No. 25-

IN THE

Supreme Court of the United States

BANC OF AMERICA SECURITIES LLC, MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, BARCLAYS CAPITAL INC., CITIGROUP GLOBAL MARKETS INC., GOLDMAN SACHS & CO. LLC, J.P. MORGAN SECURITIES LLC, RBC CAPITAL MARKETS LLC, WELLS FARGO BANK, N.A., WACHOVIA BANK, N.A., WELLS FARGO SECURITIES LLC, MORGAN STANLEY & CO. LLC,

Petitioners,

v.

CITY OF PHILADELPHIA, SAN DIEGO ASSOCIATION OF GOVERNMENTS, AND MAYOR AND CITY COUNCIL OF BALTIMORE,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, when putative class-action plaintiffs offer expert evidence to prove predominance under Federal Rule of Civil Procedure 23(b)(3) and the defendants present expert evidence disputing that the plaintiffs' evidence proves predominance, the district court must resolve that dispute, or instead may certify a class based only on a finding that a reasonable juror could credit the plaintiffs' evidence.

PARTIES TO THE PROCEEDING

Petitioners are Banc of America Securities LLC; Merrill Lynch, Pierce, Fenner & Smith Incorporated; Barclays Capital Inc.; Citigroup Global Markets Inc.; Goldman Sachs & Co. LLC; J.P. Morgan Securities LLC; RBC Capital Markets LLC; Wells Fargo Bank, N.A.; Wachovia Bank, N.A.; Wells Fargo Securities LLC; and Morgan Stanley & Co. LLC.

Respondents are the City of Philadelphia, the San Diego Association of Governments, and the Mayor and City Council of Baltimore.

CORPORATE DISCLOSURE STATEMENT

Banc of America Securities LLC (which merged with and into Merrill Lynch, Pierce, Fenner & Smith Incorporated), and Merrill Lynch, Pierce, Fenner & Smith Incorporated (n/k/a BofA Securities, Inc.) state that BofA Securities, Inc. is a direct, wholly owned subsidiary of NB Holdings Corporation. NB Holdings Corporation is a direct, wholly owned subsidiary of Bank of America Corporation. Bank of America Corporation is a publicly held company whose shares are traded on the New York Stock Exchange. Bank of America Corporation has no parent company and no publicly held corporation owns more than 10% of Bank of America Corporation's shares.

Barclays Capital Inc. identifies the following as parent corporations or publicly held corporations that own 10% or more of any class of its equity interests: Barclays PLC, Barclays Bank PLC, Barclays US Holdings Limited, Barclays US LLC, and Barclays Group US Inc.

Citigroup Global Markets Inc. is a wholly owned subsidiary of Citigroup Financial Products Inc. which, in turn, is a wholly owned subsidiary of Citigroup Global

Markets Holdings Inc. which, in turn, is a wholly owned subsidiary of Citigroup Inc. ("Citigroup"). Citigroup is a publicly traded company. Citigroup has no parent corporations, and to the best of Citigroup's knowledge, no publicly held corporation owns 10% or more of Citigroup's stock.

Goldman Sachs & Co. LLC is a direct, wholly owned subsidiary of The Goldman Sachs Group, Inc. ("GS Group"), except for de minimis non-voting, non-participating interests held by unaffiliated broker-dealers. GS Group is a publicly held corporation. It has no parent corporation, and to the best of GS Group's knowledge, no publicly traded company owns 10% or more of its stock.

J.P. Morgan Securities LLC is an indirect, wholly-owned subsidiary of JPMorgan Chase & Co., which is a publicly held corporation. JPMorgan Chase & Co. does not have a parent corporation and no publicly held corporation owns 10% or more of its stock. However, The Vanguard Group, Inc., an investment adviser which is not a publicly held corporation, has reported that registered investment companies, other pooled investment vehicles and institutional accounts that it or its subsidiaries sponsor, manage or advise have aggregate ownership under certain regulations of 10% or more of the stock of JPMorgan Chase & Co.

Morgan Stanley & Co. LLC is a limited liability company whose sole member is Morgan Stanley Capital Management, LLC, a limited liability company whose sole member is Morgan Stanley. Morgan Stanley is a publicly held corporation that has no parent corporation. Based on Securities and Exchange Commission Rules regarding beneficial ownership, Mitsubishi UFJ Financial Group, Inc. 4-5, Marunouchi 1-chome, Chiyoda-ku,

Tokyo 100-8330, beneficially owns greater than 10% of Morgan Stanley's outstanding common stock.

RBC Capital Markets, LLC is an indirect, wholly-owned subsidiary of Royal Bank of Canada. Royal Bank of Canada has no parent company, and there are no publicly held corporations that own 10% or more of Royal Bank of Canada's common stock.

Wells Fargo Bank, N.A. is an indirect wholly-owned subsidiary of Wells Fargo & Company, which is a publicly traded corporation. There is no person or entity that owns more than 10 percent of the shares of Wells Fargo & Company. Wachovia Bank, N.A. has merged with and into Wells Fargo Bank, N.A. Wells Fargo Securities LLC is an indirect wholly-owned subsidiary of Wells Fargo & Company.

DIRECTLY RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

City of Philadelphia v. *Bank of America Corporation*, No. 19-cv-1608

United States Court of Appeals (2d Cir.):

City of Philadelphia v. *Banc of America Securities LLC*, No. 24-297

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

This Court has made clear that for a case to proceed as a class action under Federal Rule of Civil Procedure 23—which establishes "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only"—a plaintiff "must

affirmatively demonstrate his compliance with Rule 23." *Comcast Corporation* v. *Behrend*, 569 U.S. 27, 33 (2013) (quotation marks omitted). And that affirmative demonstration must happen *before* class certification: As this Court put it, "certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23[] *have been satisfied*." *Id.* (emphasis added) (quotation marks omitted).

The question presented in this antitrust class action is whether, under this precedent, a district court must resolve expert disputes bearing on the predominance requirement of Rule 23(b)(3), *i.e.*, the requirement that common questions predominate over individual ones, before certifying a class. Based on a misreading of *Tyson Foods, Inc.* v. *Bouaphakeo*, 577 U.S. 442 (2016), the Second Circuit ruled here that a district court need not resolve such disputes. Rather, "a district court can only deny certification based on the persuasiveness of the expert evidence if '*no reasonable juror* could have believed' the expert evidence." App.9a (quoting *Tyson*, 577 U.S. at 459) (emphasis added).

The court of appeals' misreading of *Tyson* places it on the wrong side of a circuit conflict. Unlike the decision at issue here, the Third and Seventh Circuits hold, consistent with *Comcast*, that a district court must resolve expert disputes bearing on Rule 23(b)(3) before certification. *See In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 320 (3d Cir. 2008); *Arandell Corporation* v. *Xcel Energy Inc.*, 149 F.4th 883, 894 (7th Cir. 2025). The Ninth and D.C. Circuits, meanwhile, have taken a third approach; those courts have said that *Tyson*'s "no reasonable juror" standard controls and yet, in the same decisions, have affirmed certification orders only after concluding that the district court resolved expert disputes bearing on the predominance requirement.

See Olean Wholesale Grocery Cooperative, Inc. v. *Bumble Bee Foods LLC*, 31 F.4th 651, 667, 676 (9th Cir. 2022) (en banc); *National ATM Council, Inc.* v. *Visa Inc.*, 2023 WL 4743013, at *5 (D.C. Cir. July 25, 2023) (per curiam).

The Second Circuit's decision flouts over a decade of this Court's Rule 23 jurisprudence, encompassing not only *Comcast Corporation* v. *Behrend* but also cases from *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338 (2011), to *Goldman Sachs Group, Inc.* v. *Arkansas Teacher Retirement System*, 594 U.S. 113 (2021). Under those cases, a district court must consider "*all* probative evidence," including a defendant's expert evidence, and then "determin[e]" whether plaintiffs have satisfied their burden to prove each Rule 23 requirement, including predominance. *Goldman Sachs*, 594 U.S. at 122 (alteration in original). A district court thus cannot certify a class after finding only that a plaintiff's expert evidence could be believed by a reasonable juror. If that were the law, any plaintiff could obtain class certification just by "hiring a competent expert." *West* v. *Prudential Securities, Inc.*, 282 F.3d 935, 938 (7th Cir. 2002). This Court's Rule 23 precedents require more.

The established conflict warrants review because the question presented is recurring and important. Courts "frequently" are presented with competing expert evidence bearing on "the prerequisites of Rule 23(b)(3)," *Olean*, 31 F.4th at 665, and certification often depends on that evidence. In turn, the decision to certify a class has a substantial and often outcome-determinative effect on a putative class action. As this Court has long recognized, class certification "may so increase the defendant's potential damages" that the defendant "may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). "Overbroad and incorrectly

certified classes," in other words, have "real-world consequences" because they "can coerce businesses into costly settlements that they sometimes must reluctantly swallow rather than betting the company on the uncertainties of trial." *Laboratory Corporation of America Holdings* v. *Davis*, 605 U.S. 327, 333 (2025) (per curiam) (Kavanaugh, J., dissenting).

This case provides an excellent opportunity to answer the question presented because the Second Circuit's decision presents the question cleanly: In affirming the class-certification order, the court of appeals not only explicitly answered the question presented but also based its answer entirely on its misinterpretation of this Court's holding in *Tyson*. Future opportunities to answer this question, moreover, will likely be limited, given that courts of appeals infrequently grant interlocutory review of class-certification orders and scarcely any certified class actions proceed to trial. Under these circumstances, certiorari is warranted.

OPINIONS BELOW

The Second Circuit's unpublished opinion (App.1a-11a) is available at 2025 WL 2180607. The district court's unpublished class-certification opinion (App.13a-49a) is available at 2023 WL 6160534.

JURISDICTION

The Second Circuit entered judgment on August 1, 2025. App.1a. On October 15, 2025, Justice Kagan extended the time to file this petition through Saturday, November 29, 2025 (making the deadline Monday, December 1, 2025, under this Court's Rule 30.1). This Court has jurisdiction under 28 U.S.C. §1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 23(b) provides in relevant part:

> A class action may be maintained if Rule 23(a) is satisfied and if: …
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

STATEMENT

A. Standards Governing Class Certification

Rule 23 "does not set forth a mere pleading standard." *Comcast*, 569 U.S. at 33. Instead, plaintiffs must "prove" that Rule 23's requirements have been met before a district court may certify a class. *Id.*; *accord Halliburton Company* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014); *Wal-Mart*, 564 U.S. at 350-351.

The district court's role, in turn, is to conduct a "rigorous analysis" of the parties' evidence and arguments, *Comcast*, 569 U.S. at 33, and "determin[e] [whether] Rule 23 is satisfied," *Goldman Sachs*, 594 U.S. at 122. This analysis "will frequently entail overlap with the merits of the plaintiff's underlying claim." *Comcast*, 569 U.S. at 33-34 (quotation marks omitted). That "cannot be helped," as class certification "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Wal-Mart*, 564 U.S. at 351. These principles apply fully to Rule 23's "demanding" predominance requirement, *Comcast*, 569 U.S. at 34—*i.e.*, the requirement that the

"questions of law or fact common to class members predominate over any questions affecting only individual members," Fed. R. Civ. P. 23(b)(3).

A district court's obligation to rigorously analyze the evidence at class certification, however, extends only to those issues that "bear on" or are "relevant to" Rule 23's requirements. *Goldman Sachs*, 594 U.S. at 119; *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455, 466 (2013). An issue bears on or is relevant to the predominance requirement if resolution of the issue would make a difference between, on the one hand, a case that can proceed based on common class-wide evidence and, on the other hand, a case in which each plaintiff and class member will need to present individualized evidence. *Halliburton*, 573 U.S. at 282-283; *Amgen*, 568 U.S. at 473-474. An issue has no bearing on predominance, by contrast, if resolution of the issue in the defendant's favor would render every plaintiff's and putative class member's claim "dead on arrival," leaving no way for them to prove their cases individually. *Amgen*, 568 U.S. at 474.

Tyson involved the latter situation—*i.e.*, a "fatal similarity" defense that would necessarily defeat every class member's claim on the same ground. There, the plaintiff employees sought to prove they had worked overtime using a representative sample, prepared by an expert, on which every class member would rely. 577 U.S. at 450. Due to Tyson's failure to keep time records, that sample was the only way the plaintiffs and putative class members could prove their case. *Id.* at 450, 457. Tyson challenged the use of the sample at class certification, but this Court held that the challenge did not need to be resolved at that stage. *Id.* at 457. Given that there was no alternative individual evidence on which any employee could rely, a successful challenge to the sample

"likely would have ended the litigation and thus would not have caused individual questions" to predominate. *Id.* That type of case-dispositive defense should not be resolved at class certification, this Court held, because whether the defense prevails or not, it leaves no individualized issues for litigation. *Id.*

B. District Court Proceedings

1. In this antitrust class action, plaintiffs (respondents in this Court) are government entities that issued variable rate demand obligations ("VRDOs"), a type of municipal bond that pays a short-term, variable interest rate to bondholders. App.3a-4a, 14a. Defendants (petitioners in this Court) are financial institutions that plaintiffs hired to reset VRDO rates, typically daily or weekly. App.3a-4a, 14a-15a.

The parties' contracts required each defendant to set each VRDO's rate at the lowest level that, in that defendant's judgment, would induce investors to buy 100% of the bond issuance at face value. App.3a-4a. Although VRDO interest payments go to third-party bond investors—not defendants—plaintiffs allege that defendants conspired to set "inflated" interest rates on over 12,000 VRDOs from 2008 to 2015. App.3a-5a. Plaintiffs seek approximately $12 billion in treble damages. C.A.J.A.175.

The district court had subject matter jurisdiction under 15 U.S.C. §15(a) and 28 U.S.C. §§1331 and 1337(a).

2. Plaintiffs moved to certify a class under Rule 23(b)(3). The key issue at class certification was whether the question of antitrust injury was common or individualized. More specifically, the issue was whether plaintiffs would need to prove individually that each VRDO's rate was inflated, based on the particular market factors

applicable to that VRDO (*e.g.*, the creditworthiness of the municipal issuer, the strength of the liquidity provider, supply and demand for the VRDO), or whether instead plaintiffs could prove the alleged rate inflation on a common, class-wide basis. App.36a-37a.

Plaintiffs argued they could prove injury (inflated VRDO rates) across the class with models that their expert, William Schwert, created to estimate the VRDO rates that supposedly would have prevailed absent the alleged conspiracy. App.21a-23a. Defendants opposed certification and separately sought to exclude Dr. Schwert's testimony. App.13a-14a.

Defendants' experts, Glenn Hubbard and John Chalmers, argued that Dr. Schwert's models could not be used to prove class-wide injury because they did not, and could not, accurately distinguish between inflated and non-inflated VRDO rates. App.7a, 20a, 23a. Among other failings, the experts explained, the models did not account for the profound effects that the Financial Crisis of 2008-2009 and the European Sovereign Debt Crisis of 2010-2012 had on VRDOs during the putative class period. App.23a; C.A.J.A.750-751, 1740-1744.

Dr. Hubbard also explained that Dr. Schwert's models identified conspiracy-induced inflation during a period when all parties agreed there was no conspiracy. App.28a-30a; C.A.J.A.1780-1781, 2409-2410. In fact, he explained, they purport to find "injury" for over 90% of VRDOs during the non-conspiracy period. C.A.J.A.2401-2403. Dr. Hubbard further argued that Dr. Schwert's models yielded nonsensical results, including that VRDO rates were inflated by more than 500% at the same time that defendants were holding over $50 billion in VRDOs that went unsold at prevailing interest rates—a compelling indication that the rates were not

inflated but rather were too low to induce investors to buy 100% of the bonds. C.A.J.A.1784-1785.

Plaintiffs also offered a second expert, Rosa Abrantes-Metz, arguing that her market studies proved that class-wide impact was a common question. App.31a. Dr. Abrantes-Metz opined that if defendants inflated the "base rates" that some of them used as a starting point in the rate-setting process, then that inflation likely would also have been reflected in the VRDO rates charged to putative class members. App.31a-33a. Defendants challenged Dr. Abrantes-Metz's studies on numerous grounds, including principally that they contradicted the record evidence, and separately sought to exclude her testimony. App.33a-34a.

After stating that predominance turned "largely" on whether plaintiffs' "expert models on class-wide impact are admissible," the district court found defendants' challenges to plaintiffs' experts "forceful," "compelling," and "perhaps even meritorious." App.14a, 18a, 28a, 30a, 31a. The court nevertheless granted class certification without resolving those challenges. Instead, after finding plaintiffs' expert evidence admissible under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the court relied on *Tyson* to hold that the "persuasiveness" of plaintiffs' expert evidence was a matter "for the jury," not for class certification. App.36a, 40a. What mattered at class certification, the court concluded, was not whether each model "actually works" but whether they were "*workable*." App.24a.

C. Second Circuit Proceedings

The Second Circuit granted defendants' petition for leave to appeal under Federal Rule of Civil Procedure 23(f). On appeal, defendants argued that the district court erred by failing to resolve the parties' dispute over

whether plaintiffs' expert evidence could actually distinguish between injured and uninjured class members. That dispute bore directly on the Rule 23(b)(3) predominance requirement because it would determine whether the question of antitrust injury was a common or individualized one. Pet.C.A.Br.2-3, 20-22.

The Second Circuit affirmed the class-certification order. App.1a-11a. The court first rejected defendants' argument that the district court "merely assess[ed] the admissibility of the expert reports under *Daubert*." App.7a. In the court's view, "the district court did not stop there," but rather "went on to evaluate whether certification was permissible" under Rule 23(b)(3). App.8a.

As to *how* the district court evaluated predominance at that second step, the Second Circuit rejected defendants' argument "that the district court was required to resolve the disputes between the parties' dueling expert reports at the class certification stage." App.9a. Instead, quoting *Tyson*, the Second Circuit ruled that once the district court found plaintiffs' expert evidence admissible, that court could deny class certification "based on the persuasiveness" of plaintiffs' evidence only if "no reasonable juror could have believed" it. *Id.*

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DIVIDED OVER WHETHER DISTRICT COURTS MUST RESOLVE, AT CLASS CERTIFICATION, EXPERT DISPUTES BEARING ON THE PREDOMINANCE REQUIREMENT

This Court has held repeatedly that, on a motion to certify a Rule 23(b)(3) class, plaintiffs must *prove* predominance—and hence that district courts must decide before certifying a class that plaintiffs have done so.

However, since this Court's *Tyson* decision, the circuits have divided over what a district court must do when a plaintiff offers expert evidence to prove predominance and the defendant disputes that evidence with its own expert evidence.

The Third and Seventh Circuits correctly require district courts to resolve these expert disputes at class certification, just like any other issue that bears on class certification. By contrast, the Second Circuit here—misreading *Tyson*—concluded that these disputes should be left to the jury to resolve unless no reasonable juror could believe the plaintiff's evidence. The Ninth and D.C. Circuits take a third view, saying that *Tyson* requires use of the same "no reasonable juror" standard yet affirming class-certification orders only after finding that the district court resolved expert disputes bearing on predominance.

A. The Third And Seventh Circuits Require District Courts To Resolve Expert Disputes Bearing On Predominance

1. Starting with its 2008 decision in *In re Hydrogen Peroxide Antitrust Litigation*, the Third Circuit has been clear that, under this Court's precedent, a district court must resolve at class certification disputes about a plaintiff's expert evidence bearing on the Rule 23(b)(3) predominance requirement.

In *Hydrogen Peroxide*, an antitrust case concerning alleged price fixing in the hydrogen-peroxide market, the plaintiffs argued at class certification that their expert models could establish class-wide antitrust impact. 552 F.3d at 312-313. The defendants challenged the models with their own expert evidence, but the district court did not "confront" or "address" those challenges. *Id.* at 322. Instead, the court "uncritically accepted" the

plaintiffs' models "merely because" they were admissible. *Id.* at 322-323.

The Third Circuit held this was error because a district court at class certification must "resolve a genuine legal or factual dispute relevant to determining [Rule 23's] requirements." 552 F.3d at 320. A district court, the court of appeals explained, may not abdicate this responsibility simply because the dispute is between experts or "overlap[s] with the merits." *Id.* at 324. In particular, the court held that district courts must resolve disputes under a preponderance-of-the-evidence standard, stating that "to certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23." *Id.* at 320. Citing the Seventh Circuit, the Third Circuit reasoned that "neglecting to resolve disputes between experts 'amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert.'" *Id.* at 324 (quoting *West*, 282 F.3d at 938).

Twelve years later, the Third Circuit reaffirmed its position in *In re Lamictal Direct Purchaser Antitrust Litigation*, 957 F.3d 184 (3d Cir. 2020), expressly rejecting the contention that this Court's intervening *Tyson* decision affected *Hydrogen Peroxide*'s precedential value.

In *Lamictal*, the court reviewed an order certifying a class in an antitrust case where the experts disagreed about whether the plaintiffs could rely on certain averages to establish class-wide injury. 957 F.3d at 193-194. On appeal, the plaintiffs argued the case was "controlled by a comment" in *Tyson*—the same comment the Second Circuit relied on here—that they argued established a "lower standard for predominance whereby that

criterion is satisfied unless no reasonable juror could believe the common proof at trial." *Id.* at 191 (citing *Tyson*, 577 U.S. at 459). The Third Circuit rejected that argument, holding that "*Tyson Foods* does not control … and its no-reasonable-juror statement certainly does not overturn our longstanding rule announced in *Hydrogen Peroxide*, and reiterated in many a case, that a putative [Rule 23(b)(3)] class must demonstrate"—at class certification—"that its claims are capable of common proof at trial by a preponderance of the evidence." *Id.* As a result, it was not enough for the district court to "assume[], absent a rigorous analysis," that the plaintiffs' expert methodologies "[we]re acceptable." *Id.* at 194. Instead, the district court was obligated to "weigh the competing evidence," "scrutinize [it] to determine what was credible," and "resolve these factual disputes." *Id.*

2. Like the Third Circuit, the Seventh Circuit holds—even after *Tyson*—that a district court must "resolve" any "material disputes bearing on class certification," including expert disputes. *Arandell*, 149 F.4th at 893.

In *Arandell Corporation* v. *Xcel Energy Inc.*, an antitrust case concerning allegations of price-fixing in the natural-gas market, the plaintiffs sought to satisfy the predominance requirement through expert models. 149 F.4th at 890, 894-895. In response, the defendants' experts argued that the plaintiffs' models did not account for differences across the natural-gas market and so could not serve as class-wide proof. *Id.* at 894-895. The district court acknowledged, but made no findings about, the defendants' arguments, and held that the plaintiffs' models satisfied the predominance requirement. *Id.* at 891.

On appeal, the Seventh Circuit cited *Tyson* to define the contours of a "common question," but followed the Rule 23(b)(3) standard set forth in *Comcast* and *Hydrogen Peroxide*—not *Tyson*'s "no reasonable juror" standard. 149 F.4th at 892, 894-895. Under the former, the Seventh Circuit held, the district court erred: "[W]here the defendants have offered admissible evidence that, if credited, would mean individual questions would predominate over common questions, then the district court must" evaluate plaintiffs' expert models "in light of the defendants' counterarguments, and take evidence to that end." *Id.* at 894 (quotation marks omitted). This required the district court to resolve the parties' disputes bearing on class certification. "Tough questions must be faced and squarely decided," even if they concern "expert evidence," even if they "may also affect the decision on the merits," and even if "each side has some support." *Id.* at 893-894. The Seventh Circuit, like the Third Circuit, laid bare the stakes, noting that if the rule were otherwise, a party could obtain class certification "'just by hiring a competent expert.'" *Id.* at 894.

The court of appeals therefore vacated the class-certification order and remanded for the district court to "engage with these [expert] disputes and make findings of fact." 149 F.4th at 895. There was, as the court of appeals stated, "no shortcut that might let the district court avoid full engagement with the economic experts and their many detailed point-counterpoint debates." *Id.*

B. The Second Circuit Rules That A Plaintiff's Expert Evidence, When Disputed, Need Only Satisfy The "No Reasonable Juror" Standard

In conflict with the Third and Seventh Circuits, the Second Circuit decided here that a district court is *not*

"required to resolve the disputes between the parties' dueling expert reports" relating to predominance at class certification. App.9a. Like the defendants in *Hydrogen Peroxide*, *Lamictal*, and *Arandell*, defendants here challenged the expert models that plaintiffs offered to try to establish injury on a class-wide basis. Defendants, with their own expert evidence, argued that plaintiffs' models did not prove predominance because they could not actually distinguish between injured and uninjured putative class members. App.7a; *see supra* pp.8-9.

Unlike the Third and Seventh Circuits, the Second Circuit ruled that the district court was not required to resolve these expert disputes before certifying a class. Reading *Tyson* differently from those two circuits, the Second Circuit affirmed the class-certification order based on a standard that asks whether a reasonable juror could believe the evidence offered to prove predominance. App.9a. In the Second Circuit's words, quoting *Tyson*, "'[o]nce a district court finds [expert] evidence to be admissible,' a district court can only deny class certification based on the persuasiveness of the expert evidence if 'no reasonable juror could have believed' the expert evidence." *Id.* (alterations in original).

C. The Ninth And D.C. Circuits Take A Third Approach To Expert Disputes Bearing On Predominance

The Ninth and D.C. Circuits take yet another approach to the question presented, saying (like the Second Circuit) that *Tyson* sets a lower standard for evaluating expert evidence and yet (like the Third and Seventh Circuits) affirming class certification only after finding that a district court in some sense resolved disputes about expert evidence offered to satisfy Rule 23.

1. In *Olean Wholesale Grocery Cooperative* v. *Bumble Bee Foods*, the en banc Ninth Circuit reviewed a district court order certifying several Rule 23(b)(3) classes of tuna purchasers raising antitrust claims. 31 F.4th at 661. The plaintiffs offered expert models to show that antitrust injury could be proven on a class-wide basis, which the defendants, with their own experts, disputed. *Id.* at 662. The Ninth Circuit affirmed the certification order. *Id.* at 661.

On the one hand, *Olean* upheld certification only after concluding that the district court "resolve[d] each dispute between the experts" in the plaintiffs' favor. 31 F.4th at 676. The court of appeals noted that the district court "considered" both sides' evidence, "credited" the plaintiffs' experts, and "rejected" the defendants' experts' critiques. *Id.* at 675-676. The Ninth Circuit also recognized that deficiencies in a plaintiff's expert model are grounds to hold that the model failed to satisfy the plaintiff's burden at class certification. As the court of appeals stated, "[c]ourts have frequently found that expert evidence, while otherwise admissible under *Daubert*, was inadequate to satisfy the prerequisites of Rule 23," such as where the evidence yielded "nonsensical results" or "false positives." *Id.* at 666 n.9 (citing *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244, 252-255 (D.C. Cir. 2013)).

However, the Ninth Circuit also articulated a view of *Tyson* similar to the Second Circuit's. Relying on *Tyson*, the Ninth Circuit said that while a district court may need to consider both sides' expert evidence concerning a Rule 23 requirement, the court cannot decline certification simply because it finds the plaintiff's evidence "unpersuasive and unlikely to succeed in carrying the plaintiff's burden of proof on that issue." 31 F.4th at 667. To the contrary, the Ninth Circuit held, a "lack of

persuasiveness is not fatal at certification." *Id.* at 679. Consistent with that view, the Ninth Circuit ultimately held that the district court did not err by "concluding that [the plaintiffs'] evidence was sufficient to sustain a jury verdict on the question of antitrust impact for the entire class." *Id.* at 685.

The Ninth Circuit has continued to approach the question presented this way after *Olean*. Most recently, in *Painters & Allied Trades* v. *Takeda Pharmaceutical Company*, 2025 WL 1683472 (9th Cir. June 16, 2025), the court contrasted different approaches courts have taken when confronted with competing expert evidence at class certification.

Painters explained that Rule 23 requires more than simply determining that a plaintiff's class-certification evidence is admissible. 2025 WL 1683472, at *2. At the same time, *Painters* quoted *Olean* for the proposition that "a district court cannot decline certification merely because it considers plaintiffs' evidence relating to the common question to be unpersuasive and unlikely to succeed in carrying the plaintiffs' burden of proof on that issue." *Id.* Echoing *Olean*'s reliance on *Tyson*, *Painters* explained: If admissible evidence "'"could have sustained a reasonable jury finding" on the merits of a common question, then a district court may conclude that the plaintiffs have carried their burden of satisfying the Rule 23(b)(3) requirements.'" *Id.* at *1 (quoting *Olean*, 31 F.4th at 667 (in turn quoting *Tyson*, 577 U.S. at 455)).

2. The D.C. Circuit has taken a similar approach in addressing the proper role of a district court presented with expert disputes at class certification.

In *National ATM Council, Inc.* v. *Visa Inc.*, the D.C. Circuit confronted the same question as *Olean*: whether the plaintiffs failed to show "common injury and

thus failed to meet the predominance requirement." 2023 WL 4743013, at *3 (D.C. Cir. July 25, 2023) (per curiam). The defendants argued at class certification that the expert models the plaintiffs offered to establish class-wide injury were flawed, and the defendants offered "their own, contrasting model" showing "some members" of the class were not injured. *Id.* at *11. The district court certified three Rule 23(b)(3) classes, deeming it sufficient that the plaintiffs had offered what the court called a "colorable" method of proving class-wide antitrust injury. *Id.* at *4.

The D.C. Circuit affirmed. On the one hand, the court of appeals said that a district court may certify a class only if convinced after a "rigorous analysis" that a plaintiff has satisfied Rule 23's requirements "through evidentiary proof." 2023 WL 4743013, at *5. The D.C. Circuit noted that this Court's precedents "require district courts to closely review the record at the class certification stage … to ensure that plaintiffs provide a reliable method for establishing class wide injury." *Id.* at *6. Similarly, the court acknowledged that its own precedent "'commands'" a district court "to take a 'hard look at the soundness of statistical models that purport to show predominance.'" *Id.* at *4 (quoting *Rail Freight*, 725 F.3d at 255).

On the other hand, the D.C. Circuit articulated a view of *Tyson* similar to that of the Second and Ninth Circuits, suggesting a more limited role for district courts—and thus a lower burden for plaintiffs—at class certification. In particular, the D.C. Circuit held that district courts are "not required at class certification to make the ultimate determination which of two dueling experts to accept." 2023 WL 4743013, at *11. Citing *Tyson*, the court of appeals said that to satisfy Rule 23 in a case involving a dispute over a method of proof,

"plaintiffs need only genuinely contest, not definitively rule out, defendants' alternative ways that a reasonable factfinder might view the evidence." *Id.* at *5. Citing *Tyson* again, the court of appeals reasoned that a district court need "not focus on which of the conflicting [expert] models to credit," but instead may certify a class if the plaintiffs "offered reliable, generalized proof of injury that a reasonable factfinder could credit and that, if credited, would enable resolution of class claims without piecemeal proof." *Id.* at *9.

* * *

Nearly a decade after *Tyson*, there is a conflict among five courts of appeals about a district court's role at class certification when the parties dispute, through expert evidence, whether the plaintiff has proved predominance—reflecting persistent confusion and disagreement over the import of *Tyson*. Three courts of appeals, including the Second Circuit here, have said that *Tyson* prescribes a lenient standard, under which a plaintiff's expert evidence suffices unless no reasonable juror could believe it. Two other circuits, by contrast, reject the premise that *Tyson* is relevant and hold that this Court's other decisions—including *Comcast*—require district courts to resolve expert disputes bearing on predominance before certifying a class. The upshot is that in some circuits, district courts need not resolve expert disputes over predominance because a plaintiff may satisfy that requirement simply by hiring a competent expert, while in other circuits, district courts must resolve such disputes to find that a plaintiff has proven predominance.

II. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT

This Court should grant the petition not only because of the confusion and divergence that *Tyson* has caused in the courts of appeals, but also because the Second Circuit's refusal to require district courts to resolve expert disputes about predominance before class certification was wrong.

1. Rule 23 states that a (b)(3) class may be certified only if "the court finds" that common questions predominate over individual questions. Fed. R. Civ. P. 23(b)(3). A plaintiff therefore must prove, as this Court has held repeatedly, that all of Rule 23's requirements are "in fact" satisfied before a class can be certified. *Comcast*, 569 U.S. at 40. For example, in *Wal-Mart*, this Court held that a "party seeking class certification must affirmatively demonstrate his compliance" with Rule 23. 564 U.S. at 350. Two years later, in *Comcast*, this Court was explicit that Rule 23's requirements must be satisfied "through evidentiary proof." 569 U.S. at 33. Finally, in *Halliburton* v. *Erica P. John Fund*, this Court confirmed that *Wal-Mart* and *Comcast* "made clear" that plaintiffs "must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23, including … the predominance requirement of Rule 23(b)(3)." 573 U.S. at 275.

This Court has further held that to "determin[e]" whether plaintiffs have met their burden to prove each Rule 23 requirement, district courts must rigorously analyze "*all* probative evidence" offered by the parties, including by the defendant. *Goldman Sachs*, 594 U.S. at 122. As this Court's cases make clear—across different contexts, regarding various types of claims—these principles apply when plaintiffs seek to prove predominance

through expert models that purport to show that an element of their claims can be adjudicated on a class-wide basis, rendering it a common question.

For example, *Comcast*, an antitrust case, held that district courts must "consider" a defendant's "arguments against" a plaintiff's model when making the required "determination that Rule 23 is satisfied." 569 U.S. at 34-35. The same is true in securities-fraud cases, where plaintiffs often invoke the "fraud-on-the-market" theory to establish a presumption of class-wide reliance on an alleged misrepresentation. *Halliburton*, 573 U.S. at 268. In that context, this Court has held that plaintiffs must prove, at class certification, the elements necessary to invoke the presumption of reliance—and that courts must decide whether plaintiffs have done so, by considering all probative evidence offered by both sides. *See Goldman Sachs*, 594 U.S. at 122, 124; *Halliburton*, 573 U.S. at 276, 283.

A court may not sidestep this obligation simply because a plaintiff will need to prove the same things a second time at the merits stage. *See Goldman Sachs*, 594 U.S. at 122; *Comcast*, 569 U.S. at 34. In *Goldman Sachs*, this Court said—in language applicable to any predicate necessary to establish predominance—that when the parties "submit competing expert evidence," the district court's "task is simply to assess all the evidence … and determine whether it is more likely than not" that the predicate is true. 594 U.S. at 126-127.

Here, the Second Circuit improperly relieved the district court of this obligation. The parties here (like those in *Goldman Sachs*) submitted competing expert evidence bearing on predominance. Plaintiffs' experts opined that their models could and did detect injury on a class-wide basis, rendering the question of injury a

common one. App.5a; *see supra* p.8. Defendants' experts countered that the models could not serve as class-wide proof of injury because the models cannot actually distinguish between inflated and non-inflated interest rates. App.7a; *see supra* pp.8-9. As a result, defendants argued, plaintiffs and class members would need to resort to VRDO-specific evidence (*e.g.*, the creditworthiness of the municipal issuer, the strength of the liquidity provider, supply and demand for the VRDO) to prove injury, rendering it an individualized question.

The district court conceded that defendants' arguments were "forceful," "compelling," and "perhaps even meritorious." App.14a, 28a, 30a, 31a. Yet the Second Circuit rejected any requirement that the district court resolve the expert disputes by deciding whether, based on "all the evidence," it was "more likely than not" that plaintiffs' models could establish antitrust injury on a class-wide basis. *Goldman Sachs*, 594 U.S. at 127. According to the court of appeals, the district court was not "required to resolve the disputes between the parties' dueling expert reports at the class certification stage." App.9a. That ruling was wrong because the expert disputes bore directly upon whether certification was appropriate.

Under this Court's precedent, the Second Circuit's observation should apply only in cases where a defendant's successful challenge to a plaintiff's expert evidence would leave the plaintiff and putative class members no other options to prove their case individually—*i.e.*, a fatal-similarity defense. In that circumstance, there would be no risk of individualized issues predominating because the defense would necessarily defeat every plaintiff and class member's *only* means of proving their claims on the merits.

This Court's decision in *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds* makes this point. As *Amgen* explained, securities-fraud plaintiffs ordinarily must prove the elements of the fraud-on-the-market theory at class certification because, absent the presumption of reliance the theory affords, "[i]ndividualized reliance issues would predominate." 568 U.S. at 473-474. The only fraud-on-the-market requirement that a plaintiff need not prove is materiality, because materiality is both an element of the fraud-on-the-market presumption and an "indispensable element[] of a Rule 10b-5 claim." *Id.* at 473. Due to that overlap, a plaintiff's failure to prove materiality at class certification would not only foreclose the fraud-on-the-market presumption but also defeat every class member's claims on the merits, "end[ing] the case for one and for all; no claim would remain in which individual reliance issues could predominate." *Id.* at 468. In contrast, a failure of proof on the other elements of the fraud-on-the-market presumption would not end the case. Instead, individual plaintiffs and putative class members would remain free to attempt to prove reliance through "the 'traditional' mode" of "individualized proof." *Id.* at 473-474.

Likewise here, a successful challenge to plaintiffs' expert models would not render the claims of every named plaintiff and putative class member "dead on arrival." *Amgen*, 568 U.S. at 474. Plaintiffs and putative class members would remain free to try to prove their purported injuries through the traditional mode of individualized proof—*e.g.*, by presenting individualized evidence that the rates on their VRDOs were higher than they should have been given the individual circumstances of the VRDO.

In the same way that expert disputes in securities cases bear on whether reliance is a common or

individualized question, the expert disputes in this case bear on whether injury is a common or individualized question. The district court was therefore required to resolve defendants' challenges to plaintiffs' expert models and to do so under the "more likely than not" standard that this Court applied in *Goldman Sachs*. *See* 594 U.S. at 127.

2. The Second Circuit misread *Tyson* to impose a lower standard. As explained (*see supra* pp.6-7), *Tyson* concerned a defendant's challenge to representative evidence offered as class-wide proof in circumstances where, due to the absence of records, there was no alternative way for class members to prove they had worked overtime. 577 U.S. at 450, 457. If the defendant's challenge were successful, it would have defeated every class member's claim on the merits—a "'fatal similarity'"—leaving no danger of individualized issues predominating at trial. *Id.* at 457. Therefore, *Tyson* held that it was not necessary, at the certification stage, to resolve the merits of the defendant's challenge to the plaintiffs' evidence: "Resolving that question … is the near-exclusive province of the jury." *Id.* at 459. The case instead was controlled by the principle that "[o]nce a district court finds evidence to be admissible, its persuasiveness is, in general, a matter for the jury." *Id.* The only way the district court could credit the defendant's challenge would be "if it concluded that no reasonable juror could have believed" the plaintiffs' evidence was representative of the compensable time the plaintiffs and class members spent working. *Id.*

Tyson's "no reasonable juror" standard has no application where a defendant's showing, if successful, would not be fatal to every class member's claim but would simply defeat one of several means of proving those claims—plaintiffs' proposed method for proving such

claims on a class-wide basis. Thus, *Tyson* does not apply to cases like *Comcast*, where the failure of a plaintiff's expert model would not doom every claim on the merits. Nor does it apply to cases like *Halliburton* or *Goldman Sachs*, where a defendant's successful challenge to the fraud-on-the-market theory would not doom every claim on the merits. Under *Halliburton* and *Goldman Sachs*, courts at class certification do not ask simply whether a "reasonable juror" could believe the evidence offered to prove the elements of the fraud-on-the-market theory. Rather, courts must "assess all the evidence" and "determine" whether "it is more likely than not" that those elements have been proven. *Halliburton*, 594 U.S. at 126-127.

To conclude that *Tyson* applies outside of fatal-similarity cases would mean that the decision silently overruled *Comcast*, *Halliburton*, and this Court's other Rule 23 precedents, all of which make clear that a plaintiff is required to prove predominance at class certification. But as the Third Circuit recognized, *Tyson* "certainly does not" overrule the well-established principle that putative class-action plaintiffs must prove Rule 23(b)(3) is satisfied. *Lamictal*, 957 F.3d at 191.

In short, the Second Circuit erred by applying *Tyson*'s "no reasonable juror" standard to relieve plaintiffs of their burden to prove predominance and the district court of its obligation to resolve the parties' expert disputes.

III. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING, AND THIS CASE IS AN EXCELLENT VEHICLE TO ADDRESS IT

A. The Question Presented Is Important And Recurring In Class Actions

1. The question presented is important. The certification of Rule 23(b)(3) damages class actions often comes down to whether a plaintiff can satisfy the predominance requirement with expert evidence. As the en banc Ninth Circuit stated in *Olean*, "Plaintiffs frequently offer expert evidence, including statistical evidence or class-wide averages, to prove that they meet the prerequisites of Rule 23(b)(3)." 31 F.4th at 665. Commentators likewise recognize that "the certification decision often hinges upon the court's assessment of [competing] expert submissions about the ability of plaintiffs to show that their claims may be resolved through generalized, common proof." 1 *McLaughlin on Class Actions* §3:14 (22nd ed., West Nov. 2025 Update).

Under the Second Circuit's understanding, however, district courts are relieved of their obligation to weigh competing expert evidence and resolve whether the plaintiff's evidence actually proves predominance. Even in the face of a defendant's "forceful," "compelling," and "perhaps even meritorious" challenges to a plaintiff's expert evidence, App.14a, 28a, 30a, 31a, the district court may certify a class without resolving the merits of those challenges—based on a finding that the plaintiff's evidence is believable. As courts of appeals have remarked for over two decades, when a district court fails to engage with and resolve disputes about plaintiffs' expert evidence, the court effectively acts as a rubber stamp. *See Arandell*, 149 F.4th at 894; *Hydrogen Peroxide*, 552 F.3d at 323; *West*, 282 F.3d at 938.

This is problematic because class certification is often outcome-determinative, given the vast potential liability created by amassing many claims into a single proceeding. As this Court has long recognized, this dynamic exerts excessive pressure on defendants to settle even meritless claims: "Certification of a large class may so increase the defendant's potential damages liability and litigation costs" that the defendant "may find it economically prudent to settle," even if it must "abandon a meritorious defense." *Coopers & Lybrand*, 437 U.S. at 476. Indeed, "empirical studies … confirm what most class action lawyers know to be true: almost all class actions settle." Bone & Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1292 (2002). The threat of "massive award[s]" is particularly grave in antitrust cases, where damages are trebled. Areeda & Hovenkamp, *Antitrust Law* ¶331a (5th ed., Lexis Sept. 2025 Supp.).

The Second Circuit's approach thus "will generate real-world consequences." *Laboratory Corporation*, 605 U.S. at 333 (Kavanaugh, J., dissenting). "Overbroad and incorrectly certified classes threaten massive liability," which in turn "can coerce businesses into costly settlements that they sometimes must reluctantly swallow rather than betting the company on the uncertainties of trial." *Id.* The importance of the question underscores the need for this Court's review.

2. The question presented is also recurring—both in courts of appeals and district courts. Although class-certification decisions reach the courts of appeals infrequently, *see infra* p.29, five courts of appeals have already weighed in on the issue, including one sitting en banc. These five circuits, moreover, include six of the seven judicial districts with the highest number of antitrust class-action filings from 2009 to 2024, accounting

for more than a majority of the 1,970 antitrust class actions filed during that time. *See* Davis & Clark, *2024 Antitrust Annual Report: Class Actions in Federal Court* 7 (July 31, 2025).

District courts around the country likewise face this question regularly in class actions, as putative class plaintiffs frequently submit expert models and evidence, defendants challenge that evidence, and district courts must determine how to address those disputes. *See, e.g.*, *In re Domestic Drywall Antitrust Litigation*, 322 F.R.D. 188, 222-223 (E.D. Pa. 2017) (class-certification order relying on plaintiff models to show predominance); *Simon & Simon, PC* v. *Align Technology, Inc.*, 2023 WL 8261297, at *3-5 (N.D. Cal. Nov. 29, 2023) (same); *In re Turkey Antitrust Litigation*, 2025 WL 264021, at *17 (N.D. Ill. Jan. 22, 2025) (same), *appeal filed*, No. 25-8004 (7th Cir. Feb. 5, 2025).

Thus, whether or not district courts explicitly discuss the question presented in their decisions, the answer is vitally important nearly every time plaintiffs seek to certify damages class actions relying on expert evidence.

B. This Case Is An Excellent Vehicle

1. The Second Circuit's opinion cleanly presents the question presented. Quoting *Tyson*, the court of appeals stated that "in the context of assessing whether expert testimony establishes that common issues predominate, … a district court can only deny class certification based on the persuasiveness of the expert evidence if 'no reasonable juror could have believed' the expert evidence." App.9a. Moreover, the Second Circuit's (incorrect) answer to the question presented was consequential. This is evident from the district court's statements describing defendants' challenges to the expert evidence as "forceful," "compelling," and "perhaps even

meritorious." App.14a, 28a, 30a, 31a. Under the standard this Court's precedents require, a forceful, compelling, and meritorious challenge to plaintiffs' expert evidence matters.

2. Other opportunities for this Court to address the question presented will likely be infrequent. To start, interlocutory review of certification orders by the courts of appeals pursuant to Rule 23(f) is, by design, uncommon. The circuits have repeatedly made this point, holding that such review should be "sparing" or "rare." *See, e.g.*, *In re Sumitomo Copper Litigation*, 262 F.3d 134, 140 (2d Cir. 2001); *Chamberlan* v. *Ford Motor Company*, 402 F.3d 952, 959 (9th Cir. 2005) (per curiam); *Asher* v. *Baxter International Inc.*, 505 F.3d 736, 741 (7th Cir. 2007); *Lienhart* v. *Dryvit Systems, Inc.*, 255 F.3d 138, 145 (4th Cir. 2001); *In re Lorazepam & Clorazepate Antitrust Litigation*, 289 F.3d 98, 105 (D.C. Cir. 2002). And once a court of appeals has decided the question presented, as five circuits now have, it is especially unlikely that it would consider the question again in a Rule 23(f) appeal, given that such review is intended for class-certification orders that "present[] an unsettled and fundamental issue of law relating to class actions." *In re Lorazepam*, 289 F.3d at 99-100.

A certification decision could in theory reach this Court after a final judgment. But those opportunities are likewise rare—indeed, likely even rarer than under Rule 23(f)—given the settlement pressure that class certification generates, even in lawsuits that defendants view as meritless. *See supra* p.27. Indeed, that pressure "is one reason why Rule 23(f)'s interlocutory appeal procedure was established in 1998." *Laboratory Corporation*, 605 U.S. at 333 (Kavanaugh, J., dissenting). The Court should take this opportunity and resolve the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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