NO. 20-

In the
Supreme Court of the United States

CENTRAL PAYMENT CO., LLC,
Petitioner,

v.

CUSTOM HAIR DESIGNS BY SANDY, LLC, on behalf of themselves and all others similarly situated; SKIP'S PRECISION WELDING, LLC, on behalf of themselves and all others similarly situated,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Eighth Circuit affirmed class certification in this case even though each of the more than 160,000 class members signed a different, bespoke contract with defendant Central Payment Co., LLC ("CPAY"). The court of appeals decision prevents CPAY from invoking the terms of each contract to raise individualized defenses against the claims of absent class members. That result does not square with the Rules Enabling Act, the Federal Rules of Civil Procedure, or this Court's precedents. It also creates a circuit split. Courts in the Fourth, Sixth, Tenth, and Eleventh Circuits have held that where a putative class asserts claims implicating materially diverse contracts, Rule 23's requirements cannot be satisfied. By departing from those decisions, the Eighth Circuit's ruling raises the following important question:

Whether a class may be certified under Rule 23 of the Federal Rules of Civil Procedure when the class claims turn on materially different contractual rights and obligations between the defendant and each class member.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, CPAY is a wholly owned subsidiary of its ultimate parent company, Global Payments Inc. ("Global"), which is a publicly traded corporation. Global owns CPAY through intermediary companies that are also wholly owned by Global.

RELATED PROCEEDINGS

This case arises from the following proceedings in the U.S. District Court for the District of Nebraska and the U.S. Court of Appeals for the Eighth Circuit, listed here in reverse chronological order:

- *Custom Hair Designs by Sandy v. Cent. Payment Co.*, No. 20-1677 (8th Cir. Feb. 11, 2021), included as Appendix C; not reported;
- *Custom Hair Designs by Sandy v. Cent. Payment Co.*, No. 20-1677 (8th Cir. Dec. 30, 2020), included as Appendix A; reported at 984 F.3d 595;
- *Custom Hair Designs by Sandy, LLC v. Cent. Payment Co.*, No. 8:17-cv-310 (D. Neb. Feb. 11, 2020), included as Appendix B, not reported but made available at 2020 WL 639613.

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PETITION FOR WRIT OF CERTIORARI

The Eighth Circuit's poorly reasoned departure from its sister appellate courts should be corrected. The plaintiffs pursuing this action seek to represent a class of some 160,000 businesses that each signed an individually negotiated and bespoke contract with the defendant, CPAY. The U.S. District Court for the District of Nebraska granted the plaintiffs' motion for class certification in an order that on its face falls far short of the rigorous analysis that this Court's precedents require. Indeed, the district court's analysis was not only cursory, at times it did not even pertain to this case, addressing irrelevant issues apparently transported from another order the court had previously issued in a different case (an order that the Eighth Circuit has since overturned). Instead of reversing under the requirements of well-settled precedent, the Eighth Circuit papered over the district court's work by making its own self-contradictory factual findings in (purported) support of class certification. The result is a precedent that splits from the consensus view of other federal circuits, which have not permitted the use of class-action procedures when a defendant holds materially different contractual rights against each class member.

Having exhausted its other options for correcting these errors, CPAY now seeks certiorari review from this Court. For the reasons set forth below, the Court should grant the writ.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 984 F.3d 595 and reproduced at App.1–14. The opinion of the U.S. District Court for the District of Nebraska was not reported, but it has been made available at 2020 WL 639613 and is reproduced at App.15–56.

JURISDICTION

The Eighth Circuit issued its opinion on December 30, 2020. It then denied CPAY's petition for panel and en banc rehearing on February 11, 2021. Under this Court's March 19, 2020 order, the deadline to file this petition is July 12, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 23 provides that "[a] class action may be maintained if … the [presiding federal district] court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The relevant rule is reproduced in full at App.59–68.

STATEMENT OF THE CASE

"The crux of this matter is and always has been a contract dispute." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 346 (4th Cir. 1998). Plaintiffs Custom Hair Designs by Sandy, LLC ("Custom Hair"), and Skip's Precision Welding, LLC ("Precision Welding"), are merchants that accept credit card payments from their customers. JA242 ¶¶ 19–20.[1] Each of those credit card payments must be "processed" from the customer's bank to the merchant's bank through a system of intermediaries. JA1191–94. The merchants do not handle the processing themselves. Instead, they contract with and pay a third party to facilitate the provision of these card-processing services. *See id.* In this case, that third party was CPAY. *See* JA829–834 (Precision Welding contract); JA965–68 (Custom Hair contract); JA1508–42 (supplemental terms applicable to both contracts).

Under their contracts with CPAY, the merchants promised to pay various fees attendant to the services CPAY provided. *See* JA1511 § 3.1 ("MERCHANT agrees to pay BANK the fees as set forth in the Merchant Application and all other sums owed to BANK for SALES and Services as set forth in this AGREEMENT as amended from time to time ('FEES')."). In exchange, CPAY, and entities contractually bound to CPAY, promised to process the merchants' credit card transactions. *See* JA1509 § 1.1

[1] Citations to briefing and the appendix ("Aplt. Br." and "JA") refer to documents filed in the U.S. Court of Appeals for the Eighth Circuit.

("As a result of MERCHANT submitting SALES for processing to BANK, BANK will process such SALES and credit or debit MERCHANT'S DESIGNATED ACCOUNT (as defined herein) with the resulting financial proceeds of such SALES ….").[2]

The merchants now contend that "CPAY charged fees for its payment processing services that do not coincide with the terms of" these contracts. App.16. They say that CPAY developed a "scheme … to raise the credit card 'discount rates' charged to [the merchants] and the [proposed] class … despite having no contractual right to do so." JA345.

Not content to bring their own claims, the merchants also seek to represent a nationwide class of roughly 160,000 businesses that purchased card-processing services from CPAY between 2010 and the present. *See* JA374. In their motion for class certification, the merchants took aim at four specific CPAY billing practices:

- CPAY's assessment of a "TSSNF" or "Network" Fee, beginning in 2014, JA347.
- CPAY's assessment of a "PCI Noncompliance Fee" on "merchants who

[2] The Terms & Conditions for the merchants' contracts generally did not mention CPAY by name. Instead, they most often used the term "BANK" to refer to the entities that would provide the services CPAY facilitated. *See, e.g.*, JA1511 § 3.5. The contracts make clear that CPAY and TSYS Merchant Solutions, LLC ("TMS") were assigned contractual rights and obligations from First National Bank of Omaha ("FNBO") and that CPAY, TMS, and FNBO would provide the services under the contracts. *See* JA1509 ¶ F; JA1260 § 5.6.

are non-compliant with certain electronic security criteria," *id.*

- CPAY's increase of "discount rates," which were part of CPAY's compensation for processing each individual transaction, *id.*
- CPAY's alleged practice of "shifting" certain transactions from lower-fee tiers to higher-fee tiers within its stratified rate structure for merchants agreeing to such a fee model. JA348.

The merchants claim that each of these four billing practices was both a breach of contract and a fraud. *See* JA347–48. They thus seek to hold CPAY liable under Nebraska law and the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"). *See id.*

CPAY's principal defense to these claims is that it had every right to bill its merchant customers through the practices at issue. *See* JA1158–59. The strength of that defense necessarily depends on the terms of the contracts CPAY signed with each merchant. "As a contract consists of a binding … set of promises, a breach of contract is a failure, without legal excuse, to perform any promise that forms the whole or part of a contract." *McGill Restoration, Inc. v. Lion Place Condo. Ass'n*, 959 N.W.2d 251, 269 (Neb. 2021). And "[o]ne suffers no damage where he is fraudulently induced to do something which he is under legal obligation to do." *Beltner v. Carlson*, 46 N.W.2d 153, 155 (Neb. 1951) (quoting 23 Am. Jur., Fraud and Deceit, § 177); *see also Lesiak v. Cent. Valley Ag Coop., Inc.*, 808 N.W.2d 67, 82 (Neb. 2012) (per curiam)

("[W]hen the alleged breach is of a … duty which arises only because the parties entered into a contract[,] only contractual remedies are available."). Moreover, the merchants could not have reasonably relied on, or been caused harm by, billing practices that merely aligned with their contractual bargains. *See Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008) (citing *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992)); *Luscher v. Empkey*, 293 N.W.2d 866, 869 (Neb. 1980).

Crucially, though, CPAY signed a materially different contract with each and every merchant. To be sure, there was a standardized component — the "Terms & Conditions" — that laid out certain rights and obligations applicable to all of the payment-processing contracts. *See* JA1508–42; *see also* JA1505 (containing the standardized portion of the contract wherein merchants agreed to the standardized "Terms & Conditions"). But each of the contracts also contained a non-standardized component — the "Merchant Processing Application & Agreement" — that was open to negotiation between CPAY and each merchant. *See, e.g.*, JA1377–79.

Over the past decade, CPAY's 10,000 independent sales agents negotiated unique contracts between CPAY and each of its individual merchants. In all cases, this involved plugging in individually negotiated rates and fees. *Compare* JA834 (setting the "Non-Qualified" fee rate at 1.75% and specifying an additional 10-cent "Transaction Fee"), *with* JA968 (setting the "Non-Qualified" rate at 0.8% and specifying an additional 22-cent "Transaction Fee"). At times, these negotiations led CPAY to waive its

right to specific fees. *See, e.g.*, JA1375 (waiving CPAY's default-term right to a $195 "Application & Setup Fee"). Still other variations resulted from CPAY's periodic revisions to the Merchant Agreement template, which resulted in at least 28 different sets of default language during the class period. JA1200.

The variations among the merchants' contractual rights directly bear on CPAY's potential liability for the challenged billing practices. To recover for CPAY's assessment of the Network Fee, a merchant would have to show, at a minimum, that it did not consent to the fee in its contract with CPAY. But some of the merchants explicitly agreed to pay that fee when they signed up for CPAY's services. *See* JA1387 ("The following fees will also be assessed … Total System Services Network fee (TSSNF)."). The same goes for the PCI Noncompliance Fee, which CPAY had the right to collect from merchants — including Custom Hair and Precision Welding — that consented to the fee but were not PCI compliant. *See* JA834 ("A PCI Annual Compliance Fee … will be assessed to the merchant account. If Compliance requirements are not met within the first 2 months of the Agreement, … [a] Monthly Non-Compliance fee will be charged to the merchant account …."); JA968 (same). Just as strikingly, the "tier-shifting" practices the merchants challenge could only have affected merchants who agreed to a tiered fee structure, not the merchants who opted for single-rate "pass through" pricing. *Compare* JA1379 (selecting tiered pricing), *with* JA1375, 1387 (selecting pass through pricing).

In addition, the standardized Terms & Conditions give rise to individualized fact questions regarding

contract performance. To provide one example, CPAY generally reserved the right to amend all fees "on thirty … days written notice to MERCHANT." JA1511 § 3.5; *see also* JA1260 § 5.6 (FNBO granting CPAY the power to "change charges and fees to MERCHANTS" and making CPAY "responsible for notifying MERCHANTS with thirty (30) days written notice of such change"). The validity of a given fee change under the payment-processing contracts would thus turn, among other things, on the individualized question of whether the merchant received such notice.

Due to these variations, and for numerous other reasons, CPAY opposed the merchants' motion to certify a single, expansive plaintiffs' class. CPAY stressed that the varying contractual terms precluded the court from "find[ing] that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). "To assess the impact of a common question on the class members' claims, a district court obviously must examine not only the defendant's course of conduct towards the class members, but also the class members' legal rights and duties." *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs.*, 601 F.3d 1159, 1170 (11th Cir. 2010). That inquiry includes considering any contractual "rights and duties" bearing on the dispute. *See id.* Accordingly, even if CPAY's billing practices were susceptible to class-wide proof, CPAY's liability for those practices necessarily turns on what contractual promises CPAY made to each individual merchant.

The district court rejected CPAY's arguments and "certifie[d] the following class":

> All of CPAY's customers that, from January 1, 2010, to the present
>
> (a) were assessed the [Network Fee];
>
> (b) were assessed the PCI Noncompliance Fee;
>
> (c) had their contractual credit card discount rates increased above the contractual rate by CPAY; and/or
>
> (d) had credit card transactions shifted by CPAY from lower-cost rate tiers to higher-cost rate tiers.

App.56.

The district court's reasons for certifying a class have never been clear. Despite its obligation to conduct a "rigorous analysis" of all class-certification issues, *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011)), the district court's explanation of its predominance finding is not intelligible. It reads, in full, as follows:

> The Court finds that "questions of law or fact in this case are common to the class members and predominate over any questions affecting only members [sic]." Fed. R. Civ. P. 23(b)(3). The proposed classes are sufficiently cohesive as to the alleged pattern of the class, more so than to the individuals [sic]. The class is easily ascertainable with or without the expert work of [the merchants' expert

witness] Mr. Olsen, and the class will become more obvious once defendant provides all the necessary data. *See, e.g.*, *McKeage v. TMBC, LLC*, 847 F.3d 992, 999 (8th Cir. 2017) (affirming certification though it required "an intensive file-by-file review process" to determine class members). The plaintiffs, as a whole, do in fact allege and have injury. The same evidence will be used to establish class-wide proof. Further, the common issues predominate over the individual issues. The important evidence will be ascertainable from CPAY's files, testimony and expert reports. The legal theories all turn on the same evidence. Assuming the general allegations are true, the plaintiffs in this case have made a prima facie case based on the common evidence. *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 618 (8th Cir. 2011) (quoting *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005)). The only possible variations that the Court sees at this time is [sic] the computation of any damages. However, "[W]here [sic] damages can be computed according to some formula, statistical analysis, or other easy or essentially mechanical methods, the fact that damages must be calculated on an individual basis is no impediment to class certification." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1259–60 (11th Cir. 2004) (footnotes omitted). Here, it appears that Mr. Olsen can make such calculations based on CPAY's billing records and such would [sic] be ministerial in nature.

> For these reasons, the Court finds predominance requirement [sic] is clearly met.

App.31–33.

In response to the district court's certification order, CPAY filed for permission to bring an interlocutory appeal in the Eighth Circuit, which was granted. *See* 28 U.S.C. § 1292(e); Fed. R. Civ. P. 23(f). Before the court of appeals, CPAY renewed its argument that variations in the merchants' contract terms prevented a class-wide assessment of liability and damages and precluded a predominance finding. *See* Aplt. Br. 32–54. The Eighth Circuit sided with the district court, but instead of addressing the district court's analysis, it made its own factual findings and provided entirely new justifications for certifying the class. Contradicting itself from one sentence to the next, the Eighth Circuit explained, in relevant part, that:

> [A]ll claims deal with either a common scheme of fraud or a term common to all contracts with CPAY. True, the negotiated pricing terms are different and some contracts authorize some fees that plaintiffs allege were fraudulent. However, all plaintiffs allege failure to get bank preauthorization. The relevant contract term was uniform. * * * [T]hat some contracts authorize a "PCI Noncompliance Fee" or a "[Network] Fee" does not defeat predominance. The actual extent of inquiry required here is cursory. Plaintiffs' expert, in calculating damages, need identify only

> whether a contract authorized a PCI or [Network] fee. Because this inquiry is not highly individualized, it does not defeat predominance.

App.6–7.

The Eighth Circuit's analysis errs in crucial respects. As explained below, the decision conflicts with multiple precedents from other circuits, which have confirmed that where would-be class members have materially different contractual rights, Rule 23's requirements cannot be satisfied. Moreover, the Eighth Circuit did not limit itself to reviewing the district court's exercise of discretion. Instead, the Eighth Circuit assumed the district court's fact-finding role and robbed CPAY of the "rigorous" certification analysis to which it was entitled.

This Court's discretionary review is CPAY's last chance to avoid class-wide proceedings that will abridge the substantive contractual rights CPAY holds against absent class members. The Court should grant CPAY's petition.

REASONS FOR GRANTING THE PETITION

This Court should grant CPAY's petition for a writ of certiorari. The Court has broad discretion to grant certiorari review, and it often does so to ameliorate a Circuit split, clarify its precedent, and correct a lower court's extreme "depart[ure] from the accepted and usual course of judicial proceedings." Sup. Ct. R. 10(a). In this case, the Eighth Circuit split from four other federal appellate courts by affirming class certification despite numerous outcome-determinative variations in the class members' contractual rights. In

so doing, the court of appeals consummated a highly irregular and sub-standard certification process that robbed CPAY of a fair adjudication. Only this Court can correct the lower courts' errors and set the law straight.

I. The Eighth Circuit's ruling creates a significant split with other federal appellate courts.

A ruling from this Court would avoid discord among the Circuits regarding Rule 23's requirements. The law in most Circuits is clear: a district court abuses its discretion when it certifies a class with materially diverse contractual rights against the defendant. The Eighth Circuit's opinion muddies those waters.

A. Multiple circuits have held that class certification is inappropriate when the proposed class members have materially differing contractual rights.

Were CPAY not sued in the Eighth Circuit, its appeal would have come out differently.

Faced with a similar certification order in *Sacred Heart Health Systems, Inc. v. Humana Military Healthcare Services, Inc.*, 601 F.3d 1159 (11th Cir. 2010), the Eleventh Circuit recognized the error of certifying a class of plaintiffs with materially diverse contractual rights. In that case, the district court had allowed a class of some 260 hospitals to proceed collectively against Humana for allegedly underpaying certain medical bills. *See id.* at 1164. The Eleventh Circuit recognized, however, that "uncommon questions" arising from the hospitals'

individual contracts with Humana "overwhelm[ed] the one common issue and render[ed] the case unsuitable for class treatment." *Id.* In reaching its conclusion, the Eleventh Circuit explained that "claims for breach of contract are peculiarly driven by the terms of the parties' agreement, and common questions rarely will predominate if the relevant terms vary in substance among the contracts." *Id.* at 1171.

Explaining its conclusion, the Eleventh Circuit noted that to certify a class of plaintiffs that have each entered separate contracts with the defendant, the district court must find "at the threshold that all of the subject contracts [are] 'materially similar.'" *Id.* (quoting *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1261 (11th Cir. 2003)). In the case before the court, "more than 300 [distinct] contracts … f[e]ll within the ambit of the class definition," and they were "reducible linguistically to a minimum of around 33 variants." *Id.* As a result of those variations, even if Humana engaged in a common "course of conduct," *id.* at 1176, the different contract terms would "variously bolster or detract from Humana's non-frivolous argument that [the] rates" it charged any individual hospital were "contractually valid," *id.* at 1175. Indeed, the Eleventh Circuit discerned "a 'distinct possibility that there was a breach of contract with some class members, but not with other class members.'" *Id.* at 1176 (quoting *Broussard*, 115 F.3d at 340). In light of the differences between class members, the court held that "an abridgment of [Humana's individual contractual rights] seem[ed] the most likely result of class treatment," and thus the

district court abused its discretion in certifying the class. *Id.*

Sacred Heart is in keeping with a host of opinions from other federal appellate courts. In *Sprague v. General Motors Corp.*, the Sixth Circuit reversed a class certification order that lumped together some 50,000 GM retirees due in part to the retirees' differing retirement-benefit contracts with GM. *See* 133 F.3d 388, 398 (6th Cir. 1998) (en banc); *see also id.* at 395 ("Not all early retirees signed a statement of acceptance. Some merely signed a 'statement of intent' to retire, while others apparently signed nothing."). The court specifically noted that "[p]roof that GM had contracted to confer vested benefits on one early retiree would not necessarily prove that GM had made such a contract with a different early retiree." *Id.* at 398.

Likewise, in *Broussard v. Meineke Discount Muffler Shops, Inc.*, the Fourth Circuit reversed certification of a class comprising thousands of Meineke muffler shop franchisees because "[t]he cornerstone of plaintiffs' contract case was language that appeared only in some versions of the" franchise agreement. 155 F.3d at 336. The *Broussard* court held in no uncertain terms that "plaintiffs simply c[ould]not advance a single collective breach of contract action on the basis of multiple different contracts." *Id.* at 340. As in *Sprague*, "the differences between the" contracts "raise[d] the distinct possibility that there was a breach of contract with some class members, but not with other class members." *Id.* The district court thus abused its discretion in certifying the class because Rule 23 does

not permit the "amalgama[tion of] multiple contract actions into one." *Id.*

The Tenth Circuit reached a similar holding in *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213 (10th Cir. 2013). That case concerned the defendant XTO Energy's payment of royalties on leased natural gas wells. The plaintiffs' claims turned on one "central allegation: that XTO ha[d] systematically underpaid royalties by deducting costs associated with placing gas (and its constituent products) in marketable condition." *Id.* at 1215–16. Seeing a unified pattern of defendant conduct in that allegation, the district court had certified a class that "include[d] thousands of royalty owners, whose claims [were] based on approximately 650 leases." *Id.* at 1215. But the Tenth Circuit vacated that order. *See id.* Relying in part on *Broussard*, the *XTO* court faulted plaintiffs for not "affirmatively demonstrat[ing] commonality" with respect to the lease terms. *Id.* at 1218. Although they had alleged that "an implied duty of marketability" present in "every class member's lease" made XTO's billing practices improper, they had not shown "that duty exist[ed] classwide" despite the "known variations in lease language." *Id.* And just like the plaintiff hospitals in *Sacred Heart*, the *XTO* plaintiffs could not establish a predominance of classwide issues "simply by virtue of [XTO's] uniform payment methodology." *Id.* at 1220.

In sum, multiple circuit courts have held that class certification is inappropriate where the proposed class members have materially different contractual rights against the defendant. Their logic is sound;

Rule 23 cannot be used to "enlarge … [the] substantive right[s]" of absent plaintiffs. 28 U.S.C. § 2072(b); *see Broussard*, 155 F.3d at 345. Where those rights have been fixed by contract, a defendant's common course of conduct will not paper over "the class members' [individual] legal rights and duties." *Sacred Heart*, 601 F.3d at 1170.

B. The Eighth Circuit's decision departs from other Circuits' decisions in a self-contradictory analysis.

The Eighth Circuit's opinion does not accord with the decisions of other Circuits. The court did not even address CPAY's discussion of *Sacred Heart* and related case law. *Compare* Aplt. Br. 38–39, *with* App.4–6. Instead, it offered a perfunctory and internally inconsistent analysis that both acknowledged and then ignored the material differences in the class members' contractual rights.

The Eighth Circuit recognized that each contract had "different" "negotiated pricing terms" and that "some contracts authorize some fees that plaintiffs allege were fraudulent." App.6; *see also* App.7 (noting, again, "that some contracts authorize a 'PCI Noncompliance Fee' or a '[Network] Fee'"). That should have foreclosed class certification. Instead, the Eighth Circuit asserted that determining whether a particular contract gave CPAY the right to charge a particular fee to a particular customer in a class of more than 160,000 members was "not [a] highly individualized" inquiry. App.7. In fact, the court appeared to suggest that CPAY's varying contractual rights would impact only damages calculations, which the court deemed irrelevant to certification. *See*

App.6–7 (citing *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016)); *but see Comcast*, 569 U.S. at 34 ("Questions of individual damage calculations will inevitably overwhelm questions common to the class."); *Tyson Foods*, 577 U.S. at 473 & n.2 (Thomas, J., dissenting) addressing the tension between *Comcast* and *Tyson Foods*).

The Eighth Circuit thus explicitly found dispositive differences in the class members' contractual rights but reached the incongruous conclusion that "[t]he relevant contract term was uniform." App.6. It then inexplicably acknowledged that the merchants' expert would need to review each contract individually to determine if it authorized a particular fee. App.7. The court's approach did not even comport with the plaintiffs' view of their own case. In briefing before the district court, the plaintiffs argued that it was unnecessary even to consider the individual contracts — meaning that the Eighth Circuit's affirmance relies on an individualized inquiry that plaintiffs do not propose to conduct. *See* JA393.

The consequences of the Eighth Circuit's errors are far-reaching and call out for this Court's intervention. Significantly, this is not the first time the Eighth Circuit has affirmed class certification by stretching proper procedures — and basic logic — to their breaking points. In *McKeage v. TMBC, LLC*, 847 F.3d 992 (8th Cir. 2017), the court blessed a certification process that required a "file-by-file review" of over 100,000 separate contracts to identify which among them contained the specific provision the named plaintiffs were suing over. *Id.* at 999. Both

the district court and the court of appeals relied on *McKeage* in this case, underscoring that the Eighth Circuit has a different view of what it takes for "individual" questions to be predominated by common ones.

Without this Court's intervention, these errors are likely to persist. Confronting the Eighth Circuit's opaque analysis in this case, future parties will see that the contracts in this case *did* contain variations that *directly* bore on each individual class members' personal right to hold CPAY liable. If the Eighth Circuit was correct to affirm class certification anyway, then the *Sacred Heart*, *Sprague*, *Broussard*, and *XTO* courts must have all been wrong. Only this Court's intervention can reconcile these two competing views of what Rule 23 requires.

II. The Eighth Circuit's error stems from its failure to scrutinize the district court's ruling.

In addition to creating a circuit split, both the district court and the Eighth Circuit have adjudicated this case in a way that constitutes extreme "depart[ure] from the accepted and usual course of judicial proceedings." Sup. Ct. R. 10(a). The district court did not engage with CPAY's arguments and evidence, and it did not even bother to reach the specific findings required to justify its certification order. The Eighth Circuit then supplied its own factual findings and reasoning to justify an affirmance. As a result of this irregular process, CPAY never received a fair consideration of the evidence precluding class certification. This Court can and should correct that failing.

A. The district court did not conduct a rigorous certification analysis.

This Court has long and repeatedly held that district courts must conduct a "rigorous analysis" before certifying a class under Rule 23. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982); *see Comcast*, 569 U.S. at 35; *Dukes*, 564 U.S. at 350–51. Far from an empty formality, this requirement recognizes the extraordinary nature of class-wide adjudication and aims to prevent the abridgement of substantive rights. *See Comcast*, 569 U.S. at 33–34 (citing *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979) and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623–24 (1997)). The district court's analysis in this case was not "rigorous"; in fact, it appears unfinished.

The district court's opinion contains numerous grammatical and typographical errors that undermine confidence in its conclusions. Examples include:

- "The amount of damages allegedly is over $100,000 million dollars." App.34;
- "CPAY created a scheme to have the sellers to the merchants and thereafter increase the rates and fees …." App.51;
- "Rule 23(a)(2) 'language is easy to misread' …." App.25 (quoting *Dukes*, 564 U.S. at 349);
- "Plaintiffs have clearly articulated its alleged dishonest billing actions." App.50.

More troublingly, the opinion at times does not apply — or even appear to appreciate — the requirements of class certification. "Rule 23 does not

set forth a mere pleading standard." *Dukes*, 564 U.S. at 350. Instead, "[a] party seeking class certification must affirmatively demonstrate" that the Rule's requirements "are *in fact*" met. *Id.* Yet the district court's opinion suggests at one point that the merchants had "show[n]" through their "*allegations* … that CPAY systematically raised discount and contractual rates and participated in shifting transactions … and creating unfounded fees." App.26–27 (emphasis added). Likewise, the court found Rule 23(a)(3)'s "typicality" requirement satisfied by the mere fact that Custom Hair and Precision Welding were asserting the same legal claims as the would-be class — a feature of practically every class-action complaint. *See* App.27–28. Later on, the opinion suggests that Rule 23(b)(3)'s "superiority" requirement is met merely because "*it may turn out* that a class action is the 'superior' method of adjudicating the controversy" — not that it actually *would* be superior. App.33 (emphasis added).

The court's predominance analysis, however, is truly an outlier. After laying out a string of quotations from predominance case law across the country, the district court described CPAY's argument as follows:

> Defendant argues that plaintiffs' individual claims and factual issues overwhelm the individual issues. Thus, argues defendant, this is not a superior method of adjudication. Further, defendant contends that a mere finding of liability cannot be used to determine punitive damages in the first stage. That determination argues defendant must be made at the individual stages of the

> litigation. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 434 (5th Cir. 1998); *Equal Employment Opportunity Comm'n v. JBS USA, LLC*, No. 8:10CV318, 2011 WL 13137568, at *2–3 (D. Neb. May 31, 2011) (quoting Allison and similarly concluding "that punitive damages should be part of the Phase II litigation").

App.31. Every sentence of that paragraph is flawed. CPAY obviously did not argue that "individual claims and issues overwhelm the *individual* issues"; it argued that individual issues would predominate over *common* issues. *See* JA1156–75. And CPAY did not, in fact, make any specific arguments regarding superiority, *see* JA1107, which is a separate question altogether, *see* Fed. R. Civ. P. 23(b)(3).

More importantly, though, the court's second two sentences do not even pertain to this lawsuit. CPAY's brief opposing class certification never once mentioned "punitive damages" or "the individual stages of litigation." And the district court's reliance on *EEOC v. JBS USA* and *Allison v. Citgo Petroleum Corp.* — or, more accurately, Judge Dennis's dissent in *Allison* — confirm that the court was addressing irrelevant concerns not raised in, or applicable to, this case. Both *JBS* and *Allison* are employment law precedents that have no bearing on the issues at play here. One can only assume that the court thought it was ruling on some other motion in some other suit.

Having misstated CPAY's arguments, the district court next provided the following cryptic statement on predominance:

The Court finds that "questions of law or fact in this case are common to the class members and predominate over any questions affecting only members." The proposed classes are sufficiently cohesive as to the alleged pattern of the class, more so than to the individuals. The class is easily ascertainable with or without the expert work of Mr. Olsen, and the class will become more obvious once defendant provides all the necessary data. The plaintiffs, as a whole, do in fact allege and have injury. The same evidence will be used to establish class-wide proof. Further, the common issues predominate over the individual issues. The important evidence will be ascertainable from CPAY's files, testimony and expert reports. The legal theories all turn on the same evidence. Assuming the general allegations are true, the plaintiffs in this case have made a prima facie case based on the common evidence. The only possible variations that the Court sees at this time is the computation of any damages. However, "[W]here damages can be computed according to some formula, statistical analysis, or other easy or essentially mechanical methods, the fact that damages must be calculated on an individual basis is no impediment to class certification." Here, it appears that Mr. Olsen can make such calculations based on CPAY's billing records and such would be ministerial in nature. For these reasons, the Court finds predominance requirement is clearly met.

App.31–33 (citations omitted).

The court's first few sentences bear repeating. After directly quoting Rule 23(b)(3), the court proclaims that "[t]he proposed classes are sufficiently cohesive as to the alleged pattern of the class, more so than to the individuals." App.32. What the court meant by this statement is anyone's guess. "Cohesiveness" is a requirement of Rule 23(b)(2), not Rule 23(b)(3). In addition, the court's reference to "classes" (in the plural) does not square with its decision to certify a single, expansive class in this case. *See* App.56. The court's next sentence addresses class ascertainability, for reasons unapparent and unexplained. The opinion then states that "[t]he plaintiffs, as a whole, do in fact allege and have injury" — another misplaced and irrelevant declaration. App.32.

The remainder of the paragraph addresses predominance but only in the most conclusory terms. The court says that "[t]he same evidence will be used to establish class-wide proof," but it does not say *what* evidence it is referring to or *what* that evidence will prove. App.32. It likewise states that "the common issues predominate over the individual issues," but it identifies neither the common issues nor the individual issues. App.32. The court then says that "[t]he important evidence will be ascertainable from CPAY's files, testimony and expert reports" without explaining *what* that evidence is or *why* it is especially "important." App.32. Moving on, the court improperly "[a]ssum[es] the general allegations are true" and then apparently concludes, based on its assumption, that "the plaintiffs … have made a prima facie case based

on the" (again unidentified) "common evidence." App.32.

The opinion admits "possible variations" in the amount of damages owed to each class member, but it quickly dismisses any predominance problem because the merchants' expert, Mr. Olsen, "can make [individualized damages] calculations based on CPAY's billing records." App.32. But Olsen merely computed aggregate damages figures based on the total amount of all the disputed fees. *See* JA1722. His calculations assume that CPAY had no contractual right to collect any of the fees at issue. *See id.* Olsen testified that he never read the merchant contracts and does not plan to consider them in providing his opinions. JA1725–27. In other words, Olsen's analysis deliberately ignores the actual terms of the merchant contracts, making it wholly unresponsive to CPAY's predominance arguments.

In sum, the district court's statements regarding predominance were both lacking in analysis and, in some places, conspicuously nongermane. Given the significance of certifying a class, both to defendants and absent class members, our courts should be held to a higher standard.

B. The Eighth Circuit relied on multiple "findings" that appear nowhere in the district court's analysis.

CPAY has no other choice but to ask *this* Court to address the district court's errors because the Eighth Circuit refused to do so.

The Eighth Circuit's approach to the district court's opinion could only be described as cavalier. For

example, CPAY spent much of its appellate brief explaining that the district court responded to arguments and supplied analysis from a separate and unrelated lawsuit. *See, e.g.*, Aplt. Br. 23–25. The Eighth Circuit dismissed CPAY's concerns in a footnote, calling the district court's error (of copying an order from an unrelated case) a "careless … oversight" that did no harm. App.3. If confusing CPAY's briefing with some other party's briefing from some different case was "harmless," one wonders what the Eighth Circuit *would* recognize as prejudicial. Indeed, if Rule 23's "rigorous" analysis requirement means anything, it surely must mean an analysis of the case-specific facts and issues and not a cursory analysis taken from some other case.

Moreover, a "reviewing court oversteps the bounds of its duty … if it undertakes to duplicate the role of the lower court." *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985). But the Eighth Circuit did just that — and poorly.

The Eighth Circuit's predominance analysis relied on multiple (incorrect and inconsistent) factual findings that appear nowhere in the district court's order. According to the court of appeals, "[t]he relevant contract term was uniform," App.6. But the district court did not find that, *see supra* at 23–25, and the record evidence establishes the opposite, *see supra* at 7–8. The Eighth Circuit also reasoned that sorting through the contract variations would require only a "cursory" analysis of the contracts by the merchants' damages expert. App.7. But the district court made no such finding. *See supra* at 23–25. Instead, it claimed that the merchants' expert could make

damages calculations "based on CPAY's billing records," App.32, which did not include the contracts or individualized fee arrangements. And, again, the record evidence shows that a common damages calculation would not be possible.

Finally, the Eighth Circuit asserted that "[i]f issuing banks did change interchange fees, plaintiffs' claim fails. If no change occurred, CPAY's defense fails." App.7. This critical conclusion suffers from a variety of flaws. First, that was the Eighth Circuit's own (opaquely reasoned) conclusion, not a review of the district court's work. *See supra* at 23–25. Second, while the conclusion acknowledges at least one of the merits defenses CPAY has focused on in this case, it ignores the significant individualized fact-finding required to address that defense. CPAY contends that even if plaintiffs prevail on their construction of the relevant contracts and the court concludes that those contracts prohibit certain fee changes, whether CPAY complied with those contracts requires evaluating the reasons for any fee change or increase. Merchants are differently situated on these points. The fees charged to merchants vary based on their individual contracts, just like the justification for any fee increase or change depends on the facts and circumstances CPAY evaluated in deciding to increase or change fees.

The Eighth Circuit's oversimplification of the issues only highlights its improperly permissive approach to class certification. The whole point of this Court's class-action precedents, and the reason the district court must perform a rigorous analysis in the first instance, is to avoid off-the-cuff fact-finding by the appellate court and to ensure that individualized

issues are properly considered before a class is certified.

Like the district court before it, the Eighth Circuit's work on this case does not meet the minimum quality standard litigants should expect in federal court. Moreover, because this case reflects an especially obvious departure from ordinary class action procedures, it presents a particularly clear vehicle for this Court to re-emphasize the requirements for class certification, the need for a rigorous analysis, and the proper role of an appellate court when evaluating a district court's class certification ruling. This Court should grant review.

CONCLUSION

For these reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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