No. 17-395

IN THE

Supreme Court of the United States

TAYLOR FARMS PACIFIC, INC. D/B/A TAYLOR FARMS,
Petitioner,

v.

MARIA DEL CARMEN PENA, CONSUELO HERNANDEZ, LETICIA SUAREZ, ROSEMARY DAIL, WENDELL T. MORRIS, on behalf of themselves and on behalf of all other similarly situated individuals,
Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in considering a spreadsheet summarizing voluminous time records produced by an employer to note that many employees took short and/or late meal breaks and determining that common issues predominate in a California wage-and-hour-law class action.

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INTRODUCTION

This Court does not review dicta. Here, however, Petitioner seeks such review by reducing a fifty-six page district court opinion to a single quote cited in the opinion's background discussion as an alternative basis for an evidentiary ruling. The remainder of the district court's opinion shows that the thirteen words at issue were not necessary to the court's reasoning, leaving this case as an ordinary dispute over whether a district court made an appropriate evidentiary ruling under the Federal Rules of Evidence.

Further, Petitioner not only focuses on dicta from this case but cobbles together stray statements from other cases addressing vastly disparate issues to create the appearance of a circuit split, based on a question presented at an extraordinarily high level of generality. Not only does this case *not* turn on the question presented by Petitioner, but no court of appeals—neither in this or any other case Respondents have found—has opined on that broad question. Petitioner's reference to cases about the application of the *Daubert* standard to expert testimony—cases that *accord* with the published decisions of the Ninth Circuit—do not demonstrate a question ripe for this Court's review.

The opinion below is a non-precedential, two-paragraph order summarily affirming an order granting class certification, which the Ninth Circuit reviewed on an interlocutory Rule 23(f) appeal. Petitioner's beef is the district court's consideration of a table summarizing time records produced by Petitioner itself. In finding that the predominance requirement of Rule 23(b)(3) was met as to one of the two sub-classes it certified, the court concluded that

the table "corroborate[d]" other evidence in that it showed that many employees took meal breaks shorter and/or later than those required by law—an undisputed fact. The court did so after addressing Petitioner's evidentiary objections to "most of the documentary evidence the plaintiffs offered in support of class certification" with two generic, alternative statements. First, it discussed whether evidence must be admissible at trial to be considered at the class certification stage. Then, it noted that courts may deem documents authentic based on review of their contents, and found that rule applicable to the challenged evidence. In addition, just six days earlier, in ruling on Petitioner's summary judgment motion in this same case, the district court had ruled that an attorney-prepared spreadsheet summarizing time records—similar to the document that forms the basis of the petition—was admissible under Federal Rule of Evidence 1006.

Given this context, Petitioner's notion that the Ninth Circuit's non-precedential two-paragraph order adopted a Circuit rule that class certification can be based on evidence that would be inadmissible at trial is wholly unfounded. For this reason, as well as the absence of any discussion of the question presented by either of the courts below in this case or the courts of appeals cited by Petitioner, certiorari should be denied.

STATEMENT

In 2012, respondents Maria Del Carmen Pena, Consuelo Hernandez, Leticia Suarez, Rosemary Dail, and Wendell T. Morris brought this class action

against their former employer, petitioner Taylor Farms Pacific, Inc. (Taylor Farms or TFP),[1] operator of two food production and processing plants in Tracy, California, for violations of California wage and hour law. Pet. App. 5a. Prior to the filing of the class certification motion at issue here, the parties engaged in extensive motion practice, including multiple motions relating to discovery and the deadline for class certification, motions to dismiss, motions to strike brought by various defendants, and a motion for partial summary judgment as to an individual named plaintiff, resulting in seven written opinions by the court.

Respondents then moved for certification of multiple subclasses based on four theories of liability: a "donning and doffing" subclass, a "mixed hourly worker" subclass relating to meal and rest break violations, a "waiting time" subclass based on failures to timely pay wages owed, and a "wage statement" subclass related to certain information required by California law. *Id*. 8a–10a. Only the "mixed-hourly worker" subclass is relevant here. As to that subclass, Respondents alleged four different violations of California Labor Code § 512(a): (1) failure to offer a meal break within five hours of the beginning of a shift, (2) failure to offer a second meal break on shifts lasting ten hours or more, (3) failure to offer at least two rest breaks on shifts lasting between eight and ten hours, and (4) failure to allow employees a complete ten-minute or thirty-minute break before requiring they return to work. *Id*. 39a.

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[1] Respondents also sued several of Taylor Farms' labor contractors, none of whom are parties in this Court.

In connection with their motion, Respondents submitted dozens of exhibits. Of particular relevance, Respondents introduced Taylor Farms' Employee Handbook, which described the company's official policies and procedures, including its "Lunch & Break" period policy. *Id.* 26a. Respondents presented testimony by Taylor Farms personnel that the Handbook "embodied official policy." *Id.* 42a. They also offered a Microsoft Excel spreadsheet, referred to as Exhibit 17, summarizing a sampling of the digital timekeeping records that Taylor Farms had produced in discovery. *Id.* 41. Attached to the declaration of attorney Philip Downey, this spreadsheet was based on simple addition and subtraction, and reflected each instance where those records showed that an employee had (1) a break of less than 30 minutes, (2) work days over 10 hours, (3) work days of between five and six hours, and (4) days where breaks started after five hours of work. At the hearing, the district court asked questions about the spreadsheet and confirmed that it understood how to read it. CAER 2: 69:16–70:17.

While the motion for class certification was pending, Taylor Farms moved for summary judgment. In denying in part and granting in part Taylor Farms' motion, the court addressed its admissibility objections to similar summary spreadsheets of time records and concluded that the documents were admissible under Federal Rule of Evidence 1006. The court noted that Taylor Farms "does not contest" "[t]he data underlying the Rule 1006 exhibits," and that the data "show there were meal periods shorter than the durations specified by statute." 2015 WL 471764, at *4 (E.D. Cal. Feb. 4, 2015).

Six days later, the court ruled on the motion for class certification. In a 56-page opinion, the district court analyzed the appropriateness of class certification as to each of the four proposed subclasses. Expressly applying the rigorous standard required by this Court, the district court stated:

> Rule 23 embodies more than a 'mere pleading standard.' The party [seeking class certification] must 'prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.' The trial court must then conduct a 'rigorous analysis' of whether the party has met its burden, and 'analyze each of the plaintiff's claims separately.'

Pet. App. 14a (quoting *Wal-Mart v. Dukes*, 564 U.S. 338, 351 (2011), and *Berger v. Home Depot USA, Inc.*, 74 F.3d 1061, 1068 (9th Cir. 2014), *abrogated on other grounds by Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017)).

The court also referred briefly to Taylor Farms' "object[ions] to most of the documentary evidence the plaintiffs offered on the ground that it does not satisfy the requirements of the Federal Rules of Evidence." *Id.* 10a. Without specifying which evidentiary rules it was addressing or which items of evidence, the court first quoted another district court for the proposition that "evidence presented in support of class certification need not be admissible at trial." *Id.* 12a (quoting *Pedroza v. PetSmart, Inc.*, No. ED CV 11-298-GHK, 2013 WL 1490667, at *1 (C.D. Cal. Jan. 28, 2013)). It then went on to say:

> Moreover, documents may "be authenticated by review of their contents if they appear to be sufficiently genuine." That is the case here.

Id. (quoting *Las Vegas Sands v. Nehme*, 632 F.3d 526, 533 (9th Cir. 2011)). The court said nothing else about admissibility.

With respect to certification of the "mixed hourly worker" subclass, the court identified and summarized a range of evidence, including the "Lunch & Break Period" provision that appeared consistently in four different versions of the employee handbook, deposition transcripts and declarations pertaining to the distribution of that handbook and meal and rest break practices, "samples of TFP's time records," and testimony from Taylor Farms' payroll administrator as to what the time records the company maintained would and would not show. *Id.* 26a–29a. The court concluded that this evidence established that the requirements of numerosity, typicality, and adequacy were met on grounds not at issue here. *Id.* 30a–38a.[2] The court also concluded that common issues of law and fact existed as to three of the four alleged violations of California Labor Code § 512(a). In so doing, the court did not rely on Exhibit 17. Rather, the court concluded that, as a matter of California law, the lunch and break period policy set forth in the handbook and the existence of a waiver policy as demonstrated by deposition testimony and declarations showed a common policy. Pet. App. 39a–41a. With respect to the fourth allegation, related to the "completeness" of ten or thirty minute breaks, the court closely examined Exhibit 17 and concluded that these records did *not* establish a common issue absent a policy. *Id.* 41a.

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[2] The court concluded one of the four named plaintiffs was not an adequate representative. Pet. App. 37a.

As to whether common issues predominate as to the remaining alleged violations, the court found that it was unclear whether Taylor Farms in practice followed the policy set forth in the handbook. *Id.* 42a–43a. The court thus turned to the time records.[3] The court accurately noted that the time records maintained by Taylor Farms contained no information about rest breaks, and thus could not serve as evidence of a predominant rest break practice. *Id.* 43a–44a. But the court noted the undisputed fact that those time records record meal breaks, and that the sample produced in discovery, as summarized in Exhibit 17, showed "several thousand timekeeping data points consistent with the meal break policies described in the Employee Handbook." *Id.* 43a; *see also id.* 46a (noting that "the timekeeping evidence corroborates the policy described in the Handbook").

The district court then made the commonsense conclusion that "timekeeping records" (not Respondent's summary of those records) would "provide a common means of proof" as to the issue whether an employee worked a shift that was long enough to qualify for a break. The court explained that it was *not* making any determination whether the summaries of the timekeeping records were accurate or complete, but rather finding that *any* methodological

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[3] Taylor Farms states that the district court used the term "timekeeping records," "timekeeping data," or "time records" to refer to the summary document prepared by Respondents' counsel. Pet. 6. But these terms were frequently used to describe Taylor Farms' underlying time record data, as opposed to the summary exhibit. *See, e.g.*, Pet. App. 28a ("TFP's timekeeping records did not record rest breaks"); *id.* 44a ("the timekeeping records do record meal breaks").

analysis of time records "would remain common to all employees." *Id.* 47a.

The court thus concluded that common issues predominate as to the meal break subclasses of the mixed hourly worker subclass. *Id.* 47. After concluding that a class action was the superior method of resolving the issue, the court certified this subset of the mixed hourly worker subclass. *Id.* 52, 59.[4]

The Ninth Circuit granted Taylor Farms' Rule 23(f) petition, which challenged the district court's grant of class certification and its reliance on Exhibit 17. In an unpublished, two-paragraph opinion, which under the court's rules has no precedential value, *see* 9th Cir. R. 36-3, the court of appeals summarily affirmed the district court's grant of certification to the rest and meal break subclasses. Pet. App. 3a.

REASONS FOR DENYING THE WRIT

Taylor Farms seeks review of a two-paragraph summary affirmance which, by virtue of both the court of appeals' rules and the order's content, establishes no precedent for the Ninth Circuit. In addition, the question on which Taylor Farms seeks review is not presented by this case, where the district court concluded that the challenged exhibit was admissible. And neither the Ninth Circuit, the district court decision below, nor any of the other court of appeals' opinions cited by Taylor Farms has grappled with the question on which Taylor Farms seeks review. On the questions they have addressed, the courts of ap-

[4] The court also certified a "waiting time" subclass that is derivative of the certified mixed hourly worker subclass. *Id.* at 57.

peals are in agreement. For each of these reasons, the petition should be denied.

I. The question raised by Petitioner was not decided below.

"This Court reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black v. Cutter Labs.*, 351 U.S. 292, 298 (1956), and dismissing the writ of certiorari as improvidently granted). Accordingly, this Court "looks beyond the broad sweep of the language" of lower court opinions and focuses on what the lower court actually held. *Black*, 351 U.S. at 298. As a result, certiorari is not warranted simply because a lower court remarked on a question, where resolution of that question was not necessary to the court's disposition of the case.

Here, the question presented by the petition was not necessary to the decision below for two reasons: (1) the court concluded that the challenged evidence was admissible, and (2) the court's holding did not turn on the challenged evidence.

A. The district court stated that the evidence at issue was admissible.

The court of appeals below affirmed a class certification ruling reviewed on a Rule 23(f) appeal in a short, unpublished, non-precedential opinion. Taylor Farms' petition is thus in reality a request for review of a district court decision. Further, it is a request for review of one sentence of dicta in that district court opinion.

In that sentence, the court quoted the unpublished decision of another district court, which had stated that "evidence presented in support of

class certification need not be admissible at trial." Pet. App. 10a (quoting *Pedroza v. PetSmart, Inc.*, No. ED CV 11-298-GHK, 2013 WL 1490667, at *1 (C.D. Cal. Jan. 28, 2013)). In the very next sentence, however, which Taylor Farms fails to mention, the district court stated: "Moreover, documents may 'be authenticated by review of their contents if they appear to be sufficiently genuine.' That is the case here." *Id.* 11a (citation omitted). The term "moreover" indicates that the court considered what follows to be an independent basis for considering the evidence at issue: that the evidence *was* admissible. Taylor Farms does not contest—or even mention—that key ruling.

That the district court considered the summary of timekeeping records admissible evidence is consistent with its discussion of similar evidence in its earlier summary judgment ruling. Whereas the class certification order only spoke to evidentiary matters in broad strokes, the district court's summary judgment opinion explicitly addressed similar summary spreadsheets of time records, held them admissible under Federal Rule of Evidence 1006, and relied on them for the proposition that "there were meal periods shorter than the durations specified by statute." 2015 WL 471764, at *4 (E.D. Cal. Feb. 4, 2015). In the order at issue here, issued six days later, the court relied on a similar exhibit for the same conclusion. *See* Pet. App. 44a (noting time records show meal breaks "shorter than thirty minutes" and "later than required by law"). Taylor Farms' argument for

review collapses in the face of this background and the district court's statement on authentication.[5]

Thus, regardless of whether the single sentence quoted by the district court, stating that evidence in support of class certification need not always be evidence admissible at trial, is correct, the sentence is of no moment here. This Court "sit[s], after all, not to correct errors in dicta." *Bunting v. Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting). *See also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 843–44, (1985) (Stevens, J., concurring in part and dissenting in part) ("criticism of a portion of the [lower] court's opinion taken out of context provides an insufficient basis for reversing its judgment").

In addition, the court of appeals did not opine on the question at all, but issued only a brief, nonprecedential opinion. Pet. App. 2a–3a. If, as Taylor Farms suggests, the question whether evidence not

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[5] Although the matter is not encompassed within the question presented in the petition, the court's admissibility determination was correct. Rule 1006, by its plain text, allows the admission of calculations based on voluminous evidence so long as the underlying records are available. *See* Fed. R. Evid. 1006. Taylor Farms does not dispute that it had access to the underlying records (records it produced). And an attorney declaration was sufficient to authenticate the calculations; the mere inclusion of arithmetic calculations does not convert a Rule 1006 summary into expert testimony. *See Bryant v. Farmers Ins. Exch.*, 432 F.3d 1114, 1124 (10th Cir. 2005); *United States v. Jennings*, 724 F.2d 436, 443 (5th Cir. 1984); *see also In re Directech Sw., Inc.*, No. 08-1984, 2009 WL 10663104, at *4 (E.D. La. Nov. 19, 2009) (ruling that attorney calculations based on voluminous time records were admissible under Fed. R. Evid. 1006).

admissible at trial may be considered at the class certification stage is a recurring question, this Court should await a case where that issue is, in fact, presented.

B. The district court's decision did not turn on the challenged exhibit.

Although Taylor Farms focuses on the Exhibit 17 spreadsheet, that exhibit was not vital to the district court's conclusion. The district court relied primarily on the Employee Handbook. It concluded that, under California law, the Handbook created a common, unlawful meal break policy.[6] Pet. App. 40a. The court referred to Exhibit 17 only in responding to Taylor Farms' argument that its policy was not actually followed in the workplace, and that individualized inquiries thus predominated.

The district court's rejection of Taylor Farms' argument on this point was primarily based on its understanding of California law and the Employee Handbook itself. The district court noted that there was no dispute that the Handbook, which Taylor Farms distributed to all of its employees, both prescribed an unlawful policy and threatened discipline—including termination—for violations of that policy. *Id.* 44a, 46a. And under the California Supreme Court opinion in *Brinker Restaurant Corp. v. Superior Court*, 273 P.3d 513 (Cal. 2012), the relevant question for liability is whether an employer *offers* compliant meal breaks, not whether employees take meal breaks. *See Id.* 44a (discussing *Brinker*).

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[6] Petitioner does not argue here that the Handbook was inadmissible. *See* Pet. 20-21 (limiting discussion of "inadmissible" evidence to the summary of time records).

Thus, "a determination of [Taylor Farms'] liability will not require the finder of fact to delve into the circumstances of a particular meal break to deduce whether [the employer] prevented each putative class member employee from doing work. *Id.* 44a–45a. The district court did reference the summary time records as "corroborating" the Handbook's policy, *id.* 46a, by showing thousands of meal breaks that were consistent with that policy in time and duration—a fact that Petitioner has not *ever* contested.[7] But referring to the Handbook, it did so noting that "the data do not stand alone." *Id.* 44a.

Again, the court of appeals did not opine on any of these points or issue a precedential opinion on any of the legal questions raised in the interlocutory appeal.

II. The decision below does not conflict with the decision of any court of appeals.

The court of appeals did not issue a precedential opinion or announce any substantive holding that could conflict with the decisions of other courts. The court of appeals simply affirmed "for the reasons set forth in [the district court's] order." Pet. App. 3a.

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[7] Although Taylor Farms notes that Respondents bear the evidentiary burden at class certification, its failure to even dispute the factual conclusion derived from the challenged evidence is certainly relevant to this Court's determination of certworthiness. Moreover, Taylor Farms bore the burden insofar as it was attempting to rebut its own written policy. *See In re Nexium Antitrust Litig.*, 777 F.3d 9, 27 (1st Cir. 2015) (defendant bears burden to rebut evidence of predominance); *Campbell v. Facebook Inc.*, 315 F.R.D. 250, 266 (N.D. Cal. 2016) (same); *cf. Brinker*, 273 P.3d at 353 (Werdegar, J., concurring) (as matter of California law, rebuttable presumption of Labor Code violation in absence of records showing compliant meal breaks).

Even if a non-precedential opinion could somehow form the basis for a conflict among the circuits, the decision below, incorporating the district court's reasoning, does not conflict with the decision of any court of appeals on the question stated by Taylor Farms.

As explained above, in granting class certification, the district court did not consider evidence that it considered inadmissible. But even if the district court had done so—and even if the court of appeals had adopted that approach as Circuit law—the soundbites from disparate cases compiled in the petition do not demonstrate a circuit split on the issue raised by Taylor Farms. To the contrary, each of the cited cases is consistent with the law of the Ninth Circuit; none even purports to state the bright-line rule requested by Taylor Farms. Notably, several of these cases do not even mention the word "admissible" or "admissibility."

A. The cases cited by Taylor Farms generally do either or both of two things. First, they make general statements about the need for rigorous analysis of evidence presented at class certification. The Ninth Circuit has *already*, in published decisions, done so as well. *See, e.g.*, *Stockwell v. City & Cty. of San Francisco*, 749 F.3d 1107, 1111 (9th Cir. 2014) ("Rule 23(a)(2) is not a mere pleading standard, so establishing commonality sometimes requires affirmative evidence, which the courts must subject to rigorous analysis." (citing *Wal-Mart v. Dukes*, 564 U.S. 338 (2011)); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 980 (9th Cir. 2011) ("When considering class certification under Rule 23, district courts are not only at liberty to, but must perform a rigorous analysis to

ensure that the prerequisites of Rule 23(a) have been satisfied." (quoting *Wal-Mart*, 564 U.S. at 350–51)).

Second, some of the cases cited by Taylor Farms opine on how the standard set out in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), should be applied in the context of expert testimony presented in support of class certification motions. Again, the Ninth Circuit has already, in a published opinion, adopted the view favored by these cases and Taylor Farms. *See Ellis*, 657 F.3d at 982 (holding that "the district court correctly applied the evidentiary standard set forth in *Daubert*" in resolving challenge to expert evidence submitted in support of motion for class certification).

The non-precedential two-paragraph memorandum opinion in this case plainly does not and cannot overrule the pre-existing Circuit precedent. Nor does it purport to do so. Tellingly, Taylor Farms' only citation to suggest as much is to the dicta in the district court decision. *See* Pet. 12 (quoting district court opinion as Ninth Circuit's "rule"). The only pertinent sentence in the court of appeals' decision states: "For the reasons set forth in its order, we affirm the district court's grant of '[c]ertification of the mixed hourly worker subclass as to meal break claims,' and its '[c]ertification of the waiting time subclass [to the extent it] is derivative of the mixed hourly workers subclass.'" Pet. App. 3a. As for the district court order referenced in that sentence, it explicitly invoked precedent of this Court and the Ninth Circuit to guide its analysis, recognizing that the plaintiffs bear the burden of proving each of the Rule 23 requirements are met and that a district court should conduct a "rigorous analysis" as to whether the plaintiffs meet that burden. *Id.* 14a (quoting *Wal-Mart*, 564

U.S. at 351, and *Berger v. Home Depot USA, Inc.*, 74 F.3d 1061, 1068 (9th Cir. 2014), *abrogated on other grounds by Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017)).

Neither the court of appeals' summary affirmance on the Rule 23(f) appeal nor the lengthy district court opinion can reasonably be read to adopt a "lax approach," Pet. 12, to class certification. Moreover, for the reasons discussed above, *see supra* at I.A., the suggestion that the Ninth Circuit's incorporation of the district court's "reasons" constitutes adoption of one sentence of dicta as a Circuit rule that "evidence presented in support of class certification need not be admissible at trial," Pet. 12 (quoting district court opinion), is far-fetched.

Importantly, district courts in the Ninth Circuit do not agree with Taylor Farms' reading: Considering motions for class certification since the May 2017 summary affirmance in this case, district courts have analyzed the admissibility of the evidence. *See Jama v. GCA Services Corp., Inc.*, No. C16-0331RSL, 2017 WL 4758722, at *1 n.1 (W.D. Wash. Oct. 20, 2017) (evaluating admissibility of declarations submitted in connection with class certification motion); *Morrow v. City of San Diego*, No. 11-cv-01497-BAS-KSC, 2017 WL 2423825, at *3 (S.D. Cal. Jun. 5, 2017) (on class certification motion, court must find "that the plaintiff has admissible evidence that supports class certification"). And to the extent that Taylor Farms seeks review based on the views of district courts, Pet. 16 n.3, this Court does not sit to resolve disagreements among the district courts, in advance of review by the federal courts of appeals. *See* S. Ct. R. 10(a).

B. The cases cited by Taylor Farms are consistent with the law of the Ninth Circuit. Indeed, Taylor Farms begins with a Fifth Circuit case that *explicitly* agrees with the Ninth Circuit and relies on Ninth Circuit case law.

As the petition states (at 12), the Fifth Circuit in *Unger v. Amedisys Inc.* wrote that "findings must be made based on adequate admissible evidence to justify class certification." 401 F.3d 316, 319 (5th Cir. 2005). But the petition omits the first half of that sentence, in which the Fifth Circuit states that it is *agreeing* with the Ninth Circuit on this point. The full passage is:

> This case, on review pursuant to Fed. R. Civ. Pro. 23(f), implicates the standards and procedures used by district courts when considering certification of securities class actions dependent on the "fraud on the market" theory. *Like our brethren in the* Third, Fourth, Seventh and *Ninth Circuits*, we hold that a careful certification inquiry is required and findings must be made based on adequate admissible evidence to justify class certification.

Id. (emphasis added). Later, citing a Ninth Circuit opinion, *Unger* goes on to require application of "rigorous, though preliminary, standards of proof to the market efficiency determination." *Id.* at 322 (citing *Binder v. Gillespie*, 184 F.3d 1059, 1064–65 (9th Cir. 1999)). *Unger* did not purport to address anything other than the standard for assessing fraud on the market at the class certification stage in securities class actions. The opinion does not address the question on which Taylor Farms seeks review, and no Fifth Circuit case has set forth the rule sought by

Taylor Farms. To the contrary, district courts in the Fifth Circuit have expressed sentiment in line with the challenged dicta. *See, e.g.*, *Contreras v. Land Restoration LLC*, No. 1:16-CV-883-RP, 2017 WL 663560, at *3–*4 (W.D. Tex. Feb. 17, 2017); *Steward v. Janek*, 315 F.R.D. 472, 478 (W.D. Tex. 2016).

Similarly, the Seventh Circuit cases cited in the petition do not conflict with the decision below. In *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 938 (7th Cir. 1989), in which the issue was whether attorney conduct was sanctionable, the court's only discussion about evidence was to note that the attorneys could have "construct[ed] a plausible legal argument" that "the usual rules of evidence" apply to a fairness hearing. And *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 676 (7th Cir. 2002), consistent with the Ninth Circuit's *Stockwell* opinion, held that the Rule 12(b)(6) motion to dismiss standard of accepting the allegations of a complaint as true does not apply to Rule 23 motions.[8] Finally, in *American Honda Motor Co. v. Allen*, 600 F.3d 813, 817 (7th Cir. 2010), the court held that *Daubert* applies to expert evidence submitted at class certification—the same rule that the Ninth Circuit adopted in *Ellis*. *See* 657 F.3d at 982; *see also* Pet. 21 (citing *Ellis*).

The *Daubert* standard addressed in *American Honda*—which is not at issue here, where expert testimony is not at issue—was likewise the subject of *In re Zurn Pex Plumbing Products Liability Litigation*,

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[8] In *Priddy v. Health Care Serv. Corp.*, 870 F.3d 657 (7th Cir. 2017), *cited at* Pet. 13, the Seventh Circuit reiterated this point without discussing admissibility.

644 F.3d 604, 611–12 (8th Cir. 2011), relied on heavily in the petition as evidence of a divide among the Circuits. Although in *Zurn* the court declined to adopt the approach used by the Seventh Circuit in *American Honda*, the court made clear that it did so based on differences in the record, not because it was adopting a different test. *See id.* at 611 ("The record in the case before us is very different from the one in *American Honda*.").

As Judge Scirica explained in *In re Blood Reagents Antitrust Litigation*, 783 F.3d 183, 188 (3d Cir. 2015), also cited in the petition (at 14), despite "some variation between the Seventh and Eighth Circuit formulation," both are "consistent" insofar as they "limit the *Daubert* inquiry to expert testimony offered to prove satisfaction of Rule 23's requirements."[9] Neither the Eighth, Seventh, nor Third Circuit cases cited purport to state a rule as to non-expert evidence.

Finally, the Second Circuit's decision in *In re Initial Public Offering Securities Litigation*, 471 F.3d 24 (2d Cir. 2006), is inapposite. That case established five considerations for district courts faced with Rule 23 issues that interact with merits issues. *Id.* at 41. None of these considerations address evidentiary standards. And the sentence that Taylor Farms isolates directing district courts "to assess all of the rel-

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[9] *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 253 (D.C. Cir. 2013), *cited at* Pet. 14, stands for a similar, consistent proposition. There, the court remanded an action to the district court, instructing it to take "a hard look at the soundness of statistical models" submitted by an expert, where the district court had deemed competing expert analyses "plausible." *Id.*

evant evidence admitted at the class certification stage," *id.* at 42, cannot be fairly read as adopting a rule concerning whether evidence considered at the class certification stage must meet the standard for admissibility *at trial*. To the contrary, the Second Circuit has explicitly stated that its decision did not resolve the narrower issue (not presented here) of the application of *Daubert* to expert testimony at the class certification stage. *See In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 129 (2d Cir. 2013).

In short, none of the court of appeals cases cited by Taylor Farms ruled on the question presented in the petition. Thus, not only is there no conflict among the circuits, the courts of appeals have not discussed the competing views. As Justice Frankfurter noted, "Wise adjudication has its own time for ripening." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950). At this point, the question presented by Taylor Farms is neither presented here nor ripe.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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