No. 23-814

IN THE

Supreme Court of the United States

VISA INC., ET AL.,
Petitioners,
v.
NATIONAL ATM COUNCIL, INC., ET AL.,
Respondents.

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

BRIEF OF THE DRI CENTER FOR LAW AND PUBLIC POLICY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes

Other Authorities

TABLE OF AUTHORITIES—Continued

Page(s)

BRIEF OF THE DRI CENTER FOR LAW AND PUBLIC POLICY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS[1]

INTEREST OF *AMICUS CURIAE*

The DRI Center for Law and Public Policy is the public policy "think tank" and advocacy voice of DRI, Inc.—an international organization of more than 12,000 attorneys who represent businesses in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers; promoting appreciation of the role of defense lawyers in the civil justice system; and anticipating and addressing substantive and procedural issues germane to defense lawyers and the fairness of the civil justice system. The Center participates as an *amicus curiae* in this Court, federal courts of appeals, and state appellate courts in an ongoing effort to promote fairness, consistency, and efficiency in the civil justice system.

To promote these objectives, The Center participates as *amicus curiae* in cases that raise issues important to DRI's membership, their clients, and the judicial system, including a number of cases raising important issues concerning class-action practice. *See, e.g.*, *Tyson Foods, Inc.* v. *Bouaphakeo*, 577 U.S. 442 (2016); *Comcast Corp.* v. *Behrend*, 569

[1] This brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. DRI notified all parties of its intent to file this brief on February 16, 2024.

U.S. 27 (2013). DRI's members must regularly defend their clients against proposed class actions in a wide variety of contexts.

The issue raised here—the watering down of the rigorous analysis required for class certification—can have considerable, and usually dispositive, effect on class actions in a wide range of contexts from employment discrimination to products liability, and securities to municipal liability. DRI's members regularly face the precise issue raised by petitioner, and their clients are affected by the erosion of the rigorous analysis standard adopted by this Court not that long ago. This Court's review is essential to prevent unseemly, improper, and unfair forum-shopping, and to prevent the abuse of the class action device that the District of Columbia's not-really-rigorous analysis of predominance allows.

INTRODUCTION AND SUMMARY

The District of Columbia Circuit affirmed certification of a class comprised of hundreds of millions of individuals even though the district court failed to rigorously assess whether common issues predominated and despite a material dispute as to whether the class contained many uninjured persons.

In reaching that result, the court of appeals acknowledged that the district court's analysis was "arguably" contrary to this Court's precedents, "surprising and unfortunate," and "terse." App. 9a. But because the court of appeals thought that the method the plaintiffs proposed to show classwide impact had the appearance of validity, class certification was warranted. But the standard for class certification is not mere plausibility, as the court of appeals suggests.

Petitioners have persuasively demonstrated that this Court should grant review. DRI does not separately address the merits of the Petitioners' arguments but seeks to further explain the increased potential for abuse that results from watering down rigorous analysis to merely whether the plaintiffs' evidence in support of a Rule 23 factor is colorable or appears to be valid.

The frequently insurmountable pressure to settle even questionable claims because of class certification is by now well recognized by this Court and Congress. The question of whether a class can be certified is most often the determining issue in a putative class action, the result far more important to the outcome than the merits of the underlying dispute. Where, as

here, a court foregoes undertaking a rigorous analysis and instead defers to colorable theories and appearances without resolving factual disputes that test classwide impact and predominance, class certification becomes easier with the attendant increase in pressure to settle.

The harms from accepting a less-than-rigorous analysis detrimentally affects defendants and class members too, as this case demonstrates. Here, the Petitioners identified that the Respondent's theory of classwide impact brought numerous uninjured individuals into the class without a common method for exclusion. Where, in the normal course, class certification results in settlement, the uninjured class members drive up the settlement value and attendant attorney fee to the detriment of defendants who pay to resolve non-existent injuries. And the presence of uninjured class members dilutes the available funds for those who actually suffered a real injury. Thus, watering down rigorous analysis of class certification comes at the expense of fairness to the defendant and potentially to injured class members as well.

As DRI's members can attest, the problem of courts watering down the rigorous analysis standard is not unique to the D.C. Circuit. Some circuits have rejected wayward decisions from the district courts that have applied something other than rigorous analysis. Others, including the Eighth and Ninth Circuits, have also approved watered-down standards. And these decisions embolden efforts to certify classes without rigorous analysis in the anticipation that the appellate courts will not review most class certification decisions before settlement. To prevent

the degradation of the rigorous-analysis standard and the resultant increased likelihood of abuse of the class-action device, certiorari should be granted.

REASONS FOR GRANTING THE PETITION

I. The Court should grant certiorari to prevent the watering-down of the rigorous analysis standard.

This case arises from the most important decision rendered in any putative class action lawsuit: whether or not to certify a plaintiff class. "Under Rule 23, certification is the key moment in class-action litigation: It is the 'sharp line of demarcation' between 'an individual action seeking to become a class action and an actual class action.'" *In re Marriott Int'l, Inc.*, 78 F.4th 677, 686 (4th Cir. 2023) (citation omitted); *see also Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 339 (1980) ("A district court's ruling on the certification issue is often the most significant decision rendered in . . . class action proceedings"). Courts' failure to rigorously apply Rule 23 to ensure that the common issues predominate over individualized issues and that class members have standing increases the well-recognized risks of abuse posed by the class-action device.

Class certification under Rule 23 is uniquely consequential. By certifying a class, the trial court "dramatically affects the stakes for defendants" and applies "insurmountable pressure on defendants to settle," in ways that an individual action would not. *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). By exposing the defendant to hundreds (or in this case hundreds of millions) of aggregated claims, certification "makes it more likely that a defendant will be found liable" and subject to "significantly

higher damage awards." *Ibid*. "The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low." *Ibid.* These settlements "have been referred to as judicial blackmail," *id.*, and the "*in terrorem* settlement pressures brought to bear by certification," *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 296 n. 7 (2014) (Thomas, J., concurring), often mark an inflection point in the district court that, as a practical matter, forces the defendant to settle.

Congress has recognized this dynamic as well. In enacting the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4, members of Congress expressed considerable concern that, "[b]ecause class actions are such a powerful tool, they can give a class attorney unbounded leverage." S. Rep. No. 109-14, at 20 (2005). "Such leverage can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits." *Ibid*.

Well over half of all class actions have resulted in settlements over the past five years—including over 73% of class actions in 2021. *See* 2023 Carlton Fields Class Action Survey, 22 (2023), available at https://ClassActionSurvey.com. Certification decisions have resulted in over a hundred billion dollars being paid out over the past two decades in class-action settlements across the country. *Olean Wholesale Grocery Coop., Inc.* v. *Bumble Bee Foods LLC*, 31 F.4th 651, 685 (9th Cir. 2022) (Lee, J., dissenting.) "It is no secret that certification 'can coerce a defendant into settling on highly disadvantageous terms regardless of the merits of the suit.'" *Chavez* v. *Plan Benefit Servs., Inc.*, 957 F.3d 542, 547 (5th Cir. 2020).

In addition to the direct cost of class settlement, class-action litigation imposes onerous litigation costs on the target defendant. In 2022, companies spent a record $3.5 billion on class-action defense. *See* 2023 Carlton Fields Class Action Survey, 2. This spending was driven by claims getting larger, and by the simple fact that more companies than ever are facing class actions. *Ibid*.

The decision to certify a class of plaintiffs uniquely raises the stakes of civil litigation. Although certification under Rule 23 is procedural, it marks a turning point in the litigation by defining the number of claims and the scope of the defendant's potential aggregate liability. The decision to certify a class and the determination of the number and types of plaintiffs that comprise the class are often more important than the merits of the claims asserted. Simply put, the class certification decision is the whole ball game in class action litigation.

Recognizing these unique dynamics, this Court has repeatedly stressed that a district court is required to scrutinize all material evidence pertaining to class certification. Rule 23 "imposes stringent requirements for certification that exclude most claims." *Am. Exp. Co.* v. *Italian Colors Rest.*, 570 U.S. 228, 229 (2013). To obtain the exceptional ability to pursue claims on behalf of a class of plaintiffs, "a party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with Rule 23." *Comcast*, 569 U.S. at 33.

The plaintiff seeking to certify a class must "'be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact,' typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a)." *Ibid*. This

is much more than a "mere pleading standard," and the Rule 23(a) analysis frequently "overlap[s] with the merits of the plaintiff's underlying claim," because "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id*. at 33-34.

The issue presented by this Petition is the additional question of predominance, and the plaintiff is required to "satisfy through evidentiary proof" that common issues of fact and law predominate under Rule 23(b)(3). *Comcast*, 569 U.S. at 33; Fed. R. Civ. P. 23(b)(3). "Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)," and requires the district court to take a "close look" at whether common questions predominate when conducting its "rigorous analysis" of whether the plaintiff has satisfied each Rule 23 criteria. *Comcast*, 569 U.S. at 33. The reason for this heightened scrutiny is because Rule 23(b)(3) is an "adventuresome innovation" that is intended to address "situations in which class action treatment is not as clearly called for." *Comcast*, 569 U.S. at 34 (cleaned up).

Here the district court certified several Rule 23(b)(3) plaintiff classes consisting of millions of class members—perhaps so many as a majority of the U.S. population. Despite the breadth of that decision, the district court's "notably terse" predominance analysis only spanned a few pages of its opinion. That brevity was achieved in part by applying the wrong standard; the district court began its predominance analysis by stating that "plaintiffs, at this stage of the proceedings, need only demonstrate a colorable method by which they intend to prove class-wide impact." App. 37a.

This is precisely the approach that this Court rejected in *Comcast*, where it reiterated that district courts are required to rigorously analyze the plaintiff's evidence of classwide impact, "even when that requires inquiry into the merits of the claim." 569 U.S. 27 at 35. This obligation includes "entertain[ing] arguments against respondents' damages model that [bears] on the propriety of class certification," even when those arguments "would also be pertinent to the merits determination." *Id*. at 34; *see also In re Allstate Corp. Sec. Litig.*, 966 F.3d 595, 603 (7th Cir. 2020) ("If the parties dispute factual issues that are material under Rule 23, a court must 'receive evidence . . . and resolve the disputes before deciding whether to certify the class.'").

It may be, as respondent contends, that the respondent's model demonstrated class-wide impact, but it seems more likely, as petitioners explained, that the model was in-fact "hopelessly flawed" because it swept in substantial numbers of uninjured plaintiffs without any mechanism for removing those individuals. The more fundamental concern, however, is the D.C. Circuit's holding that the district court's obligation was merely to determine whether the plaintiff's proposed model *appeared* to be valid, and that it had no duty to resolve material factual dispute regarding that model raised by the defendants at the certification stage. App. 13a.

Although the D.C. Circuit cited and purported to rely on *Comcast*, its deferential approach to Rule 23 will result in district courts performing a "rigorous analysis" in name only. The D.C. Circuit excused the district court's failure to analyze defendant's evidence that the proposed classes included uninjured members that could not be weeded out, finding that the

district court could simply credit the respondent's evidence by determining that the respondent's model contends that all class members were injured "by its own terms." App. 24a. Viewing the issue in the light most favorable to the party seeking class certification, while deferring any substantive analysis of contrary evidence, hardly comports with the level of rigorous evidentiary scrutiny that this Court requires before a district court certifies a class. *Comcast*, 569 U.S. at 33-35.

The D.C. Circuit's deferential approach to class certification also raises significant constitutional concerns regarding the class members' Article III standing. "In an era of frequent litigation"—and especially in "class actions"—"courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 146 (2011). "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy." *Spokeo, Inc.* v. *Robins*, 578 U.S. 330, 338 (2016). The doctrine developed "to ensure that federal courts do not exceed their authority as it has been traditionally understood," and it "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Id.*

This Court has recently affirmed that in a class action, "[e]very class member must have Article III standing in order to recover individual damages." *TransUnion* v. *Ramirez*, 594 U.S. 413, 431 (2021). "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Ibid.* Although *TransUnion* did not reach the issue of whether it was ever appropriate to *certify* a class that includes uninjured class members, at a minimum a "rigorous analysis" of the evidence should

have addressed and rigorously analyzed the petitioner's evidence that respondent's common evidence of class-wide impact sweeps in a significant number of uninjured plaintiffs, and that the model is incapable of excluding those uninjured plaintiffs through common proof.

The district court's failure to substantively examine and resolve this dispute before certifying the class, and its decision to punt that issue to the merits stage glosses over the fundamental requirement that any plaintiff must have standing "at the outset of the litigation." *Friends of the Earth, Inc.* v. *Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000); *see Davis* v. *FEC*, 554 U.S. 724, 734–35 (2008). This is because "a failure of the plaintiff's standing is a failure of the court's subject-matter jurisdiction." *Fox* v. *Saginaw Cnty., Mich.*, 67 F.4th 284, 294–95 (6th Cir. 2023) (citation omitted).

Recognizing this dynamic, the Second Circuit has cautioned district courts against certifying classes that contain members who lack standing. *See Denny* v. *Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006 ("[N]o class may be certified that contains members lacking Article III standing.").

The question presented here, whether material factual disputes regarding predominance (i.e., classwide impact) must be resolved at the certification stage, is important in many putative class actions. By allowing the district court to defer that issue to the merits stage, the D.C. Circuit's approach increases the likelihood that classes containing uninjured class members will be certified. Under the D.C. Circuit's ruling, a plaintiff need only find an expert who can develop a model showing class-wide impact on its own terms. That plaintiff can be confident that so long

their expert presents a "colorable" methodology, further scrutiny of that opinion, and whether it sweeps in uninjured class members that cannot be removed through common proof, will be deferred to the merits stage. App. 24a. This will incentivize plaintiffs to pursue overbroad classes at the certification stage that sweep in class members that have not suffered any cognizable injury.

Certifying overinclusive classes intensifies the pressure that any class certification order puts on a defendant to settle. The likelihood that the case will settle after certification but before the case is adjudicated on the merits also harms the injured class members. As a practical matter, class-action plaintiffs who obtain certification of an overbroad plaintiff class have little incentive to find a reliable method to separate the uninjured class members from the injured class members. They obtain increased leverage from certifying an overinclusive class, leverage that enhances their extraction of a ransom from defendants. Any concerns that the class actually includes a number of uninjured plaintiffs is likely to fall to the wayside, as class counsel seeks to reach a class settlement before any merits adjudication, which will result in a larger common fund (and higher attorney fees). The DC Circuit's not-really-rigorous analysis will result in redistributing settlement funds away from class members who are actually injured and pay them to class members who have not suffered any injury and have no standing.

Although *TransUnion* reviewed a final judgment instead of an interim class-certification decision, its procedural history brings this problem into focus. There, the district court certified a class that included 8,185 individuals. *TransUnion*, 594 U.S. at 421.

Rather than settle, the defendant litigated the case through the increasingly rare step of trying the case on the merits, where the jury awarded over $60 million in damages, based on $7,337.30 awarded to each class member. *Id.* 421-22.

This Court ultimately held that 6,332 of the 8,185 class members—a full 77.4%—had not suffered any concrete harm and lacked Article III standing. *Id.* at 442. Had the defendant not endured the trial and massive judgment and then appealed all the way to this Court, it would have been required to pay $46 million to plaintiffs who had no injury whatsoever. Similarly, had the defendant acted like most class-action defendants (i.e. defendants with lesser financial resources), it presumably would have paid funds to be divided among class members, the vast majority of which had not suffered any injury whatsoever but whose presence would drive up the settlement amount.

It offends the Constitution and Rule 23 to allow uninjured plaintiffs to recover simply by being lucky enough to fall within the definition of a certified class. But that is the inevitable outcome when a district court affords prima facie validity to a plaintiff's class-wide-injury model and refuses to analyze or resolve material factual questions at the certification stage as to whether that model sweeps in and fails to exclude uninjured class members. When district courts adopt a less-than-rigorous analysis in the interest of efficiency, it comes at the expense of fairness to the defendant and frequently to the actually injured class members as well.

II. The Court should grant the Petition to ensure consistent application of rigorous analysis review among the circuits.

Although each circuit requires district courts to conduct a "rigorous analysis" review, there is significant variance among the circuits in practice. The Petition discusses these variations in detail, and DRI will not repeat that analysis here. But to summarize, the D.C. Circuit has joined the Eighth and Ninth Circuits in finding that material factual disputes among the parties pertaining to class certification need not be resolved, so long as the plaintiff's proposed method appears to be valid. By contrast, the Second, Third, Fifth, and Eleventh Circuits require district courts to resolve material factual disputes that bear on Rule 23 requirements. The latter approach comports with this Court's requirement that district courts rigorously analyze the evidence to ensure that Rule 23 is satisfied; the former does not.

The issue presented by this Petition is ripe for review, and the decision by the D.C. Circuit is a favorable vehicle for this Court to clear up the confusion several circuits have developed in applying "rigorous analysis" review. In addition to applying the wrong standard, the D.C. Circuit affirmed a "questionable" district court certification decision that relied on outdated law and contained a "notably terse" analysis of the record. App. 9a. Despite these criticisms, the D.C. Circuit excused the defects and took it upon itself to conduct its own analysis of the evidence, on the district court's behalf, to conclude that a "rigorous analysis" was performed. App. 8a.

Allowing decisions like these to stand will simply embolden district courts to certify plaintiff classes and

then let the chips fall where they may. Applying the D.C. Circuit's ruling, courts can uncritically accept the certification evidence presented by the plaintiff, disregard contrary evidence presented by the defendant, and then label it a "rigorous analysis," knowing that the decision will not be overruled. *See* Donald R. Frederico, Esq., *The Arc of Class Actions: A View from the Trenches*, 32 Loy. Consumer L. Rev. 266, 277 (2020) ("Some judges, both in the district courts and, to a lesser extent, in the circuit courts, may feel empowered to boldly distinguish Supreme Court precedent, knowing that the Court is unlikely ever to review their rulings.")

Divergent practices among federal courts on important issues of procedure, like the Rule 23 issues presented here, also inevitably give rise to forum shopping. This Court has repeatedly warned "that it would be unfair for the character or result of a litigation materially to differ" merely because of where the suit is filed. *Hanna* v. *Plumer*, 380 U.S. 460, 467 (1965).

By affirming a class certification order that certifies a class based on "colorable" evidence of classwide impact, the decision below provides a strong incentive for plaintiffs to choose to litigate in the D.C. Circuit or in the other circuits that apply this deferential version of Rule 23. Class certification is a high-stakes issue that, in practice, often resolves many cases before they ever reach the merits. *See supra* at 5-7. Given the central importance of class certification, plaintiffs will seek out jurisdictions that apply procedural rules that increase the likelihood of a class being certified. And the most attractive defendants targeted for high-stakes class actions often have nationwide presence, allowing plaintiffs

that allege class actions arising from nationwide conduct to have their pick of the circuits.

Unless this Court intervenes, the deferential approach to class certification adopted by the D.C. Circuit may well become the nationwide approach, as plaintiffs gravitate towards the Eighth, Ninth, and D.C. Circuits and away from Courts that faithfully apply this Court's precedents, such as the Second, Third, Fifth, and Eleventh Circuits.

CONCLUSION

For these reasons, and those stated by petitioner, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

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