No. 25-639

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Respondents offer no sound basis to deny certiorari. As the petition explained, *Tyson Foods, Inc.* v. *Bouaphakeo*, 577 U.S. 442 (2016), has engendered a circuit conflict on an important, recurring question: whether a district court, before certifying a class under Federal Rule of Civil Procedure 23(b)(3), must resolve expert disputes bearing on the predominance requirement, or instead should simply decide whether the plaintiff's predominance evidence is admissible and a reasonable juror could believe it. Respondents scarcely grapple with this division, instead devoting most of their response to a strawman.

In particular, respondents pretend that the petition asks whether district courts at class certification must (1) rigorously analyze the plaintiffs' predominance evidence or (2) resolve the *merits* of the plaintiffs' claim, rendering trial unnecessary. The petition presented neither question—because both have long been resolved by this Court (with the answers being "yes," and "no," respectively, *see, e.g.*, *Comcast Corporation* v. *Behrend*, 569 U.S. 27, 33-34 (2013)). The actual question, again, is whether district courts must resolve the *predominance* question (including underlying expert disputes), even if predominance has some overlap with the merits. Here, that means deciding whether to credit a defendant's expert evidence that, if correct, would defeat predominance and hence preclude certification of a Rule 23(b)(3) class, leaving the plaintiffs and putative class members to prove their claims with individualized evidence. There is an entrenched circuit conflict on the actual question presented. By ignoring it, and arguing about other questions, respondents provide no basis for denying certiorari.

Once respondents' strawman is set aside, the opposition has little (and nothing meritorious) to say. Respondents' contention that petitioners waived their argument on the question presented is wrong, which is why the Second Circuit decided that question without any mention of waiver. Respondents' recitation of the district court's analysis of the expert disputes, meanwhile, is immaterial because that court explicitly declined to resolve those disputes—squarely implicating the question presented. This Court also regularly grants review of summary orders, and it is irrelevant that this Court denied certiorari in two prior cases, especially because one case presented fundamentally different questions while the other did not cleanly raise the question presented here. Finally, the question is important and recurs frequently in class actions, yet is uncertain to reach this Court again. Respondents have no response. Now is thus the time to grant review.

ARGUMENT

I. THE CIRCUITS ARE DIVIDED

The courts of appeals are divided over the question presented. Some circuits (including the Second Circuit here) misconstrue *Tyson* to mean that district courts at class certification need not resolve expert disputes bearing on the predominance requirement. Other circuits, following *Comcast* and its progeny, require district courts to do just that, with the Third Circuit rejecting the notion, advanced by respondents here, that *Tyson* held otherwise.

Neither of respondents' two arguments regarding this conflict has merit.

A. First, respondents argue (Opp.16-19) that there is no conflict because all courts of appeals agree that

district courts must rigorously analyze expert evidence that a plaintiff offers to prove predominance. But that is not the question presented. The question is what that rigorous analysis *entails*. Specifically, what must a district court do when plaintiffs seek to prove predominance with expert evidence and the defendant responds with its own expert evidence that, if credited, would defeat predominance and require the plaintiffs to prove their case with individualized evidence? Must the court resolve that expert dispute—and hence actually decide prior to certifying a class whether the predominance requirement "ha[s] been satisfied," *Comcast*, 569 U.S. at 33—or instead simply decide whether a reasonable juror could believe the plaintiffs' expert evidence? On *that* question, the courts of appeals are divided. *See* Pet.10-19.

B. Second, respondents argue there is no circuit conflict because the Third and Seventh Circuits do not hold that district courts must resolve expert disputes bearing "on the *merits*." Opp.16 (emphasis added). There are several problems with that argument.

To start, the question presented—and the circuit conflict—concerns whether district courts must resolve expert disputes bearing on *predominance*. Respondents thus aim at the wrong target. To the extent that questions bearing on predominance might overlap with the merits, as this Court has explained, that "cannot be helped." *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 351 (2011). But the question presented, the parties' divergent answers to it, and the circuit conflict all concern expert disputes that bear on *predominance*, which is a "prerequisite[] of Rule 23" and hence something a plaintiff must show "ha[s] been satisfied" in order for "certification [to be] proper," *Comcast*, 569 U.S. at 33. Put another way, the fact that a district court's analysis at class

certification "will frequently entail 'overlap with the merits of the plaintiff's underlying claim,'" *id.* at 33-34, does not mean that a district court can refuse to actually decide before certification whether each applicable Rule 23 requirement has been satisfied.

Respondents' suggestion (Opp.16-18) that the Third and Seventh Circuits do not hold that district courts at class certification must *resolve* expert disputes bearing on predominance is wrong. The Seventh Circuit held last year, in clear language, that when faced with "material disputes bearing on class certification, the trial court must receive evidence" and "then *resolve* the disputes." *Arandell Corporation* v. *Xcel Energy Inc.*, 149 F.4th 883, 893 (7th Cir. 2025) (emphasis added). The point was so integral, in fact, that the court devoted entire sections of its decision to analyzing the issue: Part III.C ("*Resolving Expert Disputes*") and Part IV ("*Expert Disputes Material to the Class Certification*"). *Id.* at 894.

The Third Circuit has been equally explicit that a district court must "*resolve* a genuine legal or factual dispute relevant to determining [Rule 23's] requirements." *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 320 (3d Cir. 2008) (emphasis added). And that court reiterated the point after *Tyson*, holding that a district court must "weigh the competing evidence," "scrutinize" it, and "'*resolve*'" the disputes. *In re Lamictal Direct Purchaser Antitrust Litigation*, 957 F.3d 184, 191, 194 (3d Cir. 2020) (emphasis added).

Respondents do not seriously dispute this, but suggest that a later unpublished Third Circuit decision, *Hargrove* v. *Sleepy's LLC*, 2023 WL 3943738 (3d Cir. June 12, 2023), radically changed that court's law. *Hargrove* did no such thing, nor could an unpublished decision do so, *see FDRLST Media, LLC* v. *NLRB*, 35 F.4th

108, 117 n.2 (3d Cir. 2022). What *Hargrove* (together with *Lamictal*) illustrates is the distinction between cases in which *Tyson*'s "no-reasonable-juror" standard applies and those in which it does not. *Hargrove* affirmed the certification of a class of drivers seeking backpay for overtime hours in a case, like *Tyson*, in which the defendant "did not record those hours." 2023 WL 3943738, at *1, *3 (quotation marks omitted). At certification, the plaintiffs relied on "common evidence showing the amount and extent of [their] work as a matter of just and reasonable inference," while the defendant (Sleepy's) argued the common evidence "would not be truly representative of the drivers' [different] hours." *Id.* at *3 (first alteration in original) (quotation marks omitted). Relying on *Tyson*, the Third Circuit held that this argument was "common to the class" and therefore could not defeat predominance unless "'no reasonable juror could have believed'" the common evidence. *Id.* (quoting *Tyson*, 577 U.S. at 459).

Hargrove thus presented precisely the same "fatal similarity" defense as in *Tyson*. Common issues would have predominated regardless of whether the plaintiffs' common evidence was credited. Because there was no individualized evidence, Sleepy's challenge to the representative sample "would have ended" the litigation for all. *Tyson*, 577 U.S. at 457. In contrast, as the Third Circuit recognized in *Lamictal*, *Tyson*'s no-reasonable-juror standard does not apply to disputes that *do* matter to predominance. *See* 957 F.3d at 191, 194. District courts in the Third Circuit must resolve such disputes, even if they overlap with the merits. *See id.* at 192; *Hydrogen Peroxide*, 552 F.3d at 320, 324.

C. As to the other courts in the circuit conflict—the Second, Ninth, and D.C. Circuits—respondents agree that each rejected a requirement that district courts

resolve expert disputes at class certification, including disputes that bear on whether the predominance prerequisite to Rule 23(b)(3) certification is satisfied. *See* Opp.11, 19. And each did so relying on *Tyson*. *See* Pet.16-19. That confirms that the courts of appeals are divided on the question presented.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT

A. Respondents similarly have no good response to petitioners' argument that the decision below flouts this Court's precedent requiring district courts to determine at class certification whether plaintiffs have proved predominance. This Court has made clear that although district courts may not conduct "free-ranging" merits inquiries at class certification, *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455, 465-466 (2013), they must analyze "*all* evidence," *Goldman Sachs Group, Inc.* v. *Arkansas Teacher Retirement System*, 594 U.S. 113, 122 (2021), to "determin[e] that Rule 23 is satisfied, even when that requires inquiry into the merits," *id.* (quoting *Comcast*, 569 U.S. at 35). It is therefore error to "refus[e]" to resolve arguments bearing on "the propriety of class certification[] simply because those arguments would also be pertinent to the merits determination." *Comcast*, 569 U.S. at 34. The Second Circuit's decision conflicts with this precedent by relieving plaintiffs of their burden to prove predominance and district courts of their obligation to resolve disputes about expert evidence offered as such proof.

In response, respondents assert (Opp.24-26) that *Amgen* and *Tyson* hold that district courts at class certification should decline to resolve expert disputes bearing on predominance if a dispute overlaps with merits issues. That is incorrect. *Amgen* reached the opposite

conclusion, holding that district courts at class certification must decide disputes over "common, classwide proof" on any issues that, if resolved in the defendant's favor, would "leave[] open the prospect" for reliance on "individualized proof" at trial. 568 U.S. at 474. That includes any "[m]erits questions" that are "relevant to determining whether the Rule 23 prerequisites" have been satisfied. *Id.* at 466. Materiality was not such an issue, the Court held, because a "failure of proof" on that element would end the litigation, leaving no triable issues, much less any individualized issues to predominate at trial. *Id.* at 474. That is not true for other elements of the fraud-on-the-market presumption, so this Court has made clear that a plaintiff must prove those elements at class certification. *See id.* at 473-474; *Goldman Sachs*, 594 U.S. at 119; *Halliburton Company* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 276 (2014).

As the petition explained (Pet.5-7, 24-25), *Tyson* did not change any of these decisions by holding that expert disputes bearing on predominance must be resolved under a no-reasonable-juror standard. The key fact in *Tyson* was that the class-member employees lacked individualized evidence of the time they had worked, thereby requiring them to rely on an expert's representative sample. *See* 577 U.S. at 456. If the employees "had proceeded with 3,344 individual lawsuits," each employee still "would have had to introduce" the expert's representative sample "to prove the hours he or she worked." *Id.* at 456-457. And if Tyson's challenge to the representative sample prevailed, individualized issues could not predominate because "there were no alternative means for the employees to establish their hours worked." *Id.* at 457. Tyson's defense was thus a "fatal similarity" defense. *See id.* Respondents simply ignore this central point. They likewise ignore that this case is

different because if the district court credited petitioners' challenges to respondents' expert models—challenges that the court called "forceful," "compelling," and "perhaps even meritorious," Pet.App.14a, 28a, 30a, 31a—respondents could still prove injury with individualized evidence.

B. Respondents also try to defend the Second Circuit's application of *Tyson* here by accusing petitioners (Opp.13, 28-29) of advocating a rule requiring judges to replace juries as the factfinder on merits issues relevant to a class-action claim. Petitioners seek no such rule. The petition asks this Court to clarify that district courts must resolve expert disputes bearing on predominance before certifying a class.

Contrary to respondents' suggestion, any such resolution by the district court does not foreclose any later (even different) determination on the merits by a factfinder. As this Court explained in *Wal-Mart*, a plaintiff must prove facts relevant to a Rule 23 requirement at class certification and then, if the issues overlap with the merits, "prove [them] *again* at trial in order to make out their case on the merits." 564 U.S. at 351 n.6. Respondents' view here that a ruling at class certification on a Rule 23 requirement displaces a jury determination on an overlapping merits issue later in the case is starkly inconsistent with this clear precedent.

Indeed, respondents agree that district courts must *rigorously analyze* issues at class certification that may "'overlap[] with the merits.'" Opp.12 (quoting *Comcast*, 569 U.S. at 33-34). Yet they also argue that district courts must not *resolve* those issues. This Court's cases admit of no such distinction, because it makes no sense. This Court did not require a rigorous analysis as an abstract or academic exercise. Instead, it tied the

rigorous-analysis requirement to actual resolution of disputed issues that bear on Rule 23 requirements, stating that "certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23[] have been satisfied," *Comcast*, 569 U.S. at 33 (quotation marks omitted). Respondents say nothing that explains how to reconcile that clear holding with the decision below.

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

A. Respondents do not dispute that the question presented is important because it has a major impact on class-action litigation, recurs frequently, yet is unlikely to return to this Court. Pet.26-29. Multiple courts of appeals have addressed the question presented, so those courts are unlikely to grant additional Rule 23(f) petitions considering the same issue. Pet.29. And, because the certification of a class action imposes immense pressure on defendants to settle, even meritless claims, it is even more unlikely that any end-of-case appeal will present this Court with an opportunity to resolve the circuit conflict. Pet.29.

B. Respondents instead say this case is a poor vehicle to address the question presented. They assert (Opp.21) that in the district court, petitioners did not preserve their argument on that question. That is wrong: Petitioners argued at length in that court that respondents' expert evidence failed to prove predominance "even if … admissible under *Daubert*," that the court should credit petitioners' expert evidence over respondents' evidence, and that respondents failed to meet their burden of proving predominance. D.Ct. Dkt.390 at 12-13, 18-30. Indeed, the Second Circuit ignored this

same waiver argument from respondents, addressing and rejecting petitioners' argument on the merits. Pet.App.9a-10a. That suffices to enable this Court's review because the issue was "passed upon" below, *e.g.*, *Citizens United* v. *FEC*, 558 U.S. 310, 330 (2010) (quotation marks omitted). The Second Circuit also answered the question explicitly based on a misreading of *Tyson*, making this case an excellent opportunity to resolve the circuit conflict.

Respondents also recount (Opp.5-9) the district court's discussion of the expert evidence, characterizing the decision as "thorough[]" (Opp.2). There is no dispute, however, that the court then refused to resolve the parties' disputes. Pet.App.25a, 31a. If the court had resolved the expert disputes, it likely would not have certified a class; the court found petitioners' challenges to be "forceful," "compelling," and "perhaps even meritorious." Pet.App.14a, 28a, 30a, 31a. But the district court refused to resolve those disputes, relying on *Tyson*. Pet.App.36a, 40a. The Second Circuit affirmed that approach, relying on *Tyson* too. *That* is the ruling now presented for review, and nothing about any of the district court's other rulings bars this Court from reaching it.

Respondents also note (Opp.20) that the Second Circuit decided this case in a summary order. That too is irrelevant, as this Court frequently grants certiorari in cases arising from unpublished decisions. *See, e.g.*, *Bowe* v. *United States*, 146 S.Ct. 447 (2026); *Riley* v. *Bondi*, 606 U.S. 259 (2025); *Martin* v. *United States*, 605 U.S. 395 (2025). Respondents do not say otherwise.

Finally, respondents claim (Opp.20) there is "no reason" to grant the petition because this Court declined to review "precisely the issue [p]etitioners raise here" in *Olean Wholesale Grocery Cooperative, Inc.* v. *Bumble*

Bee Foods LLC, 31 F.4th 651 (9th Cir. 2022) (en banc), and *National ATM Council, Inc.* v. *Visa Inc.*, 2023 WL 4743013 (D.C. Cir. July 25, 2023) (per curiam). But the *Olean* petition presented different questions, and *National ATM*, though presenting a conceptually similar question to the one here, did not present it as cleanly, for reasons explained in the petition here (Pet.17-19). In contrast, this case cleanly presents the question for this Court's review. And, as the Second Circuit's decision underscores, coming on the heels of decisions by other circuits, this is not an issue that will benefit from further percolation.

The lower courts are plainly divided about how to apply *Tyson* to expert disputes about predominance. This Court should grant review and answer this question of critical importance to class-action litigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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