NO. 21-51

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**

## REPLY IN SUPPORT OF THE PETITION


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## INTRODUCTION

CPAY urges this Court to grant review to address a split in circuit authority and to correct the serious errors committed below. The district court's class certification order is incoherent and does not reflect the rigorous analysis that Rule 23 demands. The Eighth Circuit looked past the order's obvious flaws, invented its own (erroneous) factual findings to support certification, and blessed the classwide adjudication of some 160,000 absent class members' claims despite acknowledging CPAY's materially different contractual relationships with each class member.

The merchants' brief in opposition — filed by respondents Custom Hair and Precision Welding — barely defends the lower court decisions. The merchants' inability to defend the decisions below on their own terms underscores that this Court should, at the very least, grant summary reversal. Because the lower court decisions are clearly wrong, they should not be allowed to stand.

There are also sound reasons for this Court to grant plenary review. The Eighth Circuit's decision deepens a split in authority on an important, recurring issue: Whether a class may be certified when the class claims turn on materially different contractual rights and obligations. Seeking to downplay the importance of this split, the merchants contend that the decision to certify a contract-based class action is almost always fact dependent. But they fail to acknowledge that the Eighth Circuit applies an improper "file-by-file" review rule, which end runs Rule 23. Without admitting its departure from other

courts, the Eighth Circuit allows the certification of class actions predominated by individualized issues on the view that the *plaintiffs'* damages experts can be entrusted to resolve those issues.

The Eighth Circuit's rule warrants scrutiny, and this case provides an ideal vehicle for it. A decision from this Court correcting the Eighth Circuit and permitting CPAY to litigate its individualized defenses would meaningfully alter the course of this suit. More broadly, it would provide much-needed guidance to the lower courts regarding class certification in cases involving contract-based claims and defenses.

## ARGUMENT

### I. The lower courts' errors warrant summary reversal.

CPAY has identified numerous errors in the lower-court orders that violate the requirements of Rule 23, contravene this Court's precedents, and are in conflict with approaches taken by other circuits. The merchants attempt to sweep those errors under the rug. *See* Opp.31–33. But the substandard analyses provided by the lower courts show that, at the very least, this case warrants summary reversal. The lower courts' decisions should not be allowed to remain on the books, where they will only sow confusion.

The legal errors undergirding the question presented have roots in the district court's anomalous certification order. District courts must conduct a "rigorous analysis" of all class-certification issues to ensure that classwide proceedings will not deprive

defendants and absent class members of substantive rights and due process. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982); *see Comcast v. Behrend*, 569 U.S. 27, 33–35 (2013). If that requirement has any force, the district court's order here is invalid. The district court improperly treated certification requirements as pleading standards, *see* App.26–27, approached the typicality requirement as an empty formality, *see* App.27–28, and did not even definitively conclude that class-action procedures would be superior to other means of adjudication, *see* App.33. The court then provided a predominance analysis lacking in baseline coherence. The court addressed what can only be characterized as phantom issues — issues that arise from claims and facts that have no relation to this case. *See* Pet.21. It likewise made oblique references to "the alleged pattern of the class," App.32, while failing to identify any of the supposedly "common," "important evidence" that could be used to determine classwide liability and damages, App.32–33.

Rather than correct these errors, the Eighth Circuit added to them. 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 City*, 470 U.S. 564, 573 (1985). In this case, the Eighth Circuit decided *not* to review the district court's certification analysis; instead, it invaded the district court's purview by inventing its own reasons for class certification. The Eighth Circuit made up factual findings that appear nowhere in the district court's analysis and then wielded those findings to justify an affirmance. *See* Pet.26–27. Perhaps not surprisingly, given the district court's order, the

Eighth Circuit misunderstood the record in several crucial respects. *See id.* As a result, no court engaged in the careful, rigorous analysis that is a prerequisite to class-action proceedings.

The merchants' response to CPAY's petition hardly defends these errors. The merchants brush aside the district court's incoherence, *see* Opp.31 ("[T]he district court made an error or two …."), ignore the Eighth Circuit's analysis, *see* Opp.32 (couching the Eighth Circuit's fact finding as "review [of] the facts"), and distance both issues from the question presented, *see* Opp.32–33. This Court should take that response as a tacit admission "that something unusual" did indeed "happen[] in this case." Opp.33.

The merchants' failure to defend the lower court decisions on their own terms makes this case a prime candidate for summary reversal. That relief "is warranted" when a lower court decision is "so clearly wrong," *Kalamazoo Cnty. Rd. Comm'n v. Deleon*, 574 U.S. 1104 (2015) (mem.) (Alito, J., dissenting from denial of certiorari), and this Court's intervention is needed "to correct a clear misapprehension of the" law, *Brosseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004) (per curiam). Granting summary reversal would send a strong signal that the judicial system does not tolerate radical departures from Rule 23's requirements.

## II. The Eighth Circuit's special rule for "file-by-file" contract review does not square with other circuit precedent.

Although summary reversal is warranted, there are compelling reasons the Court should grant plenary review. Contrary to the merchants' suggestions, this

case presents a straightforward legal question on which the Eighth Circuit has split from other federal appellate courts.

The Eighth Circuit affirmed class certification on grounds that substantively contradict other circuits' precedents. *See* Pet.17–19. To be sure, just like courts in the Fourth, Sixth, Tenth, and Eleventh Circuits, the Eighth Circuit acknowledged that material variations in CPAY's contractual rights against putative class members *should* preclude class certification. *See* App.6. But the Eighth Circuit then identified *outcome determinative* differences in the contracts and decided that those differences did not matter. *See* App.6–7. To justify its decision, the Eighth Circuit treated CPAY's contractual rights *not* as defenses to the merchants' breach and fraud claims, but as mere limitations on the merchants' damages calculations. *See* App.7. Reimagining the issues in this way, the Eighth Circuit reasoned that CPAY's substantive rights could be entrusted to the merchants' damages expert, who would (presumably) deal with them through a "cursory" file-by-file review of the 160,000 individual class-member contracts. App.7; *see also* App.6–7 (relying in part on *Tyson Foods, Inc. v. Bouapheakeo*, 136 S. Ct. 1036 (2016)). By casting material contract variations as a damages issue to be addressed by expert witnesses in the plaintiffs' case-in-chief, this special "file-by-file" review rule sets the Eighth Circuit apart from other appellate courts. *See* Pet.13–19; *see also McKeage v. TMBC, LLC*, 847 F.3d 992, 999 (8th Cir. 2017) (per curiam) (applying similar principles).

The merchants contend that CPAY has merely identified decisions where "courts reach[ed] different

conclusions from different sets of facts." Opp.13. According to the merchants, "[e]very circuit engages in the same analysis under Rule 23: evaluating the contracts to determine whether they are materially similar or have differences substantial enough that each individual contract must be reviewed to adjudicate the claims." Opp.14. But these arguments ignore the real issue: The Eighth Circuit deepened a split with its sister circuits by deeming the contracts "materially similar" *despite* the fact that "every one of the contracts [would] have to be considered individually." Opp.16 (quoting *Naylor Farms, Inc. v. Chaparral Energy, LLC*, 923 F.3d 779, 795 (10th Cir. 2019)). As the Eighth Circuit recognized, CPAY's rights and disclosures in the bespoke "Merchant Processing Applications" provide individualized defenses to the merchants' fraud and breach claims. *See* App.6–7. The varying contract terms prevent certain individual merchants from proving liability on either their fraud claims or their breach of contract claims. *See id.* If a merchant agreed to a particular fee, there is no fraud or broken promise; there is only a valid exercise of CPAY's contractual right to charge the agreed-upon fee. Yet even after acknowledging that the terms of each Application provide CPAY varying, individualized, contract-based defenses, the Eighth Circuit concluded that those defenses would not overshadow the common issues. *See* App.6–7. Why? Because the merchants' expert witness could "consider[]" "every one of" the 160,000 "contracts" and subsume CPAY's individualized defenses within the merchants' case for damages. Opp.16 (quoting *Naylor Farms*, 923 F.3d at 795); *see* App.7.

The merchants have not identified other circuit authorities adopting the same approach. They claim *Gray v. Hearst Communications, Inc.*, 444 F. App'x 698 (4th Cir. 2011), supports their position, *see* Opp.18, but "there [was] no dispute" in that case "that a uniform [contract] obligation exist[ed]," 444 F. App'x at 701. The same goes for *Gunnells v. Healthplan Services, Inc.*, 348 F.3d 417 (4th Cir. 2003), which concerned breach claims arising out of a single health insurance plan that the defendant insurer sold for less than a year, *see id.* at 422–23; *see also* Opp.18 (citing *Gunnells*, 348 F.3d at 428–29, where the court discusses causation issues, not contractual uniformity). Similarly, in *Zehentbauer Family Land, LP v. Chesapeake Exploration, L.L.C.*, 935 F.3d 496 (6th Cir. 2019), the issue was not whether the contracts were materially similar, but whether the plaintiffs' proof of contractual breach would necessitate individualized causation inquiries and damages calculations that would defeat predominance, *see id.* at 505–06; *see also id.* at 509 (noting that "the defendants [had] not argue[d] on appeal that any differences … in the [contract] language defeat[ed] commonality or predominance"). The Eleventh Circuit in *Allapattah Services, Inc. v. Exxon Corp.*, 333 F.3d 1248 (11th Cir. 2003), likewise noted that "all of the [contracts] were materially similar" without mentioning any specific opposition to that point from the defense, *id.* at 1261. It then concluded that the "individual issues" the defendant identified as "inherent in each [plaintiffs'] breach of contract claim" "pertained primarily to the issue of damages," *id.*, which in that case turned on the

amount of gasoline purchased by some "10,000 current and former Exxon dealers," *id.* at 1252.

The only authority the merchants identify that even remotely resembles this case is *Naylor Farms, Inc. v. Chaparral Energy, LLC*, 923 F.3d 779 (10th Cir. 2019), but it does not support them either. In that case, the defendants argued that deciding the class's breach of contract claims would require individualized inquiries into the contractual promises made to each absent class member. *See id.* at 784, 795. Unlike the Eighth Circuit, however, the Tenth Circuit recognized the contractual variations as a legitimate obstacle to certification, which the district court had dealt with appropriately. Rather than folding a file-by-file contract review into the plaintiffs' damages case, the district court defined the class as limited to only those plaintiffs whose contracts contained the particular, uniform clause at issue. *See id.* at 795. In affirming that decision, the Tenth Circuit stressed that the district court had *not* entrusted this weed-out process to the plaintiffs alone, but had instead "independently 'confirmed that' the [plaintiffs'] chart" cataloging the contract variations "was 'generally accurate.'" *Id.* at 796.

The problem here is that the Eighth Circuit did just the opposite. First it included class members with materially different Merchant Applications in the same class. Then it posited that the salient contractual variations would impact only the plaintiffs' damages calculations. Then it entrusted plaintiffs' expert to later resolve any such variations on an *individualized* basis through a unilateral review of each class member's contract. *See* App.6–7.

This Court has stressed that classwide adjudication is appropriate only when the evidence can "generate common *answers*" to the questions that bear on a defendant's liability to each plaintiff. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). In this case, even if CPAY made some common contractual promises and took some common actions in conducting its business, the fact that "some contracts authorize some fees that [the merchants'] allege were fraudulent," App.6, means that CPAY has different substantive rights against each absent class member. The Constitution and the Rules Enabling Act guarantee CPAY an adversarial litigation process to protect those rights. *See* 28 U.S.C. § 2072(b). But the Eighth Circuit thinks those rights — and the individualized defenses they provide — can be summarily determined by CPAY's adversaries through a one-sided, file-by-file review. *See* App.6–7. That conclusion departs from other circuit precedent.

## III. This case provides an appropriate vehicle for deciding the question presented.

The merchants are wrong to contend that this Court should shy away from the question presented. Their efforts to reframe their lawsuit only highlight the reasons why certiorari is warranted.

Although the merchants now contend that their fraud-based RICO and Nebraska common-law claims provide their "primary" theory of recovery, *see* Opp.1, 13, 19, that does not cure the lower courts' errors or resolve the split in authority. Neither the district court nor the Eighth Circuit drew any distinction between the merchants' fraud and contract claims for purposes of class certification. In fact, the district

court's predominance analysis did not identify *any* common or individualized issues bearing on *any* of the merchants' claims, so it could not possibly have thought the fraud claims were appropriate for classwide adjudication even if the contract claims were not. *See* App.29–33. The Eighth Circuit, for its part, addressed the fraud claims separately from the contract claims only in response to CPAY's claim-specific arguments. *See* App.5–11. Importantly, though, the Eighth Circuit affirmed in full, keeping the certification order intact and allowing the merchants to press all their claims on a classwide basis. *See* App.14. The merchants have yet to abandon their contract claims. Nor can they deny that a decision from this Court rejecting the Eighth Circuit's file-by-file review rule would meaningfully impact all of their claims.

While disputing CPAY's characterization of this case as "a contract dispute," Opp.1, the merchants ignore that all of their claims grow out of contractual relationships, and CPAY's contractual rights impact not only the merchants' breach claims but their fraud claims too. It may well be that "[t]he contract terms that matter" to the merchants' case-in-chief "are uniform," Opp.24, but the contract terms that matter to CPAY's individualized defenses are not. Just because the merchants "contend that" assent to these fees is irrelevant does not make it so. Opp.28. As CPAY has explained, the terms of each Merchant Agreement offer CPAY defenses that prevent certain class members from establishing the "promise" and "breach" elements of their contract claims as well as the "reliance," "materiality," and "damages" elements of their fraud claims. *See* Pet.5–6. If this Court

determines that the Eighth Circuit's file-by-file review rule is improper, that holding will upset all the certification analysis below.

The merchants' apparent wish for this Court to review a class action involving multiple state laws has no proper bearing on CPAY's petition. The merchants identify no such case actually before this Court. *See* Opp.3–4. They also neglect to say what supposedly pressing questions presented by such cases cry out for this Court's resolution. *See* Opp.30 (identifying the vague "issue of how to synchronize multiple states' laws"). In any event, the fact that the contracts in this case "are all governed by Nebraska law," Opp.19, only simplifies and crystalizes the question presented, making it easier for this Court to approach and answer.

Nothing the merchants have argued overcomes that this case presents an ideal vehicle for the Court to address an important area of class-action law. It was once accepted that contract-based claims are appropriate for class treatment only when the class members' contracts are the same and all class members are similarly situated. Unfortunately, the Eighth Circuit is accepting innovative approaches to class certification that treat liability issues as damages questions and pass over material differences in individual contractual rights and obligations, extinguishing defendants' rights to raise individual defenses. Correcting the Eighth Circuit's misguided approach is important to clarifying the law and preventing this rule from being applied in other cases.

* * *

The merchants pretend that CPAY has never identified individualized defenses. That just isn't true. As the Eighth Circuit recognized, some of the merchants agreed to pay the contested fees, which in turn gave CPAY contractual rights to charge those fees. Those contractual rights give rise to an individualized defense: CPAY could not have breached a contract or defrauded a merchant by charging that merchant a fee the merchant agreed to pay. The merchants refuse to recognize that defense for one obvious reason: it depends on the terms of each individual Merchant Application, and those Applications vary from merchant to merchant. By certifying this case as a class action, the district court and the Eighth Circuit robbed CPAY of the right to raise its individualized defenses. More broadly, the Eighth Circuit's errors have deepened a circuit split on an important issue that calls out for this Court's intervention. The Eighth Circuit's improper departures from both sister court precedent and the essential requirements of Rule 23 should not be allowed to stand.

## CONCLUSION

The Court should grant a writ of certiorari.

Respectfully submitted,

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