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.

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

REPLY BRIEF FOR THE PETITIONERS

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This case squarely presents an important legal question regarding the standard for class certification that has been the subject of confusion in the courts of appeals. The court of appeals here affirmed the district court's certification of three classes—comprising hundreds of millions of putative members and seeking billions of dollars in damages—based on three paragraphs of analysis under Federal Rule of Civil Procedure 23(b)(3). Like the district court, the court of appeals expressly deferred "material factual dispute[s]" on predominance to the merits and required only "colorable" evidence that common questions will predominate. That standard contradicts this Court's

precedents mandating a "rigorous analysis" at the class-certification stage, and it deepens the disarray among the courts of appeals.

Respondents deny that this case involves any legal question on which the courts of appeals are divided. But the court of appeals here plainly declined to resolve disputes between the parties over the predominance of common questions. Despite respondents' arguments to the contrary, the Second, Third, Fifth, and Eleventh Circuits require resolution of such disputes. And as respondents do not contest, the Eighth and Ninth Circuits have permitted classes to be certified based on a more relaxed legal standard similar to that applied in this case.

As to the merits, petitioners argue, as they consistently have, that a district court must resolve disputes bearing on the predominance of common questions and that a merely "colorable," "reasonable," or "well established" method of proving classwide impact is insufficient. This Court's decisions provide no support for a sparse certification analysis like the one conducted here. And while this Court need not apply the correct legal standard to the facts in the first instance, it is readily apparent that individualized questions predominate here over common questions regarding antitrust impact.

This case is a perfect opportunity to address the question presented. That question has undisputed importance for class-action practice. And respondents' purported vehicle problems are insubstantial: the recently denied petition they identify presented different questions, and the question presented here was briefed in and passed upon by the court of appeals. The petition for a writ of certiorari should be granted.

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

1. Respondents first contend (Br. in Opp. 15-20) that the decision below did not endorse an expansive standard for assessing predominance. Respondents are incorrect. Far from "unambiguously reject[ing] a 'merely colorable method' of proving class-wide injury as the standard on class certification," Br. in Opp. 17, the court of appeals embraced it. See Pet. 21-23.

The district court determined that Rule 23(b)(3) was satisfied because respondents "met their burden * * * of demonstrating a colorable method by which they intend to prove class-wide impact." Pet. App. 39a. The court of appeals then concluded that "[t]he district court applied the correct legal standard" (and that the failure to have done so would have constituted an abuse of discretion). *Id.* at 11a-12a. The court of appeals specifically approved of the district court's statement that "plaintiffs, at this stage in the proceedings, need only demonstrate a colorable method by which they intend to prove class-wide impact." *Id.* at 13a (citation omitted). It endorsed the district court's reliance on an "evidentiary case" that was "'reasonable' and based on 'well established,' 'well-accepted methodolog[ies].'" *Id.* at 13a-14a (alteration in original; citation omitted). And it confirmed that it was considering only what respondents' evidence showed "by its own terms." *Id.* at 24a.

The legal standard in the District of Columbia Circuit thus diverges from the standard in the Second, Third, Fifth, and Eleventh Circuits, where a class cannot be certified if a court finds that the plaintiffs' proposed method for establishing classwide injury is merely "colorable" or "reasonable" or if the court fails to resolve material disputes that bear on the Rule 23 requirements. See Pet. 13-18. With the decision below, the court of appeals has

adopted a more relaxed standard similar to that of the Eighth and Ninth Circuits. See Pet. 18-21.

2. On the decisions of other courts of appeals, respondents have less to say. See Br. in Opp. 20-23. Respondents primarily argue that the Second, Third, Fifth, and Eleventh Circuits do permit certification of a class based on a plaintiff's citation of evidence that is merely "plausible or well-established." *Id.* at 20 (citation omitted). But those circuits unambiguously require the district court to resolve material factual disputes bearing on the predominance of common questions.

a. Respondents argue that, in *In re Initial Public Offerings Securities Litigation*, 471 F.3d 24 (2006) (*IPO*), the Second Circuit "merely held that [a] court should resolve disputes about whether the requirements for class certification are satisfied." Br. in Opp. 21. But that is precisely the point. See Pet. 14-15. In the Second Circuit, a district court cannot defer decision on a "material" dispute about predominance on the ground that it is "better suited" for trial. Pet. App. 24a. Resolution of such a dispute goes to the plaintiffs' compliance with Rule 23(b)(3), and "the obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue." *IPO*, 471 F.3d at 41.

Respondents also contend that, in *In re U.S. Foodservice Inc. Pricing Litigation*, 729 F.3d 108 (2013), the Second Circuit "clarified that the proper scrutiny of expert evidence at class certification is a *Daubert* analysis of reliability." Br. in Opp. 21; see *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). But the Second Circuit ultimately declined to reach the question of "whether or when a *Daubert* analysis forms a necessary component of a district court's rigorous analysis." 729 F.3d at 129 (emphasis added). The Second Circuit thus

manifestly did not hold that the Rule 23 analysis consists only of a *Daubert* inquiry.

Respondents' reliance on *Kurtz* v. *Costco Wholesale Corp.*, 818 Fed. Appx. 57 (2d Cir. 2020), fares no better. There, the Second Circuit affirmed the certification of the classes only after the district court issued two lengthy opinions resolving a "litany" of disputes over the Rule 23 requirements. *Id.* at 61; see *Kurtz* v. *Costco Warehouse Corp.*, 768 Fed. Appx. 39, 40-41 (2d Cir. 2019).

b. As to the Third Circuit, respondents argue that *In re Lamictal Direct Purchaser Antitrust Litigation*, 957 F.3d 184 (2020), stands for the proposition that "the [district] judge should [not] determine which evidence is more correct," but rather should only "determine what [evidence] was *credible*." Br. in Opp. 21-22 (citation omitted). But the Third Circuit left no doubt that the district court had to "resolve" the parties' disputes over the "acceptability of averages," because a court "cannot simply make that assumption." *Lamictal*, 957 F.3d at 194.

Respondents also cite *Hargrove* v. *Sleepy's LLC*, No. 22-2040, 2023 WL 3943738 (3d Cir. June 12, 2023). But that case, unlike this one, concerned the permissibility of representative evidence in a case involving "uniform policies" and no "individualized facts." *Id.* at *3. The Third Circuit did not rest on a determination that the plaintiffs' evidence was merely colorable, nor did it defer to the merits any material factual disputes regarding predominance.

c. Moving on to the Fifth Circuit, respondents argue that, in *Prantil* v. *Arkema Inc.*, 986 F.3d 570 (2021), the Fifth Circuit held only that "the district court erred in failing to perform a full *Daubert* analysis" where the plaintiffs had "failed to offer a reliable means" of proving classwide injury. Br. in Opp. 22 (quoting 986 F.3d at 577). But that is an incomplete description of the Fifth Circuit's

holding. The Fifth Circuit went on to address the requirements of Rule 23(b)(3), and that portion of its decision—which respondents conspicuously fail to discuss—is at odds with the decision below. See *Prantil*, 986 F.3d at 578-580; Pet. 16-17.

d. As to the Eleventh Circuit, respondents claim that, in *Brown* v. *Electrolux Home Products, Inc.*, 817 F.3d 1225 (2016), the Eleventh Circuit held "only that the district court should resolve *legal* questions." Br. in Opp. 22. But the Eleventh Circuit drew no such distinction. It explained that, "if a question of *fact or* law is relevant to [the Rule 23] determination, then the district court has a duty to actually decide it and not accept it as true or construe it in anyone's favor," regardless of "whether the question also pertains to the merits." 817 F.3d at 1234, 1237 (emphasis added; internal quotation marks and citations omitted).

Nor did the Eleventh Circuit's decision in *Green-Cooper* v. *Brinker International, Inc.*, 73 F.4th 883 (2023), apply a more relaxed standard to "factual dispute[s]," as respondents contend. Br. in Opp. 22. There, the Eleventh Circuit rejected the defendant's argument that a data breach did not cause "similar injury" to all affected consumers; as a result, it concluded that "[a]ny individual inquiry into particularized damages * * * does not predominate." 73 F.4th at 894.

3. Finally as to the positions of the circuits, respondents' attempt to sow confusion about the applicable legal standard in the D.C. Circuit backfires. See Br. in Opp. 23 (citing *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244 (2013) (*Rail Freight I*), and *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 934 F.3d 619 (2019) (*Rail Freight II*)). The decision below, and the subsequent denial of rehearing en banc, confirm the D.C.

Circuit's understanding of its own precedents. As respondents concede (Br. in Opp. 14-15), despite petitioners' contrary arguments, the D.C. Circuit stated that *Rail Freight I* is limited to cases in which "a statistical model * * * detects injury where all agree none exists," and *Rail Freight II* is limited to cases in which "a statistical model * * *, on its own terms, identifies a high percentage of uninjured class members." Pet. App. 23a. The D.C. Circuit has thus clarified that its *Rail Freight* decisions preclude certification only where the plaintiffs concede that their model is flawed. Respondents have not done so here.

* * * * *

If respondents had brought suit in the Second, Third, Fifth, or Eleventh Circuits, their classes would not have been certified. Those four courts of appeals do not merely require a colorable method of proving classwide impact; they require a district court to resolve material factual disputes regarding the predominance of common questions. See Pet. 23-24. In this case, the D.C. Circuit adopted a more expansive standard, and—as respondents do not dispute—the Eighth and Ninth Circuits have done the same. There is chaos and confusion in the lower courts when it comes to class certification. Only this Court can provide clarity.

B. The Decision Below Is Incorrect

Respondents have no persuasive justification for affirming the certification of three classes comprising hundreds of millions of putative members based only on a "colorable" or "reasonable" method of proving classwide impact, without resolving material factual disputes regarding predominance. See Br. in Opp. 25-27. Far from

supporting that superficial approach, this Court has required a court to resolve material factual disputes relevant to predominance. The Court should correct the court of appeals' deeply flawed legal standard.

1. The decision below is inconsistent with this Court's decisions, and respondents' efforts to spin those decisions in their favor are unavailing.

Respondents overread the instruction in *Amgen Inc.* v. *Connecticut Retirement Plans and Trust Funds*, 568 U.S. 455 (2013), that a court must determine whether there has been "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 Br. in Opp. 25. Petitioners do not argue that the district court should have made "the ultimate determination which of two dueling experts to accept," Pet. App. 25a; they simply argue that the district court abdicated its duty to determine whether "*questions* common to the class predominate," *id.* at 13a. In other words, respondents were required "affirmatively [to] demonstrate" that, when the case proceeds to the merits, they will likely be able to prove antitrust impact on a classwide basis. *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 350 (2011). Rule 23(b)(3) "requires the judge to make findings about predominance * * * before allowing the class" to be certified, and the extent to which that analysis overlaps with the merits of plaintiff's underlying claim simply "cannot be helped." *Id.* at 351, 363.

The discussion of the role of the jury in *Tyson Foods, Inc.* v. *Bouaphakeo*, 577 U.S. 442 (2016), does not support the court of appeals' standard. See Br. in Opp. 25-26. True, "persuasiveness [of evidence] is, in general, a matter for the jury." *Tyson Foods*, 577 U.S. at 459. Once again, however, petitioners do not contend that the district court should have resolved the merits of the case. A

district court may not shirk its obligations under Rule 23(b)(3) "simply because [the parties'] arguments would also be pertinent to the merits determination." *Comcast Corp.* v. *Behrend*, 569 U.S. 27, 34 (2013). The court of appeals' contrary approach would "reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Id.* at 36.

This Court's decision in *Comcast* is not limited to discrepancies "between the liability and damages theories." Br. in Opp. 27. As petitioners have explained, the "rigorous analysis" required by Rule 23 entails "entertain[ing] arguments against" a proposed model, "even when that requires inquiry into the merits of the claim." *Comcast*, 569 U.S. at 34, 35.

2. Although this Court need not apply the correct legal standard in the first instance, the court of appeals' decision upholding class certification cannot stand. See Pet. 24-29.

Respondents fail to grapple with the fundamental error of the court of appeals. For instance, as to the *Burke* consumer plaintiffs, respondents quibble with the data supporting petitioners' critique of their method of proving classwide impact. See Br. in Opp. 28-29. But they do not dispute that the court of appeals concluded that, although petitioners' critique raised "material issue[s]" that go to the heart of the predominance inquiry, resolution of that dispute should be deferred until "trial." Pet. App. 18a. Similarly, as to the *Mackmin* consumer plaintiffs, respondents claim that petitioners "focus[] narrowly" on evidence that they "mischaracterize." Br. in Opp. 30. Yet the court of appeals concluded that, even though petitioners' criticisms raise "material factual dispute[s]" regarding predominance, resolution of those disputes is "better suited for adjudication * * * on the merits." Pet. App. 24a (internal quotation marks and citation omitted). Fi-

nally on this score, as to the operator plaintiffs, respondents impermissibly seek to flip their evidentiary burden onto petitioners (Br. in Opp. 31) without grappling with the court of appeals' acknowledgment that, if "a factfinder credit[s]" petitioners' criticisms, "predominance is defeated by the lack of a mechanism for weeding out uninjured class members." Pet. App. 23a.

In short, as petitioners have explained (Pet. 24-29), the court of appeals erred by holding that it is inappropriate, at the class-certification stage, to resolve factual disputes regarding the predominance of common questions. The Court should grant review and reverse that erroneous holding.

C. The Court's Review Is Warranted

Respondents do not dispute that the actual question presented here has enormous consequences for class-action practice, civil procedure, and the role of federal courts. Nor do respondents dispute that the question is an important and recurring one that has vexed the courts of appeals. They instead contend that this case presents only a narrower and less important question and that this case would be a poor vehicle for further review. Both arguments are unavailing.

1. The question presented is undeniably important. As discussed above (at pp. 3-4), petitioners do not merely "disagree[] with how the D.C. Circuit reviewed the district court's decision for abuse of discretion." Br. in Opp. 24. This case instead presents a legal question concerning the meaning of a "rigorous analysis," *Wal-Mart*, 564 U.S. at 351, which respondents do not dispute is an enormously important question. See Pet. 29-33; DRI Br. 5-8.

2. This case is also an ideal vehicle in which to address that question. Respondents' preservation concerns (Br. in Opp. 3, 19-20, 24, 26) are misplaced. While petitioners

did refer below to a "reliabl[e] show[ing]," Pet. C.A. Br. 25-26, they have never argued that respondents' evidence is inadmissible under *Daubert*; instead, they have consistently argued that class certification was improper because the district court improperly "declined to determine whether [respondents] had offered reliable mechanisms to assess classwide injury." *Id.* at 26. As this Court recognized in *Comcast*, a defendant that does not file a *Daubert* motion may not "argue that [the] testimony was not admissible," but it may still dispute whether the predominance requirement has been satisfied. 569 U.S. at 32 n.4.

Finally, respondents posit that there is no reason to address the question presented in this case because *StarKist Co.* v. *Olean Wholesale Grocery Cooperative, Inc.*, No. 22-131 (cert. denied Nov. 14, 2022), "would have been an ideal vehicle" to do so. Br. in Opp. 24. But the questions presented in that petition were different: namely, whether "the presence of uninjured class members precludes the certification of a class" and whether "a plaintiff may rely on representative evidence such as averaging assumptions to establish classwide proof of injury." Pet. at i, *StarKist*, *supra*.

Whatever the reasons for denying certiorari on the questions presented in *StarKist*, the courts of appeals are in disarray on the question presented in this case. That question is cleanly presented here, and it has sweeping implications for every federal class action. The petition for a writ of certiorari should accordingly be granted.

Respectfully submitted.

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