert. denied, 143 S. Ct. 424 (2022) 20, 21
Prantil v. *Arkema Inc.*,
986 F.3d 570 (5th Cir. 2021) 16, 17, 24, 25, 29-31
Sali v. *Corona Regional Medical Center*,
907 F.3d 1185 (9th Cir. 2018) 30
Sher v. *Raytheon Co.*,
419 Fed. Appx. 887 (11th Cir. 2011) 23
Tyson Foods Inc. v. *Bouaphakeo*,
577 U.S. 442 (2016)..... 6, 7, 31
Vega v. *T-Mobile USA, Inc.*,
564 F.3d 1256 (11th Cir. 2009) 23
Wal-Mart Stores, Inc. v. *Dukes*,
564 U.S. 338 (2011).....5-7, 26-31
West v. *Prudential Securities, Inc.*,
282 F.3d 935 (7th Cir. 2002) 32

Page

Cases—continued:

Zurn Pex Plumbing Products Liability Litigation, *In re*:
267 F.R.D. 549 (D. Minn. 2010) 19
644 F.3d 604 (8th Cir. 2011), cert. dismissed, 569 U.S. 915 (2013) 18, 19, 20

Constitution and statutes:

U.S. Const. Art. III 6, 7, 29
15 U.S.C. § 1 ..... 4, 9
28 U.S.C. § 1254(1) 2

Rules:

Fed. R. Civ. P. 23 ..... 5, 6, 12-18, 21, 23, 24, 26, 28, 30, 31
Fed. R. Civ. P. 23(a) 2, 5
Fed. R. Civ. P. 23(b) 2, 5
Fed. R. Civ. P. 23(b)(2) 10
Fed. R. Civ. P. 23(b)(3) 3-7, 10-12, 17, 19, 21, 24, 27-32
Fed. R. Civ. P. 23(f) 11

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John T. Delacourt, *Protecting Competition by Narrowing 'Noerr': A Reply*, 18 Antitrust 77 (2003) 31
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Page

Miscellaneous—continued:

Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97 (2009) 31

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PETITION FOR A WRIT OF CERTIORARI

Visa Inc.; Visa U.S.A. Inc.; Visa International Service Association; Plus System, Inc.; Mastercard Inc.; and Mastercard International Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-25a) is not reported but is available at 2023 WL 4743013. The opinion of the district court (App., *infra*, 26a-41a) is not reported but is available at 2021 WL 4099451.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2023. A petition for rehearing was denied on September 27, 2023 (App., *infra*, 42a-43a). On December 12, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 25, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 23(b) provides:

> A class action may be maintained if Rule 23(a) is satisfied and if: * * *
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> > (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> >
> > (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> >
> > (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> >
> > (D) the likely difficulties in managing a class action.

STATEMENT

In this case, the court of appeals upheld the certification of three classes of plaintiffs, comprising hundreds of millions of putative class members and seeking billions of dollars in damages, based on an articulation of the predominance standard under Federal Rule of Civil Procedure 23(b)(3) that—as the court of appeals conceded—was copied from outdated decisions and "arguably" at odds with this Court's precedent. The court of appeals characterized the district court's misstatements of law as "surprising and unfortunate," and described its analysis as "terse." But the court of appeals ultimately deemed that effort sufficient. According to the court of appeals, as long as a district court concludes that the proposed method through which plaintiffs intend to prove classwide impact is "colorable," any "material factual dispute[s]" over classwide impact may be deferred to the merits. The question presented is whether that approach is consistent with Rule 23(b)(3).

Petitioners own and operate networks that allow consumers to withdraw cash from their bank accounts using automated teller machines (ATMs); respondents are three groups of plaintiffs challenging petitioners' network rules, which prevent ATM operators from imposing discriminatory fees on consumers who withdraw cash through petitioners' networks. To withdraw cash from an ATM, a consumer can use either a terminal operated by the bank that issued the consumer's ATM card, or a terminal operated by a different entity. In the latter scenario, the terminal engages in a "foreign" transaction by communicating with the bank that issued the consumer's card through an ATM network such as petitioners'. To enable that transaction, the ATM network charges the ATM's operator bank a per-transaction "network fee." That bank, in turn, receives an "interchange fee" from the

cardholder's bank. The amount of interchange fee revenue left to the ATM's operator bank after it pays the network fee is known as "net interchange." The ATM operator may also charge a "surcharge" to the cardholder for the privilege of withdrawing cash from the ATM. According to plaintiffs, in the absence of petitioners' network rules, ATM operators would have charged lower surcharges on transactions processed over networks with higher net interchange. ATM networks, in turn, would have supposedly responded by increasing net interchange, to avoid discrimination in the form of higher surcharges on their network transactions.

Two groups of individual consumers and one group of independent ATM operators filed separate class actions alleging that the petitioners' non-discrimination rules violate Section 1 of the Sherman Act. After discovery, the district court certified all three classes. The court acknowledged petitioners' argument that the methods plaintiffs offered to prove classwide impact were "hopelessly flawed," because they failed to identify and exclude substantial numbers of uninjured class members. Yet the district court declined to resolve that dispute. Instead, it held that, at the class-certification stage, plaintiffs need only demonstrate a "colorable" method by which they intend to prove classwide impact—and, according to the court, plaintiffs had done so. The court of appeals proceeded to conclude that the certification of the classes complied with Rule 23(b)(3), despite petitioners' unresolved challenge that the classes swept in at least tens of thousands of uninjured plaintiffs who could not be excluded through common proof.

That decision was erroneous. It cannot be reconciled with this Court's precedents holding that, under Rule 23(b)(3), a court must engage in a "rigorous analysis" of the proposed method to prove classwide impact, so as to

ensure that plaintiffs have affirmatively demonstrated that common issues predominate over individualized ones. The decision below is also inconsistent with the decisions of other courts of appeals applying a more stringent approach to the Rule 23(b)(3) inquiry. This Court's intervention is necessary to resolve the rampant confusion in the lower courts and to provide guidance on the appropriate level of scrutiny mandated by Rule 23(b)(3). The petition for a writ of certiorari should be granted.

A. Background

1. Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp.* v. *Behrend*, 569 U.S. 27, 33 (2013) (citation omitted). Accordingly, parties seeking class certification must "affirmatively demonstrate," *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 350 (2011), that they comply with Rule 23's "stringent requirements," *American Express Co.* v. *Italian Colors Restaurant*, 570 U.S. 228, 234 (2013). Under Rule 23, plaintiffs seeking to certify a class action must demonstrate both that their proposed class satisfies the four threshold requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—as well as the additional requirements of one of the categories listed in Rule 23(b). See *Amgen* v. *Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455, 460 (2013).

Rule 23(b)(3)'s predominance requirement is the most stringent of all. See *Comcast*, 569 U.S. at 34. That makes good sense, because Rule 23(b)(3) is an "adventuresome innovation * * * , framed for situations in which class-action treatment is not as clearly called for." *Wal-Mart*, 564 U.S. at 362 (internal quotation marks and citations omitted). As a result, Rule 23(b)(3) comes with "greater procedural protections." *Ibid.* In particular, plaintiffs

seeking certification under Rule 23(b)(3) must show that any dissimilarity among class members can be resolved in a manner that is neither "inefficient [n]or unfair," *Amgen*, 568 U.S. at 470, and that "questions of law or fact common to class members predominate over any questions affecting only individual members," *Comcast*, 56 U.S. at 33. Because "Rule 23's requirements must be interpreted in keeping with Article III constraints," *Amchem Products Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997), plaintiffs must "establish that damages are susceptible of measurement across the entire class," *Comcast*, 569 U.S. at 35. That burden is "demanding." See *Amchem*, 521 U.S. at 624.

2. Consistent with the "greater procedural protections" attendant to Rule 23(b)(3), *Wal-Mart*, 564 U.S. at 362, this Court has repeatedly explained that a court must undertake a "rigorous analysis" in order to "determine" that the requirements of Rule 23(b)(3) are satisfied. *Comcast*, 569 U.S. at 35. Specifically, a court may not credit plaintiffs where plaintiffs merely "provide[] a method" to prove classwide impact. *Ibid.* Rather, a court must "give careful scrutiny" to plaintiffs' proffered method. *Tyson Foods Inc.* v. *Bouaphakeo*, 577 U.S. 442, 453 (2016). Before certifying a class, a court is empowered to "probe behind the pleadings," even where such an inquiry "overlap[s] with the merits of the plaintiff's underlying claim" (as will "[f]requently" be the case). *Wal-Mart*, 564 U.S. at 350-351; see *id.* at 351 n.6.

Of particular relevance here, a court is required to consider defendants' challenges to plaintiffs' model of classwide impact. A failure to engage with those challenges "simply because those arguments would also be pertinent to the merits determination" would "r[u]n afoul of our precedents." *Comcast*, 569 U.S. at 34. A court thus abdicates its duty where it simply concludes that plaintiffs' proposed model is *potentially* capable of showing

classwide impact. "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Tyson Foods*, 577 U.S. at 466 (Roberts, C.J., concurring). It would "reduce Rule 23(b)(3)'s predominance requirement to a nullity" if, "at the class-certification stage[,] *any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be." *Comcast*, 569 U.S. at 36. Rule 23(b)(3) "requires the judge to make findings about predominance * * * before allowing the class" to be certified, and the extent to which that analysis overlaps with the merits of plaintiff's underlying claim simply "cannot be helped." *Wal-Mart*, 564 U.S. at 351, 363.

B. Facts And Procedural History

1. Petitioners are Visa, Mastercard, and their affiliates. Petitioners own and operate networks that allow consumers to withdraw cash from their bank accounts using automated teller machines (ATMs). To withdraw cash, a consumer either uses an ATM terminal operated by the bank that issued the payment card, or completes a "foreign" transaction at an ATM operated by a different entity. During a foreign transaction, the terminal communicates with the bank that issued the consumer's card through an ATM network, which enables participants in the transaction to communicate in real time and establishes the operating rules and default fees for the transaction. Many networks compete for foreign transactions, including Visa's network (Visa/Plus) and Mastercard's network (Cirrus). C.A. App. 3649-3650, 3980, 6489-6490.

A foreign transaction involves a number of fees paid by and to the various transaction participants. Specifically, to enable the transaction, the ATM network charges a per-transaction acquirer fee to the ATM's operator bank (known as the acquiring bank). The acquiring bank, in

turn, receives an interchange fee from the bank that issued the customer's card (known as the issuing bank). The amount of interchange fee revenue left to the acquiring bank after it pays the network fee is known as net interchange. C.A. App. 3652, 3841, 6480, 6481, 6490.

The ATM operator may also charge a surcharge to the cardholder for the privilege of withdrawing cash from the ATM. The operator-side entities involved in setting the surcharge for any given ATM vary based on the contractual arrangements supporting that terminal. In some cases, those arrangements provide that one entity (for example, the ATM processing services provider) sets the surcharge, but a different entity (for example, the ATM cash loader) retains all or a portion of the surcharge revenue. Surcharges by foreign ATMs have steadily increased over time, regardless of changes in net interchange. Some issuing banks offer programs to reimburse surcharges, but those policies vary from bank to bank and even among types of cardholders. C.A. App. 6480, 6504-6510, 6520-6522, 6532-6534.

Most ATM networks, including Visa's and Mastercard's, have non-discrimination rules prohibiting an ATM operator from imposing a surcharge on transactions routed over their networks which exceeds the surcharge applied to transactions routed over competing networks. Those rules have existed for decades. In the late 1980s and early 1990s, ATM acquiring banks and state governments pressured ATM networks to allow ATM operators to surcharge customers, and a number of States passed laws prohibiting networks from banning ATM surcharges. The leading networks modified their rules to permit surcharging as long as the surcharges did not discriminate by network; Visa and Mastercard, which had a small share of foreign transactions at the time, followed

suit. Today, most networks maintain similar non-discrimination rules, some of which are even more restrictive than Visa's and Mastercard's. C.A. App. 3845-3846, 4112, 4489, 4570, 4706.

2. Respondents are two groups of cardholders (the *Mackmin* and *Burke* plaintiffs) and one group of non-bank, independent ATM operators (the operator plaintiffs).

a. In 2011, the three groups of respondents filed separate class actions in the United States District Court for the District of Columbia, alleging that Visa's and Mastercard's non-discrimination rules violate Section 1 of the Sherman Act. According to the complaints, in the absence of those rules, bank and independent ATM operators would have charged lower surcharges on transactions processed over networks with higher net interchange. See, *e.g.*, C.A. App. 488-489. ATM networks, in turn, would have supposedly responded by increasing net interchange, to avoid discrimination in the form of higher surcharges on their network transactions. See *id.* at 150-151, 194-195, 489-490. Collectively, the complaints seek treble damages totaling over $9 billion and an injunction barring the enforcement of petitioners' rules (while leaving in place the rules of competing networks). See *id.* at 165, 248, 518.

The district court initially dismissed the complaints for lack of standing and failure to state a claim. See 7 F. Supp. 3d 51 (D.D.C. 2013). The court of appeals vacated. See 797 F.3d 1057 (D.C. Cir. 2015). This Court granted a writ of certiorari, but later dismissed the writ as improvidently granted. See 579 U.S. 940, cert. dismissed, 580 U.S. 993 (2016).

b. On remand to the district court, the parties engaged in discovery for over a year. All three groups of respondents then moved for class certification. The two

groups of consumer plaintiffs sought to certify classes of hundreds of millions of cardholders who allegedly paid surcharges for foreign transactions under Rule 23(b)(2) and Rule 23(b)(3). See C.A. App. 1856, 1908, 3169-3170. The group of operator plaintiffs sought to certify a class of independent ATM operators with surcharged foreign transactions over petitioners' networks under Rule 23(b)(3). See *id.* at 520-522, 3340. Petitioners submitted expert analyses showing that each proposed class could not establish classwide impact with common evidence; that, under respondents' proposed methods, each class included thousands of uninjured members; and that each class had offered no mechanism to exclude uninjured class members. See *id.* at 6514-6515, 6677-6678.

The district court granted respondents' motions for class certification. App., *infra*, 26a-41a. The court stated that "[respondents], at this stage in the proceedings, need only demonstrate a colorable method by which they intend to prove class-wide impact." *Id.* at 37a. The court acknowledged petitioners' argument that the method respondents offered to prove classwide impact was "hopelessly flawed" because of its failure to identify and exclude substantial numbers of uninjured class members. *Id.* at 38a. But the court did not address that argument or the evidence supporting it, reasoning that resolution of that argument would be "better suited for adjudication * * * on the merits." *Id.* at 39a. Instead, after summarizing respondents' contentions, the court concluded that respondents had offered "colorable," "reasonable," and "well established" methods by which they "intend[ed] to prove" classwide impact. *Id.* at 38a-39a. According to the court, no stricter standard was appropriate: "[T]he fact that [respondents] can point to significant scholarship * * * is sufficient at this stage [because] this is not an

adjudication of the merits of [respondents'] claims." *Id.* at 38a.

3. On interlocutory review, the court of appeals affirmed. App., *infra*, 1a-25a. As a threshold matter, the court of appeals confirmed that "[t]he questionable accuracy of unclear language in the district court's opinion combines with the 'death knell' settlement pressure to warrant [the] exercise of interlocutory appellate jurisdiction" under Rule 23(f). *Id.* at 10a. Specifically, the court of appeals noted that "[the district court's] statements of law were not entirely clear, its citations were not current, and its record analysis was notably terse." *Id.* at 9a. And, the court of appeals continued, "[t]he district court's pronouncement that [respondents] 'need only demonstrate a colorable method by which they intend to prove class-wide impact' and its citations to decades-old, nonbinding cases" were "arguably" in tension with the required "hard look" review. *Ibid.* When considered together with the district court's failure to cite this Court's most recent precedent on point, the court of appeals concluded, those failures were "surprising and unfortunate." *Ibid.*

The court of appeals nevertheless determined that the district court's analysis, while "brief," was "materially correct." App., *infra*, 11a. According to the court of appeals, the district court's statement that respondents' model need only be "colorable" accurately reflected the Rule 23(b)(3) standard. *Id.* at 13a-14a. When "[r]ead in context," the court of appeals continued, the district court "appears to have used 'colorable' to denote * * * evidence 'appearing to be true, valid, or right.'" *Ibid.* (quoting *Black's Law Dictionary* 33 (11th ed. 2019)). And that level of scrutiny, according to the court of appeals, "comports with Supreme Court holdings that require district courts to closely review the record at the class certification stage." *Id.* at 14a.

On that basis, the court of appeals upheld the district court's conclusion that respondents "satisfied Rule 23(b)(3) by providing reasonable, wholesale methodologies, tethered to [their] respective theories of liability, showing that all class members suffered injury." App., *infra*, 25a. According to the court of appeals, petitioners' contention that all of the classes swept in uninjured class members was "precisely the kind of material factual dispute that is better suited for adjudication * * * on the merits." *Id.* at 25a (internal quotation marks and citation omitted).

4. Petitioners filed a petition for rehearing en banc, which was denied without recorded dissent. App., *infra*, 43a.

REASONS FOR GRANTING THE PETITION

The decision below flies in the face of this Court's decisions interpreting Federal Rule of Civil Procedure 23. The court of appeals conceded that, in certifying the classes in this case, the district court relied on outdated decisions and engaged in cursory analysis. Yet the court of appeals upheld the district court's decision. In so doing, the court of appeals deepened the disarray among the circuits over the meaning of this Court's precedents requiring a "rigorous analysis" before a class can be certified.

The decision below cannot stand. In the Second, Third, Fifth, and Eleventh Circuits, a court cannot certify a class merely because the plaintiffs' proposed method for proving classwide injury is plausible or well-established. And those courts will overturn class certification if a district court fails to resolve material disputes among the parties that bear on the Rule 23 requirements. Joining the Eighth and Ninth Circuits, however, the D.C. Circuit adopted a standard that leaves unresolved challenges to plaintiffs' ability to meet the predominance requirement,

as long as plaintiffs' proposed method appears to be valid and, when assumed to be so, would satisfy the Rule 23 requirements.

That standard is far too porous. It cannot be reconciled with this Court's repeated statements that class certification requires "rigorous analysis." It raises serious due-process concerns. And it ignores the reality that the outcome at class certification typically results in a settlement, thereby dictating the ultimate resolution of the litigation. This case is an ideal vehicle to resolve the division among the lower courts over the meaning of this Court's Rule 23 jurisprudence. The petition for a writ of certiorari should be granted.

A. The Decision Below Deepens The Confusion Among The Courts Of Appeals

Even after this Court's most recent decisions on Rule 23, the disarray among the circuits remains entrenched. As confirmed by the decision below, the D.C. Circuit sides with those courts, including the Eighth and Ninth Circuits, holding that the Rule 23 requirements are satisfied as long as plaintiffs' proposed method appears to be valid, even if there are unresolved material disputes among the parties relevant to those requirements. The Second, Third, Fifth, and Eleventh Circuits have taken a stricter approach. In those courts, a class cannot be certified if the district court fails to resolve material disputes among the parties that bear on the Rule 23 requirements, or if it merely finds that the plaintiffs' proposed method for proving classwide injury is plausible or well-established. Under that stricter approach, the outcome of this case would have been different. The rampant uncertainty on an important question of federal law warrants this Court's review.

1. In the Second, Third, Fifth, and Eleventh Circuits, the "rigorous analysis" expected of a district court before a class may be certified requires careful consideration of a defendant's arguments that predominance is lacking, even if those arguments overlap with the merits; a finding that plaintiffs have met their burden of proving predominance; and the resolution of any factual or legal dispute relevant to the predominance inquiry.

a. The Second Circuit has long taken a rigorous approach to Rule 23. Consider *In re Initial Public Offerings Securities Litigation*, 471 F.3d 24 (2006), involving six classes raising securities-fraud claims. *Id.* at 27. As is relevant here, the defendants had argued that the plaintiffs' expert report did not establish loss causation, because "any valid theory of loss causation * * * would require intensive trade-by-trade analysis"; the district court concluded that, while the defendants were "free to attack [the plaintiffs'] theory at trial or present alternative theories," class certification was "not the time to weigh conflicting evidence or engage in statistical dueling of experts," and the plaintiffs had "satisfied their burden at this stage to articulate a theory of loss causation that is not fatally flawed." 227 F.R.D. 65, 115 & n.375 (S.D.N.Y. 2004) (internal quotation marks and citations omitted). In other words, "the *sole* job of a district court in assessing expert evidence on a class certification motion is to ensure that the basis of the plaintiff's expert opinion is not so flawed that it would be inadmissible as a matter of law." *Id.* at 93 (internal quotation marks, citation, and alteration omitted).

The Second Circuit disagreed. It explained that "an expert's testimony may [not] establish a component of a Rule 23 requirement simply by being not fatally flawed." 471 F.3d at 34, 42. Instead, the requisite determination can be made "only if the judge resolves factual disputes

relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular requirement have been established." *Id.* at 41. In performing that analysis, the Second Circuit explained, the district court must "assess all of the relevant evidence admitted at the class certification stage * * * just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit." *Id.* at 42. The district court may not decline to "weigh conflicting evidence and determine the existence of a Rule 23 requirement just because that requirement is identical to an issue on the merits." *Ibid.* And "the obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement." *Ibid.*; see *Kurtz* v. *Costco Wholesale Corp.*, 768 Fed. Appx. 39, 40 (2d Cir. 2019).

b. Like the Second Circuit, the Third Circuit requires district courts to resolve material disputes between the parties relevant to the Rule 23 requirements before class certification. The recent decision in *In re Lamictal Direct Purchaser Antitrust Litigation*, 957 F.3d 184 (2020), involved direct purchasers of an anti-epilepsy drug alleging that, but for drug manufacturers entering into an unlawful "reverse payment" agreement, each purchaser would have paid less for the drug. See *id.* at 189. Opposing certification, the defendants argued that the plaintiffs' expert testimony "impermissibly relie[d] on averages" that "mask[ed]" the fact that "up to one-third of the entire class" likely suffered no injury. *Id.* at 192. The district court "refused to address" that argument, *id.* at 193, reasoning that it went "far beyond the realm of predominance and well into the merits of [p]laintiffs' claims," Civ. No. 12-995, 2018 WL 6567709, at *6 (D.N.J. Dec. 12, 2018).

The Third Circuit disagreed. It reasoned that the proper inquiry was not whether the proposed method of proving classwide impact "could sustain a jury finding" in theory, because "a putative class must demonstrate that its claims are capable of common proof at trial by a preponderance of the evidence." 957 F.3d at 191. Accordingly, the district court erred in assuming, "absent a rigorous analysis," that "averages are acceptable." *Id.* at 194. "As is clear from the dueling expert reports, the acceptability of averages depends largely on the answer to several factual predicates," yet the district court "did not resolve these factual disputes, which would have required it to weigh the competing evidence and make a prediction as to how they would play out at trial." *Ibid.* Without a "rigorous analysis of the competing expert reports that reli[ed] on competing evidence and assume[d] competing facts," the Third Circuit reasoned, it was "impossible" to conclude that the predominance requirement had been met. *Id.* at 193, 195; see *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 323-324 (3d Cir. 2009).

c. The Fifth Circuit has taken a similar approach. In *Prantil* v. *Arkema Inc.*, 986 F.3d 570 (5th Cir. 2021), the district court had certified a class of property owners allegedly injured by a chemical plant's emission of toxic ash and smoke during Hurricane Harvey; it found classwide injury based on the assumption that even those plaintiffs not exposed to toxic emissions on their own property must have been exposed somewhere in the "community." See *id.* at 579. Though that assumption admittedly had a "welcome, commonsense appeal," the Fifth Circuit found the district court's analysis to be "wanting." *Ibid.*

The Fifth Circuit explained that "Rule 23 requires the court to find, not assume, the facts favoring class certification." 986 F.3d at 579 (internal quotation marks and alteration omitted). "An assumption about the movement

of persons throughout the class area," the court continued, "cannot relieve [p]laintiffs of their burden to *affirmatively demonstrate* compliance with Rule 23(b)(3)" or "allay the concern that proof of causation and harm could vary greatly from one class member to another." *Id.* at 579-580 (internal quotation marks and alteration omitted). A certification order must thus reflect "consideration of a defendant's weightiest arguments against certification"; a "detailing [of] the evidence the parties may use to prove or defend against liability and its commonality to all class members"; and "closer attention" to "the relative balance of concededly common claim elements to contested elements of causation and injury." *Ibid.* By completing the predominance inquiry without "adequately addressing [the defendant's] arguments that causation, injury, and damages would be highly individualized," and by taking a "'figure-it-out-as-we-go-along' approach," the district court erred. *Id.* at 578.

d. Like the Second, Third, and Fifth Circuits, the Eleventh Circuit interprets Rule 23 to require more than a finding that predominance is met if the plaintiffs' proposed method of establishing classwide injury is presumed to be true. In *Brown* v. *Electrolux Home Products, Inc.*, 817 F.3d 1225 (11th Cir. 2016), the district court had recognized its obligation to conduct a "rigorous analysis," yet it purported to "resolve[] doubts related to class certification in favor of certifying the class"; "accept[] the allegations in the complaint as true"; and "draw[] all inferences and present[] all evidence in the light most favorable to the party seeking class certification." *Id.* at 1231-1232 (internal quotation marks and citations omitted).

The Eleventh Circuit reversed. As it explained, "[a]ll else being equal, the presumption is against class certification because class actions are an exception to our constitutional tradition of individual litigation." 817 F.3d at

1233. For that reason, "the district court must conduct a rigorous analysis to determine whether the movant carried his burden, which will frequently entail overlap with the merits of the plaintiff's underlying claim"; "if doubts remain about whether the standard is satisfied, the party with the burden of proof loses." *Id.* at 1233-1234. "[I]f a question of fact or law is relevant to that [Rule 23] determination," the Eleventh Circuit explained, "then the district court has a duty to actually decide it and not accept it as true or construe it in anyone's favor," *id.* at 1234 (internal quotation marks and citations omitted), regardless of "whether the question also pertains to the merits," *id.* at 1237. A question "bears on predominance if, answered one way, an element or defense will require individual proof but, answered another way, the element or defense can be proved on a classwide basis." *Ibid.* "[B]ecause each requirement of Rule 23 must be met," the Eleventh Circuit concluded, "a district court errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the requirements." *Ibid.*

2. The Eighth, Ninth, and D.C. Circuits have embraced a significantly more relaxed approach to the Rule 23 inquiry. Those circuits do not require a court to make findings to resolve disputes relevant to the predominance requirement as long as the plaintiffs' proposed method is plausible or well-established and—if assumed to be valid—sufficient to establish predominance.

a. Start with the Eighth Circuit's decision in *In re Zurn Pex Plumbing Products Liability Litigation*, 644 F.3d 604 (2011), cert. dismissed, 569 U.S. 915 (2013), which involved the certification of a class of homeowners alleging that brass fittings used in a company's plumbing systems were inherently defective. *Id.* at 608. As is relevant here, the district court had taken the substantive allegations in the complaint as true, reasoning that, if the

plaintiffs "can prove" their theory of causation, "then proximate cause will not involve predominately individual determinations." 267 F.R.D. 549, 563, 565 (D. Minn. 2010). The district court had acknowledged that the defendants "intend to prove" that leaks resulted instead from individual "water conditions or installation problems," but the court had concluded that "[l]itigating this issue numerous times in different proceedings is neither practicable nor reasonable." *Id.* at 563.

On appeal, the defendants argued that the district court's erroneous approach "permeate[d]" the entirety of its findings and could not be "reconciled" with the "rigorous analysis" required by Rule 23(b)(3). 644 F.3d at 618. But a majority of the Eighth Circuit disagreed, holding that a district court's inquiry remains "limited in scope." *Ibid.* Specifically, the court "should be limited to determining whether, if the plaintiffs' general allegations are true, common evidence could suffice to make out a prima facie case for the class." *Ibid.* (quoting *Blades* v. *Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005)).

Judge Gruender dissented. In his view, the majority's reasoning was "problematic" and "circular." 644 F.3d at 626. Instead of making findings on *how* the classes satisfied Rule 23(b)(3), the district court relied on "merely a restatement of the predominance inquiry." *Ibid.* (citation omitted). According to Judge Gruender, the district court failed to undertake a "rigorous analysis" of the "contradictory testimony" of the parties' experts over whether an "inherent defect" caused the property damage or, instead, some leaks had "inherently individual" causes such as "corrosive water conditions, improper installation, improper use, [or] abnormal operating conditions." *Ibid.* Without making findings "resolving" that dispute, there was "no way to determine" whether the predominance requirement had been satisfied. *Ibid.* Even if that inquiry

"bleeds into the merits," it is "necessary to determine the factual setting of the case." *Ibid.*

b. The Ninth Circuit recently took a similar approach. In *Olean Wholesale Grocery Cooperation, Inc.* v. *Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir.), cert. denied, 143 S. Ct. 424 (2022), packaged tuna suppliers appealed an order certifying classes of tuna purchasers who alleged a price-fixing conspiracy. As is relevant here, the defendants argued that the plaintiffs' statistical regression model was incapable of proving classwide impact through common proof and "masked [] individual differences among class members." *Id.* at 673. The plaintiffs defended the model as a "well-known and well-accepted method" for examining antitrust impact, *id.* at 674, and the district court certified the classes on the theory that the model had a "rational basis," *id.* at 675-676. Though a panel of the Ninth Circuit disagreed with the district court's analysis, see 993 F.3d 774 (2021), the en banc court reversed, see 31 F.4th 651 (2022).

The en banc Ninth Circuit held that certification cannot be denied on the ground that the proposed method of proving classwide impact appears "unpersuasive and unlikely to succeed in carrying the plaintiffs' burden of proof," 31 F.4th at 667, because the necessary "rigorous analysis" requires only resolution of "whether evidence is capable of proving an issue on a class-wide basis," *id.* at 679. To satisfy that test, a court need only "consider[] factors that may undercut [a] model's reliability," including "unsupported assumptions, erroneous inputs, or nonsensical outputs such as false positives." *Id.* at 683. For that reason, the Ninth Circuit rejected the defendants' critique of the use of pooled regressions, because those models are "widely accepted as a generally reliable econometric technique." *Id.* at 677. It likewise dismissed the de-

fendants' argument that the regression's output contained too many individualized differences; it reasoned that a court "is not free to prefer its own views about the economics of the [relevant] market over the statistical evidence submitted by the plaintiffs," given that it is for "the jury, not the court, to decide the persuasiveness" of a model. *Id.* at 678. If "the evidence is admissible" and "determined to be capable of establishing antitrust impact on a class-wide basis," then certification is appropriate. *Ibid.*

Judge Lee, joined by Judge Kleinfeld, dissented. According to Judge Lee, certifying a class in which "potentially about one out of three" members suffered no injury constituted an abuse of discretion. 31 F.4th at 685. Moreover, according to Judge Lee, it was erroneous to acknowledge the existence of dueling expert reports on that "crucial question" but to leave that issue "for another day." *Id.* at 686. Rule 23(b)(3)'s requirement of "rigorous analysis," he explained, tasks a court with doing more than "just consider[ing] one side's expert opinion as 'reliable' and then kick[ing] the can down the road until trial." *Id.* at 687. To the contrary, Judge Lee explained, a court "must dig into the weeds and decide the battle of dueling experts if their dispute implicates Rule 23 requirements." *Ibid.* In Judge Lee's view, the majority thus confused the obligation to produce "admissible" evidence with the obligation to produce "persuasive" evidence. *Id.* at 689. Judge Lee concluded that the majority had erred by reducing a "rigorous analysis" test to a requirement that experts must merely "pass[] muster under *Daubert*." *Id.* at 687.

3. The D.C. Circuit has adopted a similarly expansive reading of Rule 23. According to the D.C. Circuit, at class certification, a court need not make any findings to resolve the parties' disputes as to the plaintiffs' ability to prove classwide impact, as long as the court finds that the

plaintiffs have offered a "colorable" method of proving classwide impact that appears to be valid. That approach cannot be squared with the approaches of the Second, Third, Fifth, and Eleventh Circuits.

a. The entirety of the district court's "rigorous analysis" to certify the three classes in this case spans a handful of sentences. See App., *infra*, 37a-39a. At the most general level, the district court noted how petitioners "argue[d] that [respondents'] approaches to proving that impact are hopelessly flawed," because the putative classes include uninjured class members, yet respondents' model is incapable of excluding those members. *Id.* at 37a-38a. According to the court, however, respondents "at this stage in the proceedings[] need only demonstrate a colorable method by which they intend to prove class-wide impact," and respondents "have offered means of proving the anti-competitive impact of [petitioners'] conduct that are reasonable and well established." *Ibid.*

The district court proceeded to apply that lenient approach to each class. Starting with the *Burke* consumer plaintiffs, the court refused to engage with petitioners' critique of plaintiffs' proposed theory of classwide impact: "Although [petitioners] quibble with [plaintiffs' proposed method], the fact that plaintiffs can point to significant scholarship and precedent in support of their claims is sufficient at this stage—this is not an adjudication of the merits of plaintiffs' claims." App., *infra*, 38a. Moving on to the *Mackmin* consumer plaintiffs, the court noted that "[petitioners] take issue with [plaintiffs'] use of Wells Fargo's increased ATM surcharges as representative of the ATM industry as a whole, but again, this critique is better suited for adjudication of plaintiffs' injury and damages on the merits, not at the class certification stage." *Id.* at 38a-39a. And concluding with the operator plaintiffs, the court determined that, "while [petitioners] contest the

merits of plaintiffs' injury and damages models, plaintiffs have met their burden here of demonstrating a colorable method by which they intend to prove class-wide impact." *Id.* at 39a.

According to the D.C. Circuit, that was enough. The "rigorous analysis" required to establish predominance had occurred even though, as the court of appeals determined, the district court had engaged in "notably terse" "record analysis"; deferred resolution of "material factual dispute[s]" over respondents' ability to prove classwide impact to "the merits"; and determined that these classes should be certified simply because respondents' proposed method was "colorable," "reasonable," "well accepted," and "appear[s] to be true, valid, or right." App., *infra*, 9a, 13a-14a, 15a, 24a. The D.C. Circuit reasoned that petitioners' arguments that the classes included uninjured class members, and that respondents were incapable of excluding them through common proof, were irrelevant at the class-certification stage. *Id.* at 23a.

b. The outcome of this case would have been different in the Second, Third, Fifth, and Eleventh Circuits.

Above all, those circuits understand that Rule 23 forbids a district court from "relying on a reviewing court to connect the dots." *Vega* v. *T-Mobile USA, Inc.*, 564 F.3d 1256, 1269 (11th Cir. 2009). But that is precisely what happened here: the D.C. Circuit attempted to compensate for the district court's "terse analysis" on predominance. See App., *infra*, 9a. The D.C. Circuit's conclusion that certification is appropriate as long as the plaintiffs' proposed method of proving classwide impact is "colorable," "reasonable," and "well established" cannot be squared with the view that plaintiffs "are required to prove * * * more than just a pretty good case." *Sher* v. *Raytheon Co.*, 419 Fed. Appx. 887, 890 (11th Cir. 2011) (internal quotation marks and citation omitted); see *Lamictal*, 957 F.3d

at 191, 194. Nor can a standard that focuses on whether the plaintiffs' method "appears to be true, valid, or right," App., *infra*, 13a, be reconciled with the view that "the district court has a duty to actually decide [the issue] and not accept [the plaintiffs' proposed method] as true," *Brown*, 817 F.3d at 1234; see *IPO*, 471 F.3d at 41. Moreover, the D.C. Circuit's holding that "material factual dispute[s]" between the parties over the existence of uninjured class members (and plaintiffs' ability to exclude them through common evidence) are "better suited for adjudication * * * on the merits," App., *infra*, 25a, amounts to precisely the "figure-it-out-as-we-go-along" approach that other circuits have rejected. *Prantil*, 986 F.3d at 578-579. According to those courts, a district court cannot decline to "weigh conflicting evidence * * * just because that requirement is identical to an issue on the merits," *IPO*, 471 F.3d at 42, and a court "errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the [Rule 23] requirements," *Brown*, 817 F.3d at 1237.

In short, if the D.C. Circuit had embraced the approach of the Second, Third, Fifth, and Eleventh Circuits, it would have had to vacate the order certifying the classes in this case, because certification cannot be based merely on a colorable method of proving of classwide injury (with material factual disputes over the reliability of plaintiffs' proposed method deferred to the merits stage). Because the difference in the circuits' approaches is outcome-dispositive in this case, further review is warranted.

B. The Decision Below Is Incorrect

The D.C. Circuit's approach relaxes the predominance inquiry beyond recognition. It reduces the "rigorous analysis" required under Rule 23(b)(3) to a prima facie show-

ing, and it seemingly allows a court to punt serious concerns that "b[ear] on the propriety of class certification" to the merits stage, in contravention of this Court's precedent. *Comcast*, 569 U.S. at 34. It is hardly surprising that happened in petitioners' case: after all, "[t]he district court did not cite *Comcast*," relying instead on "decades-old, nonbinding cases." App., *infra*, 9a, 14a. The D.C. Circuit should not have allowed the class certification in this case to stand.

1. Although confusion reigns regarding the precise contours of the "rigorous analysis" this Court has mandated, see pp. 13-24, *supra*, the decision below cannot be justified under any reading of the Court's decisions.

The D.C. Circuit insisted that the district court's application of its "colorable" standard was unintentionally consistent with this Court's decision in *Comcast*. App., *infra*, 14a. But *Comcast* does not permit affirming a certification order that contains "notably terse" analysis on the issue of classwide impact, let alone one holding that whether the proposed classes contain and can exclude "unharmed members" is "the kind of material factual dispute that is better suited for adjudication of plaintiffs' injury and damages on the merits." *Id.* at 9a, 24a (internal quotation marks and citation omitted). Although a court may defer consideration of a defendant's arguments that a proposed model "*will in fact* prove injury and damages for each class member," *id.* at 20a, deferral is not appropriate where, as here, the defendant's criticisms "b[ear] on the propriety of class certification." *Comcast*, 569 U.S. at 34; see *Lamictal*, 957 F.3d at 193; *Prantil*, 986 F.3d at 578.

In *Comcast*, the district court had certified a class based on its determination that damages from the sole cognizable alleged antitrust impact could be calculated on a classwide basis—even though the plaintiffs' expert had

calculated damages to include three theories of impact that the court itself had rejected. See 569 U.S. at 32. On appeal, the court of appeals maintained that considering the defendants' challenges to the plaintiffs' damages model was inappropriate at the class-certification stage. *Ibid.* In reversing, this Court made clear that the "rigorous analysis" standard set forth in its Rule 23 decisions necessarily encompasses "entertain[ing] arguments against" plaintiffs' proposed model where they bear "on the propriety of class certification," even if those arguments are also "pertinent to the merits determination." *Id.* at 34. The ultimate goal is to arrive at a "determination"—not an assumption or a guess—that the requirements of Rule 23 have been satisfied. See *id.* at 35.

But a guess is precisely what the D.C. Circuit countenanced in this case. Even accepting the court of appeals' reinterpretation of the district court's "colorable" standard as asking whether the proposed model of classwide impact "appear[s] to be true, valid, or right," App., *infra*, 16a (citation omitted), that approach falls drastically short of what this Court's decisions require. A court cannot accept plaintiffs' proposed model merely because it *appears* to be valid; the court must rigorously scrutinize whether that method is capable of proving classwide impact despite the defendant's contrary evidence. To do anything else would relieve plaintiffs of their burden "affirmatively [to] demonstrate" compliance with Rule 23, *Wal-Mart*, 564 U.S. at 350, and hold that "*any* method of measurement is acceptable so long as it can be applied classwide," *Comcast*, 569 U.S. at 36.

2. The D.C. Circuit reasoned that a proffered model of classwide impact should be rejected only when, "on its own terms," it sweeps in a "high percentage of uninjured class members." App., *infra*, 23a. The court's repeated invocation of the phrase "on its own terms" suggests that

it viewed class certification to be appropriate whenever, assuming plaintiffs' model is valid, plaintiffs have demonstrated classwide impact. Indeed, according to the D.C. Circuit, whether these three classes include uninjured members and are incapable of excluding them through common proof is not an appropriate inquiry for the class-certification stage at all. See *id.* at 24a. But a court cannot certify a class merely because the plaintiffs insist they can be treated as one. Otherwise, the "greater procedural protections" attendant to Rule 23(b)(3) would be a nullity. *Wal-Mart*, 564 U.S. at 362. The district court failed rigorously to analyze respondents' proposed methods of proving classwide impact, and the court of appeals' decision upholding class certification should therefore be reversed.

a. The district court found that the *Burke* consumer plaintiffs established classwide impact simply because their expert referred to academic literature broadly establishing that, "in competitive markets, industry-wide taxes are fully incorporated into industry-wide prices." App., *infra*, 38a. That may be true in the abstract, but it is not sufficient to establish classwide impact—especially where, as here, petitioners' expert presented real-world evidence that the classes swept in uninjured class members whom plaintiffs' model could not exclude. *Id.* at 19a-20a.

In upholding certification of the class, the D.C. Circuit reasoned that petitioners' criticisms, which go to the heart of the predominance inquiry and raise "material issue[s]" of fact, should be deferred until trial. App., *infra*, 18a. But the district court needed to "make findings" to resolve that dispute, and plaintiffs needed "affirmatively [to] demonstrate" compliance with the requirements of Rule 23(b)(3). *Wal-Mart*, 564 U.S. at 350, 363. The court of appeals' analysis was therefore erroneous.

b. The *Mackmin* consumer plaintiffs' expert also relied on academic theory, but supplemented it with a model based on data from a single bank. App., *infra*, 19a. In response, petitioners' expert tested plaintiffs' model against a different and broader set of real-world data, concluding that at least tens of thousands of purported class members—which plaintiffs' model could not identify through common proof, and assumed to be injured—were not injured at all. *Id.* at 19a-20a. The district court nevertheless postulated that resolution of that claim was "better suited for adjudication of plaintiffs' injury and damages on the merits." *Id.* at 39a.

The D.C. Circuit concluded that the district court had "correctly" declined to "focus on which of the conflicting models to credit," because the only question at class certification was whether plaintiffs "offered reliable, generalized proof of injury that a reasonable factfinder could credit and that, if credited, would enable resolution of class claims without piecemeal proof." App., *infra*, 20a. But that short-circuits the Rule 23(b)(3) analysis. Rule 23(b)(3) "requires the judge to make findings about predominance * * * before allowing the class" to be certified, *Wal-Mart*, 564 U.S. at 363, not to assume predominance "if [plaintiffs' proposed method] is credited," App., *infra*, 20a. As the Eleventh Circuit put it, "if a question of fact or law is relevant to that [Rule 23] determination, then the district court has a duty to actually decide it and not accept it as true or construe it in anyone's favor." *Brown*, 817 F.3d at 1234.

c. Finally on this score, the operator plaintiffs argued that every class member was "overcharged precisely the same per-transaction amount at any given time for every authorized, surcharge-bearing ATM cash withdrawal settled and cleared over the [petitioners'] networks." App.,

infra, 39a. In response, petitioners contended that plaintiffs' own evidence showed that "some members of the ATM [o]perator class" in fact "did not pay fees for use of [petitioners'] networks, whether directly or indirectly, and are therefore uninjured." *Id.* at 21a. The district court concluded, without elaboration, that the operator plaintiffs had "demonstrate[d] that individualized inquiries would not be necessary to ascertain the fees paid by each class member," and dismissed petitioners' contention as a "merits" issue. *Id.* at 39a.

On appeal, the D.C. Circuit described that unexplained conclusion as a "reasonable" one. App., *infra*, 20a. The court dismissed petitioners' contention that "predominance is defeated by the lack of a mechanism for weeding out uninjured class members," reasoning that it "depends on a factfinder crediting [petitioners'] submission that such members exist." *Id.* at 23a. But that dispute, which goes to the core of Rule 23(b)(3), cannot be skirted at the class-certification stage. See *Lamictal*, 957 F.3d at 193; *Prantil*, 986 F.3d at 578; *IPO*, 471 F.3d at 42. In any event, it is not petitioners' burden to prove a *lack* of classwide impact; it is plaintiffs' burden to *establish* classwide impact. See *Wal-Mart*, 564 U.S. at 350; *Comcast*, 569 U.S. at 34-36. "[I]f doubts remain about whether the [Rule 23(b)(3)] standard is satisfied," plaintiffs (as "the party with the burden of proof") cannot prevail. *Brown*, 817 F.3d at 1233 (citation omitted).

C. The Court's Review Is Warranted

The question presented is one of profound importance to federal civil procedure and class actions; it affects multi-billion-dollar litigation; and it raises fundamental questions concerning the powers of Article III courts. Moreover, because the question presented was thoroughly briefed below and passed on by the D.C. Circuit,

this case is an ideal vehicle to resolve the doctrinal division among the courts of appeals. The petition for a writ of certiorari should be granted.

1. Because class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," *Comcast*, 569 U.S. at 33 (citation omitted), class certification "changes the risks of litigation often in dramatic fashion," *Prantil*, 986 F.3d at 575. Whether a class exists "fundamentally alters the rights of present and absent members." *Chavez* v. *Plan Benefit Services, Inc.*, 957 F.3d. 542, 547 (5th Cir. 2020). The denial of class status can "doom" plaintiffs, while certification can place "considerable pressure" on defendants to settle. *Blair* v. *Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). "[E]mpirical studies * * * confirm what most class action lawyers know to be true: almost all class actions settle." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1292 (2002). Indeed, this Court has emphasized that a ruling on class certification "may sound the death knell" for parties. *Microsoft Corp.* v. *Baker*, 582 U.S. 23, 29 (2017). It is for that reason that federal courts treat certification not merely as a "preliminary" aspect of litigation, but as "an oftentimes dispositive step." *Sali* v. *Corona Regional Medical Center*, 907 F.3d 1185, 1188 (9th Cir. 2018) (Bea, J., dissenting).

That is why Federal Rule of Civil Procedure 23 requires a "rigorous analysis" at the class-certification stage. And because Rule 23(b)(3) represents an "adventuresome innovation," *Wal-Mart*, 564 U.S. at 362 (internal quotation marks and citations omitted), the predominance inquiry protects the propriety of a class action by playing a vital "gatekeeper" role, *Medical & Chiropractic Clinic, Inc.* v. *Oppenheim*, 981 F.3d 983, 993 (11th Cir. 2020). Far

from being some "pointless exercise," the "rigorous analysis" standard safeguards due process by winnowing out "creative"—and often "perilous"—attempts at manipulating litigation. *Chavez*, 957 F.3d. at 547. It facilitates appellate review, given that appellate courts rely on district courts to "find the facts." *Ibid.* And it mitigates against the "unacceptable risk" of holding a party liable to uninjured class members. *Tyson Foods*, 577 U.S. at 472 (Thomas, J., dissenting). Rule 23(b)(3) thus plays an "increasingly important role" by ensuring that the class device remains an "essential" and "powerful workhorse to the benefit of plaintiffs and defendants" alike. *Prantil*, 986 F.3d at 574.

The question presented here over the meaning and application of the Rule 23 "rigorous analysis" standard is an important and recurring one. Some 7,500 class actions are brought each year. See Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 Geo. Wash. L. Rev. 306, 308 n.7 (2011). And nowhere are the financial stakes greater than in the antitrust context, where defendants face the threat of "massive award[s]," 2A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 331a (5th ed. 2023), putting the parties "on the fast track to settlement shortly after class certification, long before * * * merits adjudication of any kind can play a role," John T. Delacourt, *Protecting Competition by Narrowing 'Noerr': A Reply*, 18 Antitrust 77, 78 (2003); see also Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009). Indeed, in this case alone, the putative classes comprise hundreds of millions of plaintiffs and seek billions of dollars in damages. Cf. *Wal-Mart*, 564 U.S. at 342 (concerning "one of the most expansive class actions ever[,] * * * about one and a half million plaintiffs").

Yet the courts of appeals continue to struggle with what "rigorous analysis" entails. The disarray among the circuits thus yields widespread harm. Relying on incorrect legal standards and untested expert evidence, courts nationwide are certifying classes with uninjured members in a range of contexts, from antitrust to securities and mass torts. In many of those cases, as here, certification "amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert." *West* v. *Prudential Securities, Inc.*, 282 F.3d 935, 938 (7th Cir. 2002).

2. This case is an ideal vehicle to address the prevailing confusion. The question presented is outcome-determinative for petitioners' appeal. And this petition represents an unusual opportunity to resolve that question, because "[i]t is no secret that certification can coerce a defendant into settling on highly disadvantageous terms regardless of the merits of the suit," with the result that class-certification disputes often evade appellate review. *Chavez*, 957 F.3d at 547 (internal quotation marks and citation omitted). Between 2018 and 2022, for example, companies reported settling between 47% and 73.2% of class actions. See Carlton Fields, *2023 Class Action Survey* 22 <tinyurl.com/2023ClassActionSurvey>.

What is more, the D.C. Circuit threw the conflict into sharp relief. The court upheld the class-certification order while conceding that the district court's "surprising and unfortunate" attempt at the required "rigorous analysis" relied on "decades-old, nonbinding cases" and resulted in a "terse analysis" that was "in tension" with this Court's precedent. App., *infra*, 9a. By denying en banc review, moreover, the D.C. Circuit confirmed that its decision in this case accurately reflects the law of the circuit.

At present, this Court's guidance on Rule 23(b)(3) has spiraled into entrenched confusion. There is no consensus

among the circuits in their understanding of one of the most important requirements of the Federal Rules of Civil Procedure. Instead, a division in approaches has emerged among the federal courts, with the result that where a case is brought often, as here, determines the outcome of any class-certification motion. For too long, that confusion has gone unchecked. And given the number of opinions from a wide range of circuits and respected jurists, continued percolation would serve no purpose.

This case is an ideal vehicle for bringing clarity to the law of class actions. The Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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