No. 23-814

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.,

Respondents.

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

BRIEF IN OPPOSITION OF RESPONDENTS

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QUESTION PRESENTED

Did the court of appeals correctly hold that the district court did not abuse its discretion in certifying three different classes based on its finding that well-established and reliable evidence showed that injury to all class members was capable of resolution on a classwide basis?

CORPORATE DISCLOSURE STATEMENT

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

Pursuant to this Court's Rule 29.6, Respondents state that no Respondent has a parent company, and no publicly-held company owns 10% or more of the stock in any Respondent.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

BRIEF IN OPPOSITION OF RESPONDENTS 1

COUNTERSTATEMENT 4

A. Factual Background 4

B. Proceedings On Defendants' Motion To Dismiss 6

C. The District Court's Grant Of Class Certification 8

D. The Court Of Appeals Decision 10

REASONS FOR DENYING THE WRIT 15

I. THE COURT OF APPEALS RESOLVED AN UNREMARKABLE QUESTION: WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN CONCLUDING PLAINTIFFS SHOWED PREDOMINANCE OF COMMON ISSUES WITH RELIABLE EVIDENCE NOT CHALLENGED UNDER *DAUBERT* 15

II. THERE IS NO CIRCUIT CONFLICT OVER WHETHER RELIABLE AND WELL-ESTABLISHED EVIDENCE CAN ESTABLISH THE BASIS FOR CLASS CERTIFICATION 20

III. THE QUESTION AT ISSUE HERE DOES NOT WARRANT THIS COURT'S REVIEW 23

IV. THE COURT OF APPEALS CORRECTLY HELD THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION 25

A. The Court Of Appeals Adopted The Correct Legal Standard 25

B. The Court Of Appeals Correctly Applied The Legal Standard To The Facts 27

CONCLUSION 32

TABLE OF AUTHORITIES

Pages

Cases

Amgen Inc. v. Conn. Ret. Plans & Tr. Funds,
568 U.S. 455 (2013) 3, 25

Brown v. Electrolux Home Prods., Inc.,
817 F.3d 1225 (11th Cir. 2016) 22

Califano v. Yamasaki,
442 U.S. 682 (1979) 16

Comcast Corp. v. Behrend,
569 U.S. 27 (2013) 2, 17, 27

Daubert v. Merrell Dow Pharms., Inc.,
509 U.S. 579 (1993) 15, 21, 22, 26

Green-Cooper v. Brinker Int'l, Inc.,
73 F.4th 883 (11th Cir. 2023) 22

Hargrove v. Sleepy's LLC,
2023 WL 3943738 (3d Cir. June 12, 2023) 21

In re Initial Public Offerings Sec. Litig.,
471 F.3d 24 (2006) 21

In re Lamictal Direct Purchaser Antitrust Litig.,
957 F.3d 184 (2020) 21

In re Rail Freight Fuel Surcharge Antitrust Litig.,
725 F.3d 244 (D.C. Cir. 2013) 23

In re Rail Freight Fuel Surcharge Antitrust Litig.,
934 F.3d 619 (D.C. Cir. 2019) 23

In re U.S. Foodservice Inc. Pricing Litig.,
729 F.3d 108 (2d Cir. 2013) 21

Kleen Prods. LLC v. Int'l Paper Co.,
831 F.3d 919 (7th Cir. 2016).....26

Kurtz v. Costco Wholesale Corp.,
818 F. App'x 57 (2d Cir. 2020).....21

Nat'l ATM Council, Inc. v. Visa, Inc.,
922 F. Supp. 2d 73 (D.D.C. 2013).....6

Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651 (9th Cir. 2022) (*en banc*).....24

Osborn v. Visa Inc.,
797 F.3d 1057 (D.C. Cir. 2015).....6, 7

Prantil v. Arkema Inc.,
986 F.3d 570 (5th Cir. 2021).....22

Reiter v. Sonotone Corp.,
442 U.S. 330 (1979).....16

Starkist Co. v. Olean Wholesale Grocery Cooperative, Inc., No. 22-131 (cert. denied Nov. 14, 2022).....3

Tyson Foods, Inc. v. Bouaphakeo,
577 U.S. 442 (2016).....3, 8, 25, 26, 27, 30, 31

Visa, Inc. v. Osborn,
580 U.S. 993 (2016).....8

Statutes

15 U.S.C. § 1 4

Rules

Fed. R. Civ. P. 23(b).....2, 8, 15, 18, 19, 32

Fed. R. Evid. 702 26

BRIEF IN OPPOSITION OF RESPONDENTS

In a unanimous, unpublished, *per curiam* opinion, the D.C. Circuit applied well-settled law to affirm certification of each of the three classes in these related cases, finding that the district "court's certification order does not rest on an incorrect legal standard" and discerning "no substantive inadequacy or other legal error in the district court's evidentiary assessment." Pet. App. 11a. As the D.C. Circuit explained, the district court "confirmed not only that plaintiffs offered common proof of injury, but also that their methods of establishing injury were reasonable, well accepted, and reliable." Pet. App. 14a. It further held that "the record supports the district court's finding that all three plaintiff groups demonstrated that common evidence will predominate in proving each element of their claims." *Id.* (internal quotation marks omitted). The district "court's review of the evidence comports with Supreme Court holdings that require district courts to closely review the record at the class certification stage—and thereby to ensure that plaintiffs provide a reliable method for establishing class-wide injury [ ] that is tied to plaintiffs' theory of liability […]." *Id.* (citation omitted).

The D.C. Circuit expressly applied the "reliability" standard Defendants argued was appropriate for examining class certification evidence. *See infra* at 11. The careful and fact-specific application of that standard to the particular evidence supporting the three class certifications does not warrant this Court's review.

Defendants' Petition rests entirely on the misleading characterization that the D.C. Circuit held that any "colorable" method of showing injury will satisfy the requirements of Rule 23. It did not. The D.C. Circuit held that the district court had not applied an overly lenient standard and that it had adhered to the demands of *Comcast Corp. v. Behrend*, 569 U.S. 27, 34-36 (2013), and D.C. Circuit precedent by confirming the evidence to be "reasonable" and based on "well established" and "well-accepted methodologies" showing class-wide injury. Pet. App. 12a-14a. Accordingly, the court of appeals identified no error—let alone abuse of discretion—in the district court's conclusion that the evidence of common injury to each of the classes was reliable and sufficient evidence of injury to *all* class members. Pet. App. 15a-24a.

There is no circuit conflict regarding whether the kind of reliable and well-established evidence adduced in support of class certification in these cases is sufficient for purposes of determining the predominance of common issues under Fed. R. Civ. P. 23(b)(3). Defendants cite four circuit court decisions, none of which rejects reliable evidence as insufficient. Indeed, other cases from these circuits, ignored by Defendants, explicitly adopt the same reliability standard the D.C. Circuit applied here with Defendants' urging.

Because Defendants do not contest the legal standard the D.C. Circuit actually applied (as opposed to their mischaracterization), they vastly overstate the supposed significance of the court of appeals' unpublished decision. The D.C. Circuit itself

observed, "[t]he certification decision does not pose an important and unsettled, class action-related legal question." Pet. App. 8a. And this Court recently denied a petition for certiorari seeking review of the legal standards for evaluating evidence on class certification. *See Starkist Co. v. Olean Wholesale Grocery Cooperative, Inc.*, No. 22-131 (cert. denied Nov. 14, 2022). Moreover, this case is a poor vehicle to address questions relating to class certification evidentiary standards because Defendants advocated below the exact same reliability standard that the court of appeals adopted.

The D.C. Circuit correctly held there was no error, let alone abuse of discretion, in the district court's certification order. While Defendants now appear to suggest the D.C. Circuit should have resolved battles of the experts, they conceded the opposite view below. *See* Pet. App. 25a. In any event, Defendants' argument contradicts the principle that predominance "requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 459 (2013); *see also Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 459 (2016) ("Reasonable minds may differ as to" the merits of the challenges to the expert evidence, but "[r]esolving that question … is the near-exclusive province of the jury."). Based on a careful review of the record and the meticulous application of well-settled case law to the particular facts of these cases, the D.C. Circuit concluded there was no abuse of discretion in the district court's finding that Plaintiffs had adduced reliable, class-wide evidence of injury to all three classes. Defendants simply ignore the abuse

of discretion standard of review and the D.C. Circuit's refutation of their factual arguments. Such unremarkable factual disputes provide no basis for certiorari.

For these reasons, the Petition should be denied.

COUNTERSTATEMENT

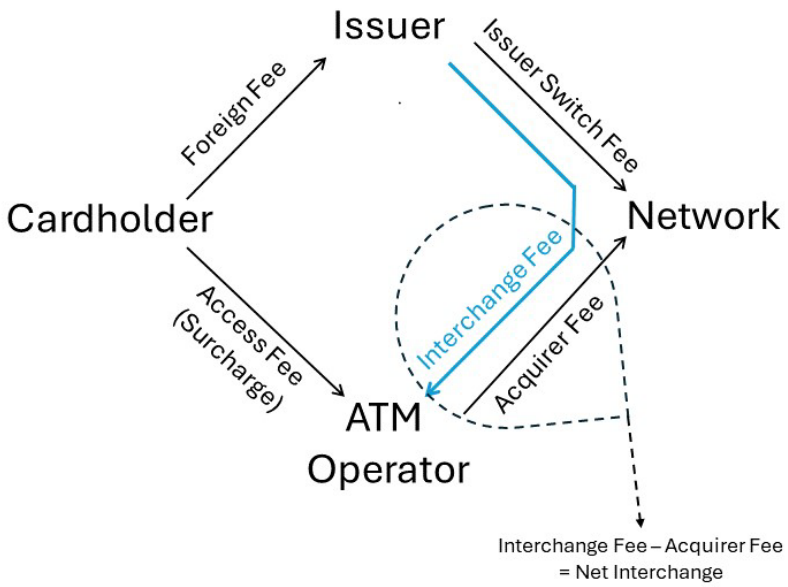
A. Factual Background

Respondents are independent (non-bank) ATM operators and two groups of consumers that in 2011 filed three separate class action complaints under Section 1 of the Sherman Act, 15 U.S.C. § 1. Pet. App. 27a. Although customers often use ATMs owned and operated by their own banks, they sometimes pay an "access fee" or "surcharge" to use an ATM that is not affiliated with their bank, conducting what is referred to as a "foreign" ATM transaction. *Id.*

All three classes challenge Defendants' ATM access fee restraints ("Access Fee Rules"). The Access Fee Rules "prohibit ATM operators from charging access fees for transactions processed over Visa or Mastercard networks that are higher than any access fee they charge for transactions processed over alternative networks." Pet. App. 29a.

Whenever a foreign ATM transaction occurs, the ATM terminal must communicate with the customer's bank through an ATM network. *Id.* Defendants Visa and Mastercard operate several of the ATM networks that plaintiffs utilize during foreign ATM transactions. *Id.*

Foreign ATM transactions involve a set of fees passed among the participants.



When an ATM operator originates an ATM transaction, it receives an "interchange fee" from the card-issuing bank, out of which it pays an "acquirer fee" to the ATM network over which the transaction is routed. *See* JA3071.[1] The ATM Operators' revenue from the transaction (in addition to a surcharge paid by the cardholder) is the net of these two fees, often called the "net interchange." *See* JA2274, JA2283, JA2547. Surcharges paid by consumers are the only other source of revenue for ATM operators. *See* JA2009, JA2329, JA2337, JA2351. Thus, if acquirer fees increase, net interchange decreases, and ATM deployers lose revenue. *See* JA2547; *infra* Part II.

[1] "JA__" refers to the Joint Appendix filed in the court of appeals.

By the operation of the challenged Access Fee Rules, ATM operators are prohibited from setting surcharges at a given ATM terminal that vary according to the particular network enabled on the cardholder's card, even though the acquirer fee deducted by the different networks can vary by as much as $0.60/transaction. That is, the ATM Access Fee Rules prohibit ATM deployers from charging lower access fees for transactions over lower cost networks.

Members of the ATM Operator Class are approximately 3,400 independent (non-bank) ATM operators suing to recover the overcharge portion of anticompetitive acquirer fees assessed by Defendants on domestic, surcharged-bearing cash withdrawals transacted over Defendants' ATM networks at Class Members' ATMs. Pet. App. 29a. Members of the *Mackmin* Class are consumers who paid ATM surcharges to withdraw cash from bank-operated ATMs in a foreign ATM transaction. *Id.* Members of the *Burke* Class are consumers who paid surcharges for a domestic cash withdrawal transaction at an independent ATM. Pet. App. 29a-30a.

B. Proceedings On Defendants' Motion To Dismiss

On February 13, 2013, the district court dismissed Plaintiffs' First Amended Complaints. *See Nat'l ATM Council, Inc. v. Visa, Inc.*, 922 F. Supp. 2d 73 (D.D.C. 2013). On August 4, 2015, the court of appeals (Wilkins J., joined by Tatel and Srinivasan, JJ.) reversed, holding that the complaints stated claims for violation of the antitrust laws. *Osborn v. Visa Inc.*, 797 F.3d 1057, 1063 (D.C. Cir. 2015). The court of

appeals explained why the existence of an agreement to restrain trade was properly alleged, holding that "the member banks developed and adopted the Access Fee Rules when the banks controlled Visa and MasterCard," and those "rules protected Visa and MasterCard from competition with lower-cost ATM networks, thereby permitting Visa and MasterCard to charge supra-competitive fees." *Id.* at 1066. The court therefore concluded: "The allegations here—that a group of retail banks fixed an element of access fee pricing through bankcard association rules—describe the sort of concerted action necessary to make out a Section 1 claim." *Id.* at 1066-67. The court also explained that Plaintiffs had established standing based on economic injury "susceptible to proof at trial" and "based on standard principles of supply and demand." *Id.* at 1065 (emphasis in original, quotation marks omitted).

This Court granted Defendants' petition for certiorari. 579 U.S. 940 (2016). However, one day after Defendants filed their merits reply brief, this Court dismissed the writ of certiorari as improvidently granted:

> These cases were granted to resolve whether allegations that members of a business association agreed to adhere to the association's rules and possess governance rights in the association, without more, are sufficient to plead the element of conspiracy in violation of Section 1 of the Sherman Act. After having persuaded us to grant certiorari on this issue, however, petitioners chose

> to rely on a different argument in their merits briefing. The Court, therefore, orders that the writs in these cases be dismissed as improvidently granted.

Visa, Inc. v. Osborn, 580 U.S. 993 (2016) (cleaned up).

C. The District Court's Grant Of Class Certification

Following remand and discovery, each of the three Plaintiff groups moved for class certification. The three motions were accompanied by voluminous documentary evidence, expert economic analysis of significant magnitudes of empirical data, and expert statistical models showing class-wide injury. Defendants did not challenge the admissibility of any of the expert opinions.

The district court granted certification under Rule 23(b)(3) for all three classes. For the *Burke* and *Mackmin* Classes, the court additionally certified classes for injunctive relief under Rule 23(b)(2), Pet. App. 35a, which Defendants did not challenge on appeal.

The court recognized that the predominance inquiry for Rule 23(b)(3) damages classes "'calls upon courts to give careful scrutiny to the relation between common and individual questions in a case.'" Pet. App. 36a (quoting *Tyson*, 577 U.S. at 453). Accordingly, the court conducted a "careful review of the parties' submissions" to conclude that "all three plaintiff groups have demonstrated that common evidence will predominate in proving each element of their claims." Pet. App. 36a-37a. First, "whether the

[Access Fee] Rules amount to an unreasonable restraint on trade is a common question to all class members." Pet. App. 36a. For the element of injury, "plaintiffs have offered means of proving the anti-competitive impact of defendants' conduct that are reasonable and well established." Pet. App. 38a.

The court then discussed that evidence for each of the classes.

For the *Burke* Class, the court noted that "plaintiffs' expert, Dr. Lehr, points to significant academic literature that in competitive markets, industry-wide taxes are fully incorporated into industry-wide prices." *Id.* In addition, Dr. Lehr "us[ed] data sets including Visa's own data to calculate industry-wide overcharges," and his "overcharge damages model provides for class-wide resolution of damages using well-accepted methodology for establishing injury and damages." *Id.*

For the *Mackmin* Class, the court acknowledged each form of proof marshalled by Professor Carlton, observing that his opinions were rooted in "economic theory and empirical studies, defendants' own documents, market structure analysis, and empirical analysis of transactional data." *Id.* And looking at Professor Carlton's damages model, it provides a "well-accepted methodology for class-wide resolution." Pet. App. 39a.

And for the ATM Operator Class, because the court found that "individualized inquiries would not be necessary to ascertain the fees paid by each class member," it accepted Plaintiffs' evidence that "aggregate, class-wide damages are directly calculable

from the total number of transactions processed by each of defendants' networks using a reliable estimate of the extent of the anticompetitive overcharge." *Id.* The court noted that the "ATM Operator plaintiffs will gain significant economies of time and expense by class litigation given the dearth of individualized issues of either liability or damages." Pet. App. 40a-41a (quotation marks omitted).

Finally, the court explained that class actions were clearly superior because "[i]n complicated antitrust cases such as these with tens of thousands of potential class members and so few individualized issues, requiring individual litigation of each class member's claims would merely multiply the number of trials with the same issues and evidence." Pet. App. 41a (quotation marks omitted).

D. The Court Of Appeals Decision

In a unanimous, unpublished, *per curiam* opinion, the court of appeals (Pillard, Edwards, Rogers, JJ.) affirmed. Pet. App. 1a-25a. The court explained that it took the interlocutory appeal under Rule 23(f) even though "[t]he certification decision *does not pose an important and unsettled, class action-related legal question* that we must resolve. Nor does it show manifest error by ignoring binding, on-point precedent." Pet. App. 8a (emphasis added).

On the merits, the court held that "[t]he court's certification order does not rest on an incorrect legal standard." Pet. App. 11a. The court "discern[ed] no substantive inadequacy or other legal error in the district court's evidentiary assessment." *Id.*

The court observed that "[t]o support certification based on predominance, plaintiffs' evidence must show their claims are susceptible to common proof." *Id.* "The rigorous analysis a district court is required to conduct in support of its certification order sometimes involves probing the merits of plaintiffs' claims, which the Supreme Court has made clear is permissible insofar as necessary to ensure that the Rule 23 requirements are met." *Id.* The court made clear that not "any method of measuring injury" will suffice; rather, there must be a "*reliable* means of proving classwide injury in fact." Pet. App. 13a (cleaned up, emphasis in original).

The court of appeals concluded that the district court had properly applied precisely these standards through a "careful review" of the record and "careful scrutiny [of] the relation between common and individual questions." Pet. App. 12a (quotation marks omitted) The court expressly held that the district court's "approv[al of] Plaintiffs' evidentiary case as 'reasonable' and based on 'well established,' 'well-accepted methodolog[ies]' showing class-wide injury" was "[i]n keeping with these precedents." Pet. App. 13a.

The court of appeals did not say that the use of the word "colorable" standing alone meant that the district court had applied a less exacting evidentiary standard. Rather, the court of appeals read the certification order as a whole and found that it "comports with Supreme Court holdings that require district courts to closely review the record at the class certification stage" and "complies with our precedent requiring that statistical models offered by plaintiffs

show all class members suffered some injury." Pet. App. 14a (quotation marks and emphasis omitted).

Examining the evidence, the court of appeals concluded that "the record supports the district court's finding that 'all three plaintiff groups have demonstrated that common evidence will predominate in proving each element of their claims.'" *Id.* "The court confirmed not only that Plaintiffs offered common proof of injury, but also that their methods of establishing injury were reasonable, well accepted, and reliable." *Id.*

For the *Burke* Class, the court held that "[t]he district court acted within its informed discretion in concluding that the *Burke* Plaintiffs put forth a 'reasonable,' 'well established' methodology that 'provides for class-wide resolution' of injury and damages." Pet. App. 15a. The court noted that "the *Burke* expert's opinion" is "drawn from 'significant academic literature,' which shows "that a supra-competitive network fee economically affects the price of the service as would an industry-wide 'tax'" that "is 'fully incorporated into industrywide prices'" passed on to consumers. *Id.* "The district court also appropriately concluded that the *Burke* expert's 'overcharge damages model,' which tracks Burke Plaintiffs' industry-wide tax theory, 'us[es] well-accepted methodology' to provide evidence of class-wide injury." *Id.* The court further explained that the *Burke* expert performed a "yardstick analysis"—"comparing the prices paid by plaintiffs with those paid by a consumer in a comparable market unaffected by the antitrust violation"—and "[w]e have no basis to dispute the district court's finding that this long-

accepted approach to establishing and quantifying injury in consumer overcharge cases was reliable." Pet. App. 15a-17a. Defendants' contrary analysis is based on data "chosen without accounting for how that data may be tainted by Defendants' alleged anticompetitive conduct." Pet. App. 18a. And it "does not engage at all with Plaintiffs' evidence that the *Burke* class members paid more than they would have in a world with no ATM Access Fee Rules." *Id.*

For the *Mackmin* Class, the court likewise held that "[t]he district court acted well within its discretion in also holding that the *Mackmin* Plaintiffs had adduced class-wide evidence of antitrust injury." *Id.* The court explained that Professor Carlton's market analysis was based on peer-reviewed studies, that he "ran a regression analyzing changes in average net interchange and cardholder access fees at Wells Fargo ATMs between 2010 and 2017 and found a statistically significant relationship between net interchange and access fees," and that "Defendants' statements corroborat[ed] that relationship." Pet. App. 19a. "Those common sources of proof all evidence harm across the entire *Mackmin* class." *Id.* The court held that Defendants' "separate expert analysis does not mean that the *Mackmin* Plaintiffs' model is itself either necessarily flawed or incapable of establishing class-wide injury." Pet. App. 20a. The court further held that "the [district] court correctly considered whether the *Mackmin* Plaintiffs offered reliable, generalized proof of injury that … would enable resolution of class claims without piecemeal proof." *Id.*

For the ATM Operator Class, the court held that "[t]he district court also acted within its sound discretion" by ruling that the ATM Operator Class had satisfied the predominance requirement by presenting "a logical method to arrive at a 'reliable estimate' of class-wide harm" and "showing that individualized inquiries would not be necessary to ascertain the fees paid by each class member." *Id.* (internal quotation marks omitted). "The district court reasonably concluded that the ATM Operators presented common evidence of injury to all class members, and thus need not identify any mechanism to weed out from the class uninjured members that Defendants contend their evidence would prove if it were credited over the ATM Operators' evidence." Pet. App. 21a. The court rejected each of Defendants' reasons for asserting the existence of uninjured class members as unsupported by a record in which they found "nothing [to] require[ ] a conclusion that the ATM Operator class includes uninjured members." Pet. App. 23a. Accordingly, "[t]he district court acted within its discretion in determining that the record includes common evidence of injury to all members of the ATM Operator class." *Id.*

In its conclusion, the court noted that "the district court's order does not bear the hallmarks of class certification decisions that we or the Supreme Court have invalidated for lack of rigor." *Id.* "Contrary to Defendants' assertions," the court found that "the district court did not rely … on a statistical model that is inconsistent with plaintiffs' theory of injury," nor on a model "that detects injury where all agree none exists," nor on a model that, "on its own terms, identifies a high percentage of uninjured class

members." *Id.* (citations omitted). Defendants simply "fail to fit this case within the precedents on which their opposition to class certification rests." Pet. App. 23a-24a.

The court thus found "no error in the district court's conclusion that the *Burke*, *Mackmin*, and ATM Operator Plaintiffs satisfied Rule 23(b)(3) by providing reasonable, wholesale methodologies, tethered to Plaintiffs' respective theories of liability, showing that all class members suffered injury." Pet. App. 25a.

On September 27, 2023, the court of appeals denied Defendants' petition for rehearing *en banc*. Pet. App. 42a-43a.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS RESOLVED AN UNREMARKABLE QUESTION: WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN CONCLUDING PLAINTIFFS SHOWED PREDOMINANCE OF COMMON ISSUES WITH RELIABLE EVIDENCE NOT CHALLENGED UNDER *DAUBERT*

The opinion below held that the district court did not abuse its discretion in finding that common issues predominate and in certifying the three Rule 23(b)(3) classes at issue. With little or no reference to the significant volume of empirical evidence adduced by Plaintiffs in support of their motions for class certification, Defendants claim that the D.C. Circuit departed from the evidentiary standards established by this Court for the assessment of predominance under Rule 23(b)(3) by affirming the district court's

certification order. But Defendants' arguments rest entirely on mischaracterizations of the court of appeals opinion and the question at issue here.

First, regardless of how they may aggrandize their legal arguments, Defendants challenge is directed to the district court's factual finding that Plaintiffs clearly and adequately established that proof of injury to each of the classes is capable of resolution using common, class-wide evidence. Such findings are reviewed for abuse of discretion, a highly deferential standard to which Defendants make no reference. *See* Pet. App. 7a; *see also Califano v. Yamasaki*, 442 U.S. 682, 703 (1979) ("[M]ost issues arising under Rule 23 . . . [are] committed in the first instance to the discretion of the district court."); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979) (district courts have "broad power and discretion . . . with respect to matters involving the certification" of class actions). There is no basis to review whether the district court abused its discretion in finding the economic opinion and other evidence, supported by data consisting of billions of records, to be reliable and sufficient to show the predominance of common issues. This question does not divide the circuits and raises only fact-specific issues that were properly resolved in an unpublished court of appeals opinion.

Second, the court of appeals fully considered Defendants' criticism of the district court's evaluation of the evidence and found it utterly unmeritorious. Now, to concoct a basis for their Petition, Defendants mischaracterize the court of appeals' opinion. Defendants' version of the Question Presented asks whether merely "colorable" evidence of classwide

impact suffices. Pet. i. And in their Petition, Defendants repeatedly claim that the D.C. Circuit held that "a 'colorable' method of proving classwide impact" suffices for class certification. Pet. 21-22.

Not only did the D.C. Circuit not do what Defendants say it did, the court of appeals expressly *disavowed* the kind of relaxed evidentiary standard Defendants attribute to it. Defendants rely heavily on the appearance of the single word "colorable" in the district court's decision, which appears no less than 15 times in Defendants' Petition. However, the D.C. Circuit unambiguously rejected a "merely colorable method" of proving class-wide injury as the standard on class certification. Pet. App. 13a-14a. Rather, it relied on the district court's findings—and its own analysis of the record confirming—that the evidence was not merely colorable, but also "reasonable" and "well established." Pet. App. 13a, 38a. Defendants present no basis to question this decision, especially given the deferential, abuse of discretion standard.

Moreover, contrary to Defendants' assertions that the panel effectively allowed "any method" to survive review at the class-certification stage, Pet. 26, or "assum[ed] plaintiffs' model is valid," Pet. 27, the D.C. Circuit said exactly the opposite. The court noted that "[t]he Supreme Court has rejected the idea that '*any* method of measur[ing injury] is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be.'" Pet. App. 13a (quoting *Comcast*, 569 U.S. at 36). "We do not read the district court to indulge the kind of 'arbitrary' or frivolous method of showing class injury that *Comcast* warns against." Pet. App. 14a. Consequently, the court of

appeals regarded the certification order as lacking "the hallmarks of class certification decisions that [they] or the Supreme Court have invalidated for lack of rigor." Pet. App. 23a.

Third, not only did the court of appeals expressly disavow the lax evidentiary standard Defendants say it adopted, but in a passage largely ignored by Defendants, the court was explicit about the standard it did apply:

> [T]he [district] court's review of the evidence comports with Supreme Court holdings that require district courts to closely review the record at the class certification stage—and thereby to ensure that plaintiffs provide a reliable method for establishing class-wide injury, that is tied to plaintiffs' theory of liability, and complies with our precedent requiring that statistical models offered by plaintiffs show all class members suffered some injury.

Pet. App. 14a (cleaned up, emphasis omitted). The court found Plaintiffs' methods and evidence to have fulfilled these standards: "The court confirmed not only that Plaintiffs offered common proof of injury, but also that their methods of establishing injury were reasonable, well accepted, and reliable." Pet. App. 14a. In short, the court of appeals required "reliable" evidence of classwide injury, "tied to plaintiffs' theory of liability," showing injury to "all class members" as to each Rule 23(b)(3) class and found that "the district

court confirmed that each group of plaintiffs cleared those hurdles." *Id.*

Fourth, Defendants do not and cannot dispute the reliability standard actually endorsed by the court of appeals. *See* Pet. 24 ("material factual disputes over the reliability of plaintiffs' proposed method" should not be "deferred to the merits stage").[2] Indeed, in the court below, Defendants argued *repeatedly* that reliability was the standard the court of appeals should apply. *See* Brief of Appellants at 25-26, *Nat'l ATM Council, Inc. v. Visa, Inc.,* No. 21-7109, *et al.* (D.C. Cir.) ("Rule 23(b)(3) prohibits certification of any class unless the plaintiffs have met their burden of offering a model that can reliably show, through common proof, that all or virtually all class members have been injured—or, at the very least, that can fairly and efficiently distinguish the injured from the uninjured without devolving into individualized inquiries."); *see also id.* at 3, 11, 41, 45 (arguing evidence was not sufficiently "reliable"); *see also* Pet. App. 25a ("The district court was not required at class certification to make the ultimate determination which of two dueling experts to accept, and no party here argues that it would be either necessary or appropriate to do so at this stage on this record."). To the extent Defendants may attempt to retract their endorsement of the reliability standard, that argument has been waived.

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[2] Defendants also understand that models of injury need only be "capable" or "susceptible" of class-wide proof at the certification stage. Pet. 6, 26. That is precisely the standard the court of appeals and district court applied. Pet. App. 10a-11a; Pet. App. 36a.

In sum, the D.C. Circuit applied the reliability standard that Defendants do not contest now and advocated for before the D.C. Circuit. Defendants' implication, that the D.C. Circuit announced one evidentiary standard while at the same time surreptitiously applying something far less rigorous, is implausible. The only question at issue here is whether the D.C. Circuit correctly held that the district court did not abuse its discretion in finding the expert evidence reliable and sufficient (with all of the other common evidence) to show predominance of common issues. There is no basis to review this question, which does not divide the circuits and which raises only fact-specific questions that were properly resolved in an unpublished court of appeals opinion.

II. THERE IS NO CIRCUIT CONFLICT OVER WHETHER RELIABLE AND WELL-ESTABLISHED EVIDENCE CAN ESTABLISH THE BASIS FOR CLASS CERTIFICATION

Even assuming Defendants had properly raised a dispute over whether reliable and well-established evidence should be accepted on class certification, there is no circuit conflict on that issue. Defendants argue that in the Second, Third, Fifth, and Eleventh Circuits, "a class cannot be certified … if [the court] merely finds that the plaintiffs' proposed method for proving classwide injury is plausible or well-established." Pet. 13. But none of those circuits have adopted any such rule.

The Second Circuit has expressly rejected Defendants' argument, holding that supposed problems with the plaintiffs' expert model that go to weight rather than admissibility should not be

resolved on class certification. *Kurtz v. Costco Wholesale Corp.*, 818 F. App'x 57, 62 (2d Cir. 2020). "A factfinder may ultimately agree. But if that is the case, then the class claims will fail as a unit" and it does not change the fact that "class issues predominate." *Id.* at 62-63. Defendants cite a much older case, *In re Initial Public Offerings Sec. Litig.,* 471 F.3d 24 (2006), *see* Pet. 14-15, but there, the court merely held that the court should resolve disputes about whether the requirements for class certification are satisfied, not which side's experts will prevail in answering a common question. And in a subsequent case discussing *In re IPO*, the Second Circuit clarified that the proper scrutiny of expert evidence at class certification is a *Daubert* analysis of reliability. *See In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 129-30 (2d Cir. 2013).

The Third Circuit also recently made clear why Defendants' argument is incorrect. When discussing an expert model, the court held that the defendant "may ultimately be correct that this evidence is 'unrepresentative or inaccurate.' But '[t]hat defense is itself common to the claims made by all class members,' and so supports class certification." *Hargrove v. Sleepy's LLC*, 2023 WL 3943738, at *3 (3d Cir. June 12, 2023) (quoting *Tyson*, 577 U.S. at 457). Defendants cite *In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184 (2020), *see* Pet. 15-16, but there, the court recognized that it suffices to show that the plaintiffs' "claims are capable of common proof at trial," not that the judge should determine which evidence is more correct. 957 F.3d at 191; *see also id.* at 194 ("It was up to the District Court to scrutinize the evidence to determine what was

credible and could be used in the expert analysis.") (emphasis added).

The Fifth Circuit case Defendants cite, *see* Pet. 16-17, also conforms to the D.C. Circuit analysis of reliability here. *See Prantil v. Arkema Inc.*, 986 F.3d 570 (5th Cir. 2021). In *Prantil*, the court held that the district court erred in failing to perform a full *Daubert* analysis and then failing to consider the predominance implications where "Plaintiffs' damages expert … failed to offer a reliable means of making these [damages] calculations." *Id.* at 576-77. Applying *Prantil*'s analysis here, there is no basis for questioning certification because there was no *Daubert* challenge, and the court found the evidence reliable and well-established.

And in the Eleventh Circuit, Defendants cite *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225 (11th Cir. 2016), but there the court held only that the district court should resolve *legal* questions (regarding "whether California and Texas law require pre-suit notice, an opportunity to cure, and manifestation of the defect") relevant to predominance. *Id.* at 1237. For a factual dispute over a damages methodology, the Eleventh Circuit has held that "[a]t the class certification stage, all that the named plaintiffs had to prove was that a reliable damages methodology existed, not the actual damages plaintiffs sustained." *Green-Cooper v. Brinker Int'l, Inc.*, 73 F.4th 883, 893 (11th Cir. 2023).

In sum, there is no circuit that adopts the view that reliable and well-established evidence—particularly evidence from, *inter alia*, experts whose opinions Defendants do not challenge under the *Daubert*

standard—does not suffice on class certification. Thus, there is no conflict with the D.C. Circuit's decision here that there was no abuse of discretion in finding predominance based on reliable and well-established evidence.

Indeed, while Defendants suggest that the D.C. Circuit is too lenient in allowing class certification, the D.C. Circuit's other opinions refute that suggestion. In prior cases, the D.C. Circuit has rejected predominance based on an expert model that "detects injury where none could exist," *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013) ("*Rail Freight I*"), or showed "2,037 members of the proposed class—or 12.7 percent—suffered 'only negative overcharges' and thus *no* injury from any conspiracy," *In re Rail Freight Fuel Surcharge Antitrust Litig.,* 934 F.3d 619, 623 (D.C. Cir. 2019) ("*Rail Freight II*"). The D.C. Circuit here cited those cases approvingly and explained the factual distinctions between this case and *Rail Freight I* and *Rail Freight II*. *See* Pet. App. 23a-24a. Thus, the D.C. Circuit—just like the other circuits Defendants cite—properly employs the fact-specific and deferential analysis required in reviewing class certification decisions.

III. THE QUESTION AT ISSUE HERE DOES NOT WARRANT THIS COURT'S REVIEW

Petitioners' arguments about the supposed importance of this case (Pet. 29-33) are based entirely on their mischaracterization of the D.C. Circuit's opinion as holding that any colorable method for proving classwide injury suffices for class certification. But it did not make such a holding. *See supra* Part I.

And while Defendants argue that the district court used the word "colorable" and its analysis was too short to be considered "rigorous," Pet. 25, that argument is nothing more than a disagreement with the D.C. Circuit's analysis of the district court's decision. Defendants' disagreement with how the D.C. Circuit reviewed the district court's decision for abuse of discretion does not warrant this Court's review.

Moreover, this case is a poor vehicle for resolving any broader legal question about the standard for reviewing evidence on class certification. To the extent this question is worthy of review, *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022) (*en banc*), would have been an ideal vehicle, but this Court denied certiorari, 143 S. Ct. 424 (2022). In that case, the court of appeals addressed class certification evidentiary standards in great detail in an *en banc* opinion with a two-judge dissent. Here, in contrast, the court of appeals issued a unanimous, unpublished memorandum opinion and *en banc* review was denied.

Because Defendants waived any argument that reliability is not the proper standard for the assessment of class certification evidence, there is no basis for this Court to evaluate any other standard. Given that this is exactly the standard the D.C. Circuit applied, this Court will be left with only the fact-bound question of whether the D.C. Circuit properly applied the standard when, after its own scrutiny of the record evidence, it found there was reliable evidence of class-wide injury to support the district court's exercise of its discretion.

IV. THE COURT OF APPEALS CORRECTLY HELD THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION

There was no error, let alone an abuse of discretion, in the district court's finding that Plaintiffs' extensive evidence showed that injury can be proven on a classwide basis.

A. The Court Of Appeals Adopted The Correct Legal Standard

As discussed *supra* at 19 - 20, Defendants waived any argument for adoption of a legal standard other than the reliability test the D.C. Circuit applied. But even if the argument were not waived, it is meritless.

Contrary to Defendants' assertion that "it is plaintiffs' burden to *establish* classwide impact" at the class certification stage, Pet. 29, the court of appeals and the district court correctly followed *Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, 568 U.S. 455 (2013), which "requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Id.* at 459; *see also* Pet. App. 12a, 37a. Thus, the court of appeals correctly held that the district "court aptly distinguished Plaintiffs' burden of establishing predominance at the class certification stage from their burden of prevailing on liability and damages at trial …." Pet. App. 12a.

Moreover, the court of appeals correctly held that the district court should not usurp the jury's role in resolving battles of the experts on class certification. Pet. App. 25a. *See Tyson*, 577 U.S. at 459 ("Reasonable minds may differ as to" the merits of the

challenges to the expert evidence, but "*[r]esolving that question … is the near-exclusive province of the jury*.") (emphasis added).

No Defendant challenged any of Plaintiffs' expert evidence under either Federal Rule of Evidence 702 or under this Court's decision in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). No fewer than six separate reports by economic experts were submitted by the three plaintiff groups without challenge or objection by Defendants. In the absence of a *Daubert* challenge, a district court may rely on expert evidence for class certification. *See Kleen Prods. LLC v. Int'l Paper Co.*, 831 F.3d 919, 922 (7th Cir. 2016) (citing *Tyson*, 577 U.S. at 459 (no legal error to rely on expert evidence admitted without objection)). Once evidence is properly admitted, its persuasiveness is for the trier of fact to determine. *Id.* At a minimum, the absence of any challenge by Defendants to the reliability or admissibility of any of the expert evidence severely compromises their claim that the certification order must be reviewed because the lower courts impermissibly credited unreliable or otherwise insufficiently probative evidence.

Moreover, it would be nonsensical to go beyond the D.C. Circuit's reliability test. The judge's view of the evidence cannot bind the jury, and thus any inquiry into which side's experts are more persuasive is simply irrelevant to the question whether common issues predominate. The jury will see the same evidence and answer the same questions regardless of the judge's views. That is why predominance tests whether an issue is "susceptible" to classwide proof, *Tyson*, 577

U.S. at 453, not whether the proof will persuade the jury (let alone persuade the judge).

Defendants rely principally on *Comcast*, but as the court of appeals explained, the district court decision is fully consistent with *Comcast*. Pet App. 13a-14a. In *Comcast*, this Court held that "any model supporting a plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation." 569 U.S. at 35 (quotation marks omitted). Here, the court of appeals held that Plaintiffs' "method for establishing class-wide injury . . . is tied to plaintiffs' theory of liability" in each of their cases. Pet. App. 14a. Defendants did not argue below and do not argue here any disconnect between the liability and damages theories, and thus *Comcast* is inapposite.

B. The Court Of Appeals Correctly Applied The Legal Standard To The Facts

The district court did not abuse its discretion by concluding that Plaintiffs' evidence showed that antitrust impact was capable of classwide proof.

The court of appeals dispelled Defendants' argument that because the district court opinion was "notably terse," it did not employ "rigorous analysis." Pet. 9a-13a. The court of appeals reviewed the record and held that the district court "explains the basis on which it concluded that plaintiffs here satisfy through evidentiary proof that common issues predominate," and "the record supports the district court's finding" as to "all three plaintiff groups." Pet. App. 14a (cleaned up). The court of appeals elaborated that the district court embarked "'[u]pon careful review of the

parties' submissions, including their expert reports,'" and "expressly acknowledged its obligation to 'give careful scrutiny to the relation between common and individual questions.'" Pet. App. 12a. Defendants suggest that the panel should have disbelieved the district court's assurance of a careful review and ignored the court's class-specific discussion demonstrating that careful review. Defendants have failed to show that the district court did not rigorously assess the evidence, let alone commit reversible error or abuse its discretion.

Furthermore, the common evidence of injury to all class members more than sufficed, for each class, to show that injury is capable of resolution on a classwide basis and that common issues predominate.

***Burke* Class.** The court of appeals correctly held that "[t]he district court acted within its informed discretion in concluding that the *Burke* Plaintiffs put forth a 'reasonable,' 'well established' methodology that 'provides for class-wide resolution' of injury and damages." Pet. App. 15a. The court noted that "the *Burke* expert's opinion" is "drawn from 'significant academic literature,' which shows "that a supra-competitive network fee economically affects the price of the service as would an industry-wide 'tax'" that "is 'fully incorporated into industrywide prices'" passed on to consumers. *Id.* The court of appeals also agreed with the district court's conclusion that "the *Burke* expert's 'overcharge damages model,' which tracks *Burke* Plaintiffs' industry-wide tax theory, 'us[es] well-accepted methodology' to provide evidence of class-wide injury." *Id.* The court of appeals further explained that the *Burke* expert performed a

"yardstick analysis"—"comparing the prices paid by plaintiffs with those paid by a consumer in a comparable market unaffected by the antitrust violation"—and "[w]e have no basis to dispute the district court's finding that this long-accepted approach to establishing and quantifying injury in consumer overcharge cases was reliable." Pet. App. 15a-17a. Finally, the court of appeals held that Defendants' data analysis, purporting to show "uninjured" class members, does not undermine the reliability of the *Burke* class-wide proof because it is based on data "chosen without accounting for how that data may be tainted by Defendants' alleged anticompetitive conduct." Pet. App. 18a. And it "does not engage at all with Plaintiffs' evidence that the *Burke* class members paid more than they would have in a world with no ATM Access Fee Rules." *Id.*

***Mackmin* Class.** The court of appeals properly concluded that "[t]he district court acted well within its discretion in … holding that the *Mackmin* Plaintiffs had adduced class-wide proof of antitrust injury." Pet. App. 18a. The proof came in several forms, including "statistical modeling, together with defendants' own documents supporting the relationship between net interchange and surcharges, economic theory and empirical studies, and market structure analysis." *Id.* (quotation and bracket marks omitted). The district court determined that, together, this "evidence showed that all or virtually all class members pay higher access fees than they would without the Access Fee Rules." *Id.* (cleaned up). This fact-intensive determination, affirmed by the panel, was correct and does not warrant this Court's review.

Ignoring most of the *Mackmin* Plaintiffs' classwide proof, Defendants' Petition focuses narrowly on just one part of that proof: a regression model developed by the *Mackmin* Plaintiffs' expert, Dr. Dennis Carlton. Pet. 28. Even as to the regression, Defendants' only contention is that Dr. Carlton used supposedly unrepresentative Wells Fargo data for modeling purposes. Defendants' expert reconfigured Dr. Carlton's model with a different dataset, and Defendants claim that his counter-regression reveals uninjured *Mackmin* Class members. *See id.* However, Defendants mischaracterize the results of their counter-regression and ignore that it used flawed data that included *only* transactions over Visa networks, thereby skewing the results, as opposed to the Wells Fargo data that Plaintiffs' expert used, which properly included transactions over all networks. *See* Pet. App. 19a. They further ignore that, when Plaintiffs included all relevant data, the counter-regression actually further *supported*, rather than undermined, Plaintiffs' evidence of common impact.

In any event, Defendants' argument is foreclosed by *Tyson*. As the D.C. Circuit observed, *Tyson* holds that "a defense that common proof is unrepresentative 'is itself common to the claims made by all class members' and so does not defeat predominance." Pet. App. 24a (quoting *Tyson*, 577 U.S. at 457). "Resolving that question" whether the data is representative thus "is the near-exclusive province of the jury." *Tyson*, 577 U.S. at 459. This principle is dispositive as to the *Mackmin* Class. Defendants may challenge the representativeness of the Wells Fargo data at trial, but the representativeness of the dataset—Defendants' *only* challenge to the *Mackmin* Plaintiffs'

class certification showing—is fundamentally a classwide issue. Having determined that "the *Mackmin* Plaintiffs offered reliable, generalized proof of injury that a reasonable factfinder could credit," the district court properly declined to supplant the factfinder's role and determine which conflicting expert analysis should ultimately carry the day. Pet. App. 24a-25a; *see also Tyson*, 577 U.S. at 457. The court of appeals' straightforward application of that precedent does not justify a grant of certiorari, especially given that Defendants have made no attempt to refute the court of appeals' reliance on *Tyson*.

ATM Operator Class. The court of appeals found that the district court acted within its discretion in crediting common evidence of injury to all members of the ATM Operator class. Pet. App. 20a. Indeed, the court found that "on this record, …, *nothing* requires a conclusion that the ATM Operator class included uninjured members." Pet. App. 23a (emphasis added).

This is because Defendants adduced no evidence to contradict the proposition that all ATM Operators paid the same acquirer fee and were overcharged by the same amount. The court of appeals accepted the district court's finding that "individualized inquires would not be necessary to ascertain the fees paid by each class member." Pet. App. 20a (quotation marks omitted). Moreover, the court credited the evidence that ATM Operator "class members were overcharged precisely the same per-transaction amount at any given time for every authorized, surcharge-bearing ATM cash withdrawal settled and cleared over the defendants' networks, and that aggregate, class-wide

damages are directly calculable from the total number of transactions processed by each of defendants' networks using a reliable estimate of the extent of the anticompetitive overcharge." Pet. App. 39a. "This," the court of appeals noted, "cuts to the heart of the predominance requirement: avoiding individualized mini-trials." Pet. App. 21a. As the district court recognized, "requiring individual litigation of each class member's claims would merely multiply the number of trials with the same issues and evidence. … As such, Rule 23(b)(3) is easily satisfied here." Pet. App. 41a (quotation marks omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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