No. 25-639

IN THE

Supreme Court of the United States

BANC OF AMERICA SECURITIES LLC, *et al.*,

Petitioners,

v.

CITY OF PHILADELPHIA, PENNSYLVANIA, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the court of appeals correctly hold that the district court conducted a rigorous analysis of the evidence submitted by the plaintiffs and defendants in finding that common issues would predominate, such that a class should be certified?

RULE 29.6 DISCLOSURE

Respondents City of Philadelphia, San Diego Association of Governments, and Mayor and City Council of Baltimore state that they have no parent corporations and that no publicly held corporation owns 10% or more of their stock.

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INTRODUCTION

The Second Circuit's unanimous, summary order applying well-settled legal standards to the evidence in this case does not warrant review.

Petitioners invent circuit conflict where none exists and overlook the Second Circuit's measured, thorough decision based on over a decade of this Court's authority. Far from "improperly reliev[ing] the district court of [its] obligation" to thoroughly vet the expert analyses on class certification (Pet. 21), the Second Circuit expressly applied this Court's standards for Rule 23(b)(3) evidence, including expert evidence. It rigorously analyzed that evidence, even if there was some overlap with the merits, to determine whether common issues would predominate—and affirmed the district court's finding that liability to all class members could be decided on a class-wide basis. Accordingly, the court of appeals identified no error—let alone abuse of discretion—in the district court's conclusion that common issues predominated. The decision below was also consistent with the purportedly conflicting decisions from other circuits. Each of the cases cited by Petitioners as allegedly giving rise to a conflict applied the same settled standard as the Second Circuit did below, but to different facts and different types of alleged conduct. Indeed, this Court has repeatedly (and recently) denied review of this exact issue. *See Visa Inc. v. Nat'l ATM Council, Inc.*, No. 23-814 (pet. denied Apr. 15, 2024); *StarKist Co. v. Olean Wholesale Grocery Cooperative, Inc.*, No. 22-131 (pet. denied Nov. 14, 2022).

The Petition rests on the theory—critically, not raised to the district court below—that "rigorous analysis" requires a district court to resolve all

disputes between the experts. This Court and every court of appeals to have considered that issue have rejected Petitioners' theory. On the contrary, it is well established that, in ruling on a motion for class certification, the district court should examine only whether a question can be decided class-wide using common evidence, not whether the question will be answered on the merits in the plaintiff's favor, *Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, 568 U.S. 455, 459 (2013), and that the persuasiveness of expert evidence is a matter for the jury, not the judge, *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 459 (2016).

Petitioners' arguments also ignore fundamental principles of law holding that a court's view of persuasiveness cannot bind the jury. Once the district court has thoroughly vetted expert evidence for admissibility—as the court did here—its opinion about which side would actually win in a battle of the experts has no bearing on the evidence before the jury and is irrelevant to whether issues can be decided on a class-wide basis.

Petitioners' request to review the application of well-settled law to the unique facts of this dispute, in the absence of any circuit-level conflict of authority, should be denied.

STATEMENT OF THE CASE

A. Defendants' Conspiracy to Inflate VRDO Rates.

This case is about the decision by Petitioners—some of the largest financial institutions in the world—to eliminate competition in the market for VRDO remarketing. App.13a. VRDOs are bonds issued primarily by municipalities and charitable

entities, such as schools and hospitals, to raise money for their operating expenses and public projects. App.3a. VRDOs are long-term bonds whose rates are reset periodically by banks acting as remarketing agents ("RMAs"). App.14a. At each reset period, RMAs are contractually obligated to set the lowest possible rate that will allow a VRDO to trade at face value, or "par." App.15a. RMAs are also required to remarket VRDOs to investors at the lowest possible rate if an investor exercises its option to redeem the bonds. App.15a.

Petitioners collectively serve as RMAs for the vast majority of the VRDO market. App.15a. In a competitive market, RMAs compete against each other for issuers' business by setting the lowest possible rates for their clients. App.15a. But here, that did not happen. Instead, Petitioners conspired to set rates well above competitive levels from at least 2008 through 2015. App.15a. They did this because inflating VRDO rates increased the chance of placing the bonds with an investor, lowering the costly likelihood of having to take VRDOs into their "inventory." App.16a.

Petitioners carried out this conspiracy by coordinating their internal, prospective VRDO "base rates," which represent the initial rates that each bank would use as a starting or reference point to price the individual VRDOs in their respective portfolios. App.16a. Petitioners implemented their scheme by exchanging prospective pricing and bond inventory information through an S&P index as well as through direct communications such as remarketer chats and phone calls. App.15a-16a. They then used that prospective pricing information to set their own rates for the period. App.16a.

In their motion for class certification, Respondents put forth abundant common evidence of injury and damages in the form of reports by two well-respected economists, each of whom demonstrated class-wide impact from the conspiracy through complementary approaches. App.20a-21a, App.31a.

First, Respondents offered the analyses of Dr. William Schwert, a leading expert in financial economics and a Distinguished Professor of Finance and Statistics Emeritus at the University of Rochester. App.21a; Expert Report of William Schwert, Dkt. 369-1, *City of Philadelphia et al. v. Bank of America et al.*, No. 19-cv-1608 (JMF) (S.D.N.Y.), at 1. Dr. Schwert constructed two multi-variate regression models to estimate the effects of Petitioners' conspiracy on VRDO rates. App.21a. The first was a multiple dummy variable model, using data from both conspiracy and non-conspiracy periods to estimate the coefficients of explanatory variables that Dr. Schwert used to control for factors, other than Petitioners' conspiracy, affecting VRDO rates. App.21a-22a. Dr. Schwert's second regression analysis was a "backcasting" or "prediction" model, using data from the post-conspiracy ("clean") period to predict what VRDO rates would have been during the conspiracy, but for the existence of the conspiracy. App.22a. The differences between actual, historical VRDO rates and Dr. Schwert's predicted VRDO rates measure the effect of the conspiracy on VRDO rates. App.22a. These regressions showed that virtually all VRDOs in the class were injured by the conspiracy. App.23a.

Second, Respondents offered the complementary analyses of Dr. Rosa Abrantes-Metz,

a former economist at the Federal Trade Commission and Adjunct Professor at New York University. App.31a; Expert Report of Rosa M. Abrantes-Metz, Dkt. 369-2, *City of Philadelphia et al. v. Bank of America et al.*, No. 19-cv-1608 (JMF) (S.D.N.Y.), at 3. Dr. Abrantes-Metz conducted a market-structure analysis, concluding that a conspiracy to increase VRDO rates was likely to have been effective and that Petitioners had readily available means to coordinate their base rates. App.31a-32a. Dr. Abrantes-Metz also conducted a "base rate study" comprising both quantitative and qualitative analyses: qualitatively, Dr. Abrantes-Metz found that Petitioners calculated their VRDO reset rates using base rates as a starting or reference point; quantitatively, Dr. Abrantes-Metz found a nearly one-to-one relationship between Petitioners' base rates and their ultimate VRDO rates and that Defendants' base rates often moved simultaneously. App.32a. Using these analyses, Dr. Abrantes-Metz concluded that Petitioners' base rate coordination had a common impact on all or virtually all class members. App.31a-32a.

B. The District Court's Decision on Class Certification.

Following a fulsome hearing, the district court denied Petitioners' motion to exclude the opinions of Drs. Schwert and Abrantes-Metz and certified the class. App.17a, App.31a, App.34a, App.47a-48a. The court explained the foundation for Respondents' expert models and how they support finding injury to all or virtually all class members, rigorously analyzed Petitioners' objections to those models, concluded that the models were reliable and should not be excluded, and concluded that common issues predominated.

First, contrary to Petitioners' argument that Dr. Schwert did not account for the financial crisis and the European Sovereign Debt Crisis, the court noted that Dr. Schwert *did* in fact account for these macroeconomic conditions "by using the commercial paper premium and municipal bond premium variables." App.25a. Petitioners' argument, the district court concluded, "boils down to an argument over which reasonable economists can (and apparently do) differ." App.25a.

Second, the district court rejected Petitioners' argument that purported instability in the relationship between VRDOs, commercial paper, and long-term municipal bond rates undermines Dr. Schwert's models. The court credited Dr. Schwert's explanation that "his regression does *not* depend on such a relationship" and "the precise relationship between commercial paper and municipal bond rates does not affect the predicted VRDO rates." App.26a.

Third, although Petitioners took issue with Dr. Schwert's selection of his commercial paper and municipal bond premium variables, the district court again found that Dr. Schwert's explanations for his selection of variables were sufficient. The court credited Dr. Schwert's explanation that a long-term municipal bond premium captures the general macroeconomic default risk attributable to VRDO issuers not paying their obligations. App.27a. The court also noted that "[Petitioners'] model that replaces his municipal bond premium variable with a short-term version has its own problems, such as producing damages that make no economic sense"—namely, enormous negative damages in 2008. App.27a (quotations and alterations omitted);

Corrected Expert Reply Report of William Schwert, Dkt. 428-2, *City of Philadelphia et al. v. Bank of America et al.*, No. 19-cv-1608 (JMF) (S.D.N.Y.), at 53. Petitioners specifically argued that the financial crisis affected VRDOs in a way that it did not affect commercial paper because the Federal Reserve intervened in the commercial paper market. But the court rejected this argument because the Federal Reserve's intervention did not reduce commercial paper premiums—the actual variable Dr. Schwert used—below pre-financial crisis levels. App.27a. In sum, the court found that "Dr. Schwert controlled for various external factors that could influence VRDO rates, and he grounded his models in well-supported, reasoned methodology." App.27a-28a.

Fourth, the district court agreed with Petitioners that "[f]alse positives can indeed be fatal to a model," but the court rejected Petitioners' false-positives challenge to Dr. Schwert's models because Petitioners failed to "point to evidence of systemic false positives produced by Dr. Schwert's models." App.28a. The district court also rejected Petitioners' arguments based on purported false positives in "modified versions of Dr. Schwert's models put forward by Petitioners' rebuttal expert, Dr. Glenn Hubbard," as opposed to in Dr. Schwert's models themselves. App.29a. The district court further found that any supposed false positives in Dr. Schwert's models in March 2020 alone do "not doom Dr. Schwert's models" because March 2020 represents less than 1% of the total period Dr. Schwert studied. App.30a. As to Petitioners' argument that Dr. Schwert's models produced so-called "nonsensical" results in finding high inflation at the same time as high VRDO inventory, the district court credited

Plaintiffs' "reasonable explanations of why these potentially cherry-picked examples were misleading snapshots in time that might not genuinely represent false positives." App.29a, App.30a.

Finally, the district court rejected Petitioners' argument that Dr. Schwert's models hide supposedly uninjured class members. This was because Petitioners' arguments that there was more than a de minimis number of uninjured class members improperly relied on "Dr. Hubbard's *modified* versions of Dr. Schwert's models," not on Dr. Schwert's models themselves. App.31a.

The district court also rejected Petitioners' challenges to Dr. Abrantes-Metz's analyses, concluding that "her models are theoretically capable of evidencing a common impact, and her factual analysis actually does so." App.34a (quotation and alterations omitted). The court found that market structure analyses like Dr. Abrantes-Metz's here have been accepted by other courts as common evidence of antitrust impact. App.32a. The district court rejected Petitioners' challenge that Dr. Abrantes-Metz's quantitative rate study did not control for macroeconomic factors, noting that she did so in her reply report and concluded that it did not change her analyses. App.33a. In response to the critique that Petitioners' rate-setters did not uniformly set VRDO reset rates with reference to a base rate, the district court noted that Dr. Abrantes-Metz's finding to the contrary was backed by "ample evidence in the record." App.33a.

The district court further explained that while "Defendants' principal arguments" on antitrust impact "rest on their *Daubert* motion," "[t]hat does not

end the analysis" and then went on to fully address and reject all further arguments Petitioners made against class certification. App.36a. The district court explained that, under *Tyson*, the persuasiveness of the expert evidence was a matter for the jury. App.36a. In addition, the court concluded that Petitioners' assertion of the need for individualized inquiries was unsupported and, even if their evidence were correct, it would not defeat the predominance of common issues. App.38a-39a. The district court explained that, unlike the expert models in the cases Petitioners cited, Dr. Schwert's models find that over 99% of VRDOs were injured by the conspiracy. App.39a. The court further noted that Petitioners "offer no counter-estimate of how many individualized inquiries would be required" and concluded that regardless of some individualized inquiries, common issues predominate. App.39a-40a.

In sum, the district court carefully examined Dr. Schwert's and Dr. Abrantes-Metz's analyses and each of Petitioners' criticisms, conducting the requisite rigorous analysis in finding that common issues predominate, and thereby warranting class certification.

C. The Second Circuit Affirmance by Summary Order.

The Second Circuit affirmed by summary order. At the threshold, the court recognized the well-worn standard established by this Court that "courts must conduct 'a rigorous analysis'" in "determining whether a plaintiff has sufficiently established that the requirements of Rule 23(b)(3) have been satisfied." App.6a (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2015)).

The court rejected Petitioners' argument that "the district court applied the wrong legal standard when assessing whether common questions predominate," finding their contention that "the district court failed to conduct the requisite 'rigorous analysis'" by "merely conduct[ing] an inquiry pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)," and "failing to weigh the[] competing evidence" a plain "misread[ing of] the district court's order." App.7a. Contrary to Petitioners' arguments, the Second Circuit concluded that "the district court properly proceeded in two stages" and faithfully applied this Court's well-settled precedents. App.7a-10a.

First, in response to Petitioners' *Daubert* motion to exclude both sets of expert reports, the district court conducted the requested *Daubert* analysis and found Petitioners' arguments unavailing. App.18a-34a. The Second Circuit then noted "the district court made explicitly clear that *Daubert* 'does not end the analysis,' and subsequently explained why [Petitioners'] arguments against class certification fell short." App.8a (quoting App.36a).

Second, the Second Circuit rejected Petitioners' argument that "the district court's analysis was insufficiently rigorous." App.8a. The court noted that Petitioners "concede[] the district court conducted a thorough analysis before determining" the admissibility of Respondents' expert reports under *Daubert*. App.8a. Moreover, "the district court did not stop there." App.8a. In addition to its rigorous analysis of the expert opinions, it "went on to evaluate whether certification was permissible, considering issues disputed and undisputed by [Petitioners],

before ultimately deciding that the common issues to the case, such as whether [Petitioners'] alleged conspiracy caused [Respondents] to pay higher interest rates, predominated over individual issues." App.8a. In sum, the Second Circuit concluded that the district court's analysis "was sufficiently 'rigorous' to meet the requirements of Rule 23(b)(3)." App.8a. (quoting *Comcast*, 569 U.S. at 35).

With respect to Petitioners' argument "that the district court was required to resolve the disputes between the parties' dueling expert reports at the class certification stage," the Second Circuit noted "that argument is clearly based on a misreading of Rule 23 and Supreme Court precedent." App.9a. "Rule 23(b)(3) 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." App.9a. (quoting *Amgen*, 568 U.S. at 459 (second emphasis added by the Second Circuit)). As the Second Circuit explained, while this Court's precedents require a "rigorous" analysis that may "entail some overlap with the merits," this Court has expressly precluded district courts from "engag[ing] in free-ranging merits inquiries at the certification stage." App.9a (quoting *Amgen*, 568 U.S. at 465-66). The Second Circuit further noted that this Court has instructed that, "in the context of assessing whether expert testimony establishes that common issues predominate, . . . 'once 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." App.9a (quoting *Tyson*, 577 U.S. at 459 (alterations omitted)).

Because "[t]he district court properly applied" this Court's clear precedents, the Second Circuit rejected Petitioners' argument that "the district court applied the incorrect legal standard" and affirmed the district court's class certification order. App.9a, 11a.

REASONS FOR DENYING THE PETITION

Certiorari is not warranted in this case for three reasons.

First, no conflict exists among the courts of appeals on the question presented by Petitioners. This Court has already clearly and repeatedly opined on the standard a district court must use in determining whether the requirements of Rule 23(b)(3) have been met, including with respect to challenged expert evidence. The district court must conduct "a rigorous analysis" that may require "prob[ing] behind the pleadings" in a manner that "overlap[s] with the merits," *Comcast*, 569 U.S. at 33-34 (quotations omitted), but without "engag[ing] in free-ranging merits inquiries at the certification stage," *Amgen*, 568 U.S. at 466, which would impede on the jury's exclusive role to weigh the "persuasiveness" of admissible expert evidence, *Tyson*, 577 U.S. at 459. The Second Circuit here and circuits across the country have followed this Court's settled precedents. Petitioners' attempt to manufacture a circuit conflict mischaracterizes the circuit court decisions, all of which rest on fact-specific applications of the agreed-upon legal standard. Thus, there is no circuit conflict warranting this Court's review.

Second, the question presented is not of sufficient importance, and this is a poor vehicle for review. This Court's clear rulings have been followed

consistently by every court of appeals. Petitioners' desire for a new rule that judges, not juries, must resolve the merits of factual disputes between experts on injury and damages does not warrant this Court's intervention and would strip the jury of a critical function. Further, this case is an especially poor vehicle to address the question presented, as it concerns a nonprecedential, summary order, the question presented was never argued to the district court, and the Petition does not attempt to identify individualized evidence that could defeat the predominance of the common issues. In any event, the district court determined that class certification was warranted apart from the parties' expert disputes on the common question Petitioners conceded below: whether the change in VRDO pricing was due to Petitioners' conspiracy or some other economic factor. App.35a.

Third, the decisions below were correct and fully adhered to this Court's precedents. Petitioners' suggestion that courts should go beyond a rigorous analysis in deciding predominance, and instead resolve which side's experts are more persuasive, directly conflicts with *Amgen* and *Tyson*. The Petition also fails to explain how a court can "resolve" expert disputes on class certification, as the jury ultimately must decide such disputes. Thus, any attempt to "resolve" such disputes on class certification would not actually resolve anything and ultimately has no bearing on whether common issues predominate—the test for class certification under Rule 23. And, again, Petitioners' approach would invade the province of the jury.

I. THERE IS NO CIRCUIT CONFLICT, AS ALL COURTS REQUIRE RIGOROUS ANALYSIS OF THE EVIDENCE TO DECIDE WHETHER COMMON ISSUES PREDOMINATE.

A. The Second Circuit's Application of This Court's "Rigorous Analysis" Standard Does Not Implicate a Conflict.

The Second Circuit's decision below repeatedly emphasized the applicability of this Court's well-settled precedents on class certification, including regarding the admissibility of expert opinions, and carefully considered the district court's application of those standards to the parties' expert dispute. App.6a ("In determining whether a plaintiff has sufficiently established that the requirements of Rule 23(b)(3) have been satisfied, courts must conduct 'a rigorous analysis'" that "'will frequently entail overlap with the merits of the plaintiff's underlying claim' and may even require courts 'to probe behind the pleadings.'" (quoting *Comcast*, 569 U.S. at 33-34)); App.8a ("Nor are we persuaded that the district court's analysis was insufficiently rigorous. . . . [T]he district court conducted a thorough analysis before determining [Respondents'] expert reports were admissible . . . ."); *id.* ("Such analysis, in our view, was sufficiently 'rigorous' to meet the requirements of Rule 23(b)(3)." (quoting *Comcast*, 569 U.S. at 35)).

Petitioners suggest that the Second Circuit took a right turn from this Court's precedents with respect to "*how* the district court evaluated predominance." Pet. 10. Not so. The Second Circuit articulated and applied the well-settled standard affirmed by this Court for more than a decade, explaining that "Rule 23(b)(3)" puts the burden on the

putative class plaintiff to "satisfy through evidentiary proof" that "questions of law or fact common to class members predominate," and that courts must "rigorous[ly] analy[ze]" that evidentiary proof including when it "overlap[s] with the merits of the plaintiff's underlying claim," where it may even need "to probe behind the pleadings." App.6a (quoting Fed. R. Civ. P. 23(b)(3) and *Comcast*, 569 U.S. at 33-34). In particular, the Second Circuit held that the district court applied the correct standard in "concluding that Dr. Schwert's and Dr. Abrantes-Metz's admissible testimony—if believed by the factfinder—could support a finding of antitrust liability as to each class member." App.9a (alterations, quotations, and citations omitted).

Rather than addressing the court of appeals and district court's faithful application of this Court's standard for predominance, Petitioners argue that the district court was required to "resolve" the expert disputes. Pet. 2. Petitioners' position is that it does not suffice that the factfinder could accept the class-wide evidence and that the class-wide evidence could support liability as to each class member. Rather, the judge must usurp the jury's role and become the ultimate factfinder. However, as discussed below, no circuit has adopted this extreme and unsupported position.

B. No Circuit Adopts Petitioners' Extreme Position That Courts Must Resolve Expert Conflicts On Class Certification.

None of the cases cited by Petitioners as allegedly giving rise to a "divide[]," Pet. 11, actually conflicts with the Second Circuit's decision. Petitioners' cited decisions simply apply this Court's

clear guidance to the facts before them, just as the Second Circuit did.

The courts of appeals are in full alignment that a district court must scrutinize expert evidence "rigorously" or "thoroughly" when it is offered for the purposes of supporting class certification. But no court of appeals has held that such scrutiny by the district court requires it to decide which expert is ultimately more persuasive on the merits. Petitioners make much of *Arandell Corp. v. Xcel Energy Inc.*, 149 F.4th 883 (7th Cir. 2025), *see* Pet. 13-14, but *Arandell* merely recognized the well-established standard that district courts may certify a class only "after a rigorous analysis," including of expert issues, that may "touch[] on merits issues" without actually deciding them. 149 F.4th at 892-93. The Seventh Circuit explained the line the trial court must maintain is a "delicate balance 'between evaluating evidence to determine whether a common question exists and predominates, *without weighing that evidence to determine whether the plaintiff class will ultimately prevail on the merits*.'" *Id.* at 893 (emphasis added) (quoting *Bell v. PNC Bank, Nat'l Ass'n*, 800 F.3d 360, 377 (7th Cir. 2015)).

In *Arandell*, the district court failed to meet this Court's "rigorous analysis" standard because it "avoid[ed] full engagement with the economic experts and their many and detailed point-counterpoint debates" regarding the existence of a nationwide market for natural gas. 149 F.4th at 895. The district court remanded for further consideration of that issue because it was a predicate question to whether common issues would predominate. *Id.* The facts are different here, where even Petitioners "concede[] the

district court conducted a thorough analysis before determining" the challenged "expert reports were admissible," App.8a, and "did not stop there," but "went on to evaluate whether certification was permissible, considering issues *disputed and undisputed*" by Petitioners before making its ultimate determination "that the common issues to the case, such as whether [Petitioners'] alleged conspiracy caused [Respondents] to pay higher interest rates, predominated over individual issues," *id.* (emphasis added).

Arandell expressly recognized that "[a]t class certification, a district court is not required to resolve every expert dispute." 149 F.4th at 894. *Arandell* carefully limited its holding to the nationwide-market issue, which the court viewed as a predicate question to whether common questions would predominate. *Id.* With respect to questions about the "uniformity," "degree," and "magnitude" of impact—the types of merits questions at issue here—the Seventh Circuit expressly *rejected* the idea that the court should resolve expert disputes. *Id.* at 896-99. Thus, *Arandell* is fully consistent with the Second Circuit's holding that the district court cannot, and should not, decide at class certification whether questions will be answered in favor of the class on the merits, but must instead limit its conclusion to whether common issues predominate, engaging in merits inquiries only to the extent they bear upon predominance. App.9a (citing *Amgen*, 568 U.S. at 465-66, 459).

Likewise, Petitioners' claim that the Third Circuit requires "a district court" to "resolve at class certification disputes about a plaintiff's expert evidence," Pet. 11, grossly overstates its cited

authority. Like every circuit in the country, the Third Circuit requires a district court to scrutinize expert evidence as part of its rigorous analysis of class certification evidence. *See In re Lamictal Direct Purchasers Antitrust Litig.*, 957 F.3d 184, 194 (3d Cir. 2020) ("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)); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 322 (3d Cir. 2008) (vacating certification where the district court failed entirely to address a criticism of the plaintiffs' expert opinions). Unlike the district court in this case, which rigorously analyzed all issues bearing on class certification, including the expert issues, the trial courts in these cases failed to engage with the expert issues. Petitioners' Third Circuit cases most certainly do not require a trial court to decide which side's expert is ultimately more persuasive on the merits in order to certify a class. Indeed, the Third Circuit after *Lamictal* expressly rejected Petitioners' argument that district courts should resolve expert disputes, explaining that while the defendant "may ultimately be correct that this [expert] evidence is 'unrepresentative or inaccurate,'" "'[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).

Petitioners' claim of "yet another approach" from the Ninth and D.C. Circuits (Pet. 15) also reveals other lower courts faithfully applying the same well-defined standards to the unique facts before them. Both circuits require district courts to "make a 'rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use

the class-wide evidence to prove' the common question in one stroke," including "weighing conflicting expert testimony" to determine whether common issues predominate. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 666 (9th Cir. 2022) (quoting *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 312); *see also Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharm. Co. Ltd.*, 2025 WL 1683472, at *2 (9th Cir. June 16, 2025) ("The required rigorous analysis will frequently entail some overlap with the merits of the plaintiff's underlying claim, but merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." (quotations and citations omitted)); *Nat'l ATM Council, Inc. v. Visa Inc.*, 2023 WL 4743013, at *5 (D.C. Cir. July 25, 2023) ("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."). Both correctly rejected the idea that courts should not only engage in rigorous analysis but resolve which side's experts will ultimately prevail on the merits. *See Olean*, 31 F.4th at 667-68; *Nat'l ATM Council*, 2023 WL 4743013, at *5-6.

As demonstrated above, the courts of appeals are not split on the issue raised by petitioners. They uniformly require a rigorous analysis of expert evidence at the class certification stage, but preclude district courts from determining which side will prevail on the merits.

II. THIS CASE PRESENTS NO SIGNIFICANT LEGAL ISSUES WARRANTING REVIEW AND IS A POOR VEHICLE.

This Court has already repeatedly addressed the standard district courts must use when evaluating evidence, including expert evidence, for the purpose of deciding class certification motions. Given the absence of any circuit conflict, as discussed above, there is no reason for this Court to revisit the issue again.

This Court twice has rejected precisely the issue Petitioners raise here. *See Visa v. Nat'l ATM Council*, No. 23-814 (pet. denied Apr. 15, 2024); *StarKist v. Olean*, No. 22-131 (pet. denied Nov. 14, 2022). If the issue were worthy of review, then *Olean* would have been the ideal vehicle, as it was an *en banc* decision, discussing the issue extensively, with a two-judge dissent. 31 F.4th at 670-82, 685-92. Here, in contrast, the Second Circuit's decision is a unanimous, nonprecedential, summary order. This Court denied review of a similar order in *Visa*. If anything, *Visa* would also have been a better vehicle than this Petition, as the court of appeals there recognized that the district court's "statements of law were not entirely clear, its citations were not current, and its record analysis was notably terse." *Nat'l ATM Council*, 2023 WL 4743013, at *4. The district court here made no incorrect statements of law and addressed all of the arguments regarding the experts and predominance in great detail, satisfying any definition of rigor.

This case is also a poor vehicle for review because Petitioners never argued to the district court that it should resolve disputes about the persuasiveness of each side's experts. This fact alone

militates strongly in favor of denying Petitioners' Writ as the issue was not preserved for appeal. Petitioners contended that the district court should take a "hard look at the soundness of statistical models" and that the challenged models were "fatally flawed." Defs.' Joint Mem. of Law in Opp'n to Pls.' Mot. for Class Certification, Dkt. 397, *City of Philadelphia et al. v. Bank of America et al.*, No. 19-cv-1608 (JMF) (S.D.N.Y.), at 19 (quotation omitted). They did not argue that the court should go a step further to consider not only whether the model was fatally flawed, but whether the model or Petitioners' criticisms were ultimately persuasive. Petitioners raised this issue for the first time on appeal to the Second Circuit. The district court never had the opportunity to even consider Petitioners' argument.

The Petition confirms that this case is an especially poor vehicle because Petitioners fail to challenge the district court's finding (which the Second Circuit confirmed) that proof of injury to all class members is capable of resolution using common, class-wide evidence. App.8a. This finding is reviewed for abuse of discretion, a highly deferential standard to which Petitioners also make no reference. App.6a; *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). Petitioners do not discuss the supposedly individualized evidence or attempt to argue that individualized issues will predominate over common ones in a trial. Nor do Petitioners dispute that the expert disputes they raise

can be resolved on a class-wide basis. Petitioners' only discussion of individualized evidence is that such evidence could be used in an individual action. Pet. 23. Thus, Petitioners' argument boils down to the idea that regardless of whether common issues would predominate in a class action, class certification must be denied if individual issues would predominate in an individual action. This theory has no legal basis in any precedent from any court.

Moreover, the district court's rigorous analysis unrelated to the challenged expert issues shows precisely why common issues predominate in this case, such that class certification would be warranted regardless of Petitioners' expert challenge. As the district court explained—relying on Petitioners' own admission on this point—during the alleged conspiracy period, VRDOs behaved differently from other comparable financial instruments. *See* App.35a (quoting Petitioners' oral argument). Thus, the parties in this case *agree* that *something* impacted VRDO rates disproportionately. According to Petitioners, it was the financial crisis, and according to Respondents, it was the price-fixing conspiracy. Thus, the primary dispute between the parties is whether the change in VRDO rates is attributable to the conspiracy or some other economic factor. The jury can resolve that dispute on a class-wide basis, and that resolution will apply to all class members. That Petitioners (incorrectly) believe that VRDOs' supracompetitive pricing was not caused by their antitrust violations does not change the predominance analysis. The district court was well within its discretion to determine that the common issue of what caused the disproportionate impact on VRDOs, and whether it was Petitioners' alleged conspiracy, predominated.

Petitioners' claim that courts that do not resolve expert disputes are "rubber stamp[s]," Pet. 26, is demonstrably false, as courts of appeals routinely review and reverse class certification decisions where rigorous analysis of expert evidence shows that common issues do not predominate. *See, e.g.*, *Ambrosio v. Progressive Preferred Ins. Co.*, 154 F. 4th 1107, 1111-13 (9th Cir. 2025) (affirming finding that individual issues predominated, after review of expert and other evidence); *Haley v. Teachers Ins. & Annuity Ass'n of Am.*, 54 F.4th 115, 121-24 (2d Cir. 2022) (vacating class certification order where district court did not sufficiently examine whether individualized issues defeated predominance); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 623 (D.C. Cir. 2019) (rejecting predominance where plaintiffs' expert model 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.*, 725 F.3d 244, 252 (D.C. Cir. 2013) (rejecting predominance based on an expert model that "detects injury where none could exist"). Thus, the courts of appeals properly engage in the fact-specific and deferential analysis required in reviewing class certification decisions, and there is no reason for this Court to review these fact-specific judgments.

III. THE SECOND CIRCUIT AND OTHER CIRCUITS CORRECTLY DO NOT RESOLVE EXPERT DISPUTES OVER ANTITRUST IMPACT ON CLASS CERTIFICATION.

Petitioners argue that the district court was required to "resolve" the parties' expert disputes on class certification, even when the district court rigorously vetted the Respondents' expert analyses

and concluded they were sufficiently sound and capable of showing class-wide impact. This argument is meritless and foreclosed by this Court's precedents.

First, this Court has already held unequivocally that the question of whether common evidence ultimately will persuade the jury is *not* a legitimate basis to deny class certification. "Rule 23(b)(3) 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*, 568 U.S. at 459 (second emphasis added). Petitioners attempt (Pet. 23) to distinguish *Amgen* because it concerned the element of materiality in securities class actions, but *Amgen* never stated or implied its holding was a special rule for materiality. On the contrary, this Court has held repeatedly that the pertinent question is whether an issue is "capable of class-wide resolution," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011), or "susceptible to generalized, classwide proof," *Tyson*, 577 U.S. at 453 (quotation marks omitted). Whether an issue is "capable" or "susceptible" to class-wide resolution depends on whether a reasonable jury *could* accept the class-wide evidence, not on whether the judge believes the jury *should* ultimately resolve that class-wide issue in favor of the plaintiffs. Indeed, at one point in the Petition, Petitioners appear to accept this distinction. Pet. 22 (arguing the Second Circuit should have decided whether "plaintiffs' models *could* establish antitrust injury on a class-wide basis") (emphasis added). But there is no dispute that the district court made precisely this finding here, which the Second Circuit confirmed. App.36a-39a, 9a-10a.

Second, this Court's decision in *Tyson* applied the same principle from *Amgen* outside of the materiality context, and specifically to disputes over expert analysis. In *Tyson*, the plaintiffs relied on an expert study to show that the class did not receive statutorily mandated overtime pay for time spent donning and doffing protective equipment. 577 U.S. at 446, 450. The defendant argued that the plaintiffs' "study manufactures predominance" because "[r]eliance on a representative sample . . . absolves each employee of the responsibility to prove personal injury, and thus deprives petitioner of any ability to litigate its defenses to individual claims." *Id.* at 454. This Court rejected that argument, holding that whether the data were sufficiently representative is a question for *Daubert*, summary judgment, or ultimately for the jury—but not for class certification. In particular, the Court noted that "[r]easonable 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*." *Id.* at 459 (emphasis added). In short, "[o]nce a district court finds evidence to be admissible, its persuasiveness is, in general, a matter for the jury." *Id.* The same reasoning is dispositive here on the same issue: Petitioners' criticisms of the persuasiveness of Respondents' expert evidence is a jury question, not a question to be resolved on class certification.

Petitioners misread *Tyson*, arguing it is limited to the situation where a "fatal similarity" defense would "necessarily defeat every class member's claim on the same ground" and there is "no alternative individual evidence" proving injury. Pet. 6-7, 24-25. But while this Court noted that issue in *Tyson*, it did not remotely suggest that was a limitation in its

holding. Rather, the critical question in *Tyson* was not *why* the class members relied on class-wide evidence, but *whether* they could rely on that evidence if the case were instead an individual action:

> One way for respondents to show . . . that the sample relied upon here is a permissible method of proving class-wide liability is by showing that each class member could have relied on that sample to establish liability if he or she had brought an individual action. If the sample could have sustained a reasonable jury finding as to hours worked in each employee's individual action, that sample is a permissible means of establishing the employees' hours worked in a class action.

577 U.S. at 455. Thus, "[t]he underlying question" in *Tyson* was whether the evidence at issue could be used "to establish liability in an individual action." *Id.* at 458. Here, the district court properly found under *Tyson* that individual plaintiffs *could* rely on class-wide evidence. App.39a ("Even if Defendants are correct that VRDO rate-setting was an individualized process involving multiple factors, each class member could rely on Dr. Schwert's and Dr. Abrantes-Metz's testimony to support a finding of antitrust liability in a hypothetical individual action. That is sufficient at this stage.").

Third, Petitioners' reliance on other precedent from this Court as allegedly in conflict the Second Circuit's application of *Amgen* and *Tyson* is misplaced. Petitioners cite *Comcast*, *Halliburton Company v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014), and

Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System, 594 U.S. 113 (2021),[1] as requiring a district court to "'consider' a defendant's 'arguments against' a plaintiff's model when making the required 'determination that Rule 23 is satisfied.'" Pet. 21 (quoting *Comcast*, 569 U.S. at 34-35).[2] But contrary to Petitioners' accusation that "the Second Circuit improperly relieved the district court of this obligation" (Pet. 21), the Second Circuit determined that the district court had done just that. In full alignment with those precedents, the Second Circuit held that the district court "conducted a thorough analysis" of the challenged expert reports and

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[1] *Goldman* is further inapposite because it did not concern the evaluation of expert evidence at class certification and instead bore on the presumption under *Basic v. Levinson*, 485 U.S. 224, 241-47 (1988), to prove the element of reliance in securities class actions at the certification stage. *Goldman*, 594 U.S. at 119 ("[W]ithout the *Basic* presumption, individualized issues of reliance ordinarily would defeat predominance . . . ."). This special presumption concerning reliance in securities class actions does not demonstrate a generalized rule that plaintiffs must prove every element of their claims at class certification. Petitioners do not cite a single case applying this aspect of *Goldman* outside the context of the *Basic* presumption.

[2] Indeed, the principal court of appeals case Petitioners rely upon explicitly rejected their understanding of *Comcast*. *See Arandell*, 149 F.4th at 900 ("Defendants point out that plaintiffs here allege the conspirators used different methods for fixing prices . . . . . Defendants then try to equate those different methods with the *Comcast* plaintiffs' different theories of antitrust impact. The argument tries to compare apples to oranges."). Other courts uniformly agree. *See, e.g.*, *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 123 n.8 (2d Cir. 2013) ("Plaintiffs' proposed measure for damages is thus directly linked with their underlying theory of class-wide liability . . . and is therefore in accord with [*Comcast*].").

"consider[ed] issues disputed and undisputed by" Petitioners before making its determination that common issues to the case predominate. App.8a.

Fourth, Petitioners' demand for a new rule that district courts must resolve the merits of expert disputes on injury and damages is legally incoherent and conflicts with hornbook legal principles. It is beyond dispute that the jury, not the judge, decides the facts on the merits, and a district court's determination that an element of Rule 23 has been satisfied will not bind the ultimate trier of fact, the jury. *See Tyson*, 577 U.S. at 459 (explaining that "[r]easonable minds may differ as to" the probative value of the plaintiffs' expert evidence, but "[r]esolving that question . . . is the near-exclusive province of the jury"). Accordingly, the district court's view of which side's expert evidence is more or less persuasive is entirely irrelevant to whether common issues predominate. Indeed, Petitioners' proposal for a new hurdle on class certification would violate the Rules Enabling Act, 28 U.S.C. § 2072, by subjecting otherwise admissible evidence to an additional persuasiveness requirement simply because it is class-wide (not individual) evidence. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 609 (1997) ("Rule 23's requirements must be interpreted in keeping . . . with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'" (quoting 28 U.S.C. § 2072(b)); *Tyson*, 577 U.S. at 455 ("In a case where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class. To so hold would ignore the Rules Enabling Act[] . . . ."). Rule 23 provides no legitimate

basis for a court to usurp the jury's role in deciding which side's experts are more persuasive.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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