

No. 26-244

IN THE
Supreme Court of the United States

THE KROGER CO., dba FRED MEYER

Petitioner,

v.

ELISHA SOLANO, KATHLEEN ZACK, and DENISE CONROY,
individually and on behalf of other customers,

Respondents.

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

**BRIEF FOR THE CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA, AMERICAN
TORT REFORM ASSOCIATION, AND BUSINESS
ROUNDTABLE AS *AMICI CURIAE*
SUPPORTING PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

Amici represent a diverse array of businesses and business interests across the United States. They regularly advocate for the interests of their members in federal and state courts throughout the country in cases of national concern, and their members are frequent targets of class-action lawsuits. They support the petition because they have a strong interest in ensuring that lower courts comply with the rigorous analysis required by Federal Rule of Civil Procedure 23 and Article III of the Constitution before permitting a case to proceed as a class action.

The organizations joining this brief are:

The Chamber of Commerce of the United States of America. The Chamber is the world's largest business organization. As the nation's leading advocate for business, the Chamber represents companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the nation's business community.

American Tort Reform Association. ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms

¹ Pursuant to Rule 37.6, amici state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from amici, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties received timely notice of this brief under Rule 37.2(a).

that have pooled their resources to promote reform of the civil justice system with a goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed amicus briefs in cases involving important liability issues.

Business Roundtable. Business Roundtable represents the chief executive officers of America’s leading companies. Business Roundtable’s CEO members lead U.S.-based companies that support one in four American jobs and almost a quarter of U.S. gross domestic product. Business Roundtable was founded on the belief that businesses should play an active and effective role in the formulation of public policy, and Business Roundtable members develop and advocate for policies to promote a thriving U.S. economy and expanded opportunity for all. Business Roundtable participates in litigation as *amicus curiae* when important business interests are at stake.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should follow through on what it has already recognized twice before: lower courts need clarity on whether they may certify a class containing members with no concrete injuries. Although the Court ultimately sidestepped that question in *Laboratory Corp. of America Holdings v. Davis*, 605 U.S. 327 (2025) (“*LabCorp*”), and *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016), before that, the considerations that warranted review on each occasion are as compelling as ever. This clean vehicle—an interlocutory Rule 23(f) decision issued while all other proceedings remain stayed—presents an ideal opportunity for this Court to finally resolve the

divisions among circuits and affirm baseline limitations on deploying the class-action device.

As was the case at the time of *LabCorp*—a petition, like this one, that arose out of the Ninth Circuit—Ninth Circuit precedent has gone badly astray. It codifies what is in effect an injury-optional analysis of Rule 23(b)(3) predominance, whereby courts may forge ahead with certifying classes that sweep in uninjured members—with no firm limits on the outermost proportion of the class the uninjured can comprise—and table known injury gaps for another day. But that certify-first, winnow-later approach cannot be reconciled with the demanding threshold requirements of Rule 23(b)(3) predominance or Article III injury-in-fact. It permits swaths of consumers who *from the outset* of litigation have no claim of harm, and no conceivable entitlement to relief, to still be counted as members of the class. And it incentivizes the padding of classes with uninjured members who would never have standing to bring claims individually. The Court should grant the petition to make clear that lack of injury is an obstacle to certification that courts must grapple with at the certification stage, not simply punt.

This Court's intervention is overdue. The Ninth Circuit's lax gatekeeping in class-certification decisions continues to whipsaw parties to litigation, who face drastically different approaches to uninjured class members depending on the circuit. It has produced, moreover, overbroad damages classes on the glidepath to *in terrorem* settlements. And the losers have been American businesses, and the consumers and workers that depend on them, for whom uninjured plaintiffs with no viable merits claims are nonetheless

driving up the costs of doing business. Absent this Court’s resolution, the Ninth Circuit will continue to function as a veritable conveyor belt of candidates for certiorari on this critical and recurring issue.

ARGUMENT

I. As this Court Has Recognized, Review is Needed to Clarify that Federal Courts May Not Certify a Rule 23(b)(3) Class Containing Uninjured Class Members.

A. This Court Has Twice Granted Certiorari to Answer This Question.

This Court correctly judged 11 years ago in *Tyson Foods* and again two years ago in *LabCorp* that whether a class may be certified under Rule 23(b)(3) when it sweeps in uninjured class members warrants resolution. Neither case produced that resolution. In *Tyson Foods*, the Court held that the petitioner’s reframing of the question presented in its merits brief marked an “abandonment of its argument from the petition,” removing the basis on which the Court had waded in. 577 U.S. at 460. And in *LabCorp*, the Court dismissed the writ as improvidently granted after the respondents argued that the relevant class-certification order had been mooted by a subsequent clarification of the class definition. *See* 605 U.S. at 330-31 (Kavanaugh, J., dissenting).

In both cases, however, what prompted the Court to grant certiorari in the first place was the “important class-action question” presented. *Id.* at 330. Indeed, as *LabCorp* argued in its petition, “It is hard to imagine a better issue for this Court’s review” than one that “sharply divides the circuits, implicates billions of dollars, and has already ... captured this

Court’s attention.” LabCorp Pet. at *13, No. 24-304, 2024 WL 4241232 (Sept. 13, 2024). Having now *twice* reeled in this Court’s attention, the same considerations apply with even greater force.

Though the circuit divisions on the question have been acknowledged for over a decade, *see, e.g., In re Deepwater Horizon*, 739 F.3d 790, 800-01 (5th Cir. 2014), more courts have joined that chorus since *LabCorp*, *see, e.g., Wilson v. Centene Mgmt. Co., LLC*, 168 F.4th 217, 230 (5th Cir. 2026) (noting “circuit split” among “competing approaches to class standing”). And though courts have long anticipated that resolution of the divisions would fall to this Court, *see, e.g., In re Rail Freight Fuel Surcharge Antitrust Litig. - MDL No. 1869*, 934 F.3d 619, 625 (D.C. Cir. 2019), that expectation has only heightened, *see, e.g., Speerly v. Gen. Motors, LLC*, 143 F.4th 306, 315 (6th Cir. 2025) (en banc) (“The Supreme Court has not decided whether an unnamed class member’s lack of standing poses an Article III problem.”).

Since *LabCorp*, the circuit divisions at issue have only sharpened. Courts remain split along “three blocs” as far as how many uninjured members can be encompassed in a certified class: *none*, per the courts that focus on Article III standing at certification; a *de minimis* number, per the courts that construe Rule 23(b)(3) predominance as allowing nothing more; and *many*, per the courts like the Ninth Circuit that reject even a *de minimis* cap. Pet. 14-21.

The Fourth and Tenth Circuits recently solidified their positions within those camps. Joining the second bloc, the Fourth Circuit in *Spurlock v. Wexford Health Sources, Inc.* squarely held that “at the class

certification stage, district courts ... need not find that all of the unnamed class members possess Article III standing,” and that “some uninjured individuals may be encompassed within the proposed class” without defeating predominance, so long as they are still “outliers.” 175 F.4th 232, 251-52 (4th Cir. 2026). Joining the third bloc, meanwhile, the Tenth Circuit in *Rider, Tr. of Cherry Rider Fam. Tr. v. OXY USA, Inc.* marshaled Ninth Circuit precedent for the proposition that Rule 23 permits certification of a class “that potentially includes *more than a de minimis* number of uninjured class members.” 175 F.4th 1214, 1226, 1232 (10th Cir. 2026) (emphasis added) (quoting *Olean Wholesale Grocery Coop. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022) (en banc)). On that premise, the Tenth Circuit acknowledged the defendant’s objection to certification on grounds that many “putative members cannot have a claim,” but still found predominance satisfied and the class certifiable. *Id.* at 1226.

The continued splintering over when, if ever, a certified Rule 23(b)(3) class may encompass uninjured members thus cries out for resolution, and the Court should heed the call. This case, a Rule 23(f) ruling issued on interlocutory review while all other proceedings were stayed, presents a uniquely clean vehicle. With all the same upsides of review from *Tyson Foods* and *LabCorp* and none of their pitfalls, this Court should not hesitate to grant certiorari and close the loop. Deferring the issue yet again will only permit the circuit divisions to further metastasize.

**B. The Ninth Circuit’s Approach is
Irreconcilable with this Court’s
Precedents.**

On the merits, the Ninth Circuit’s “hyper-permissive approach to certification,” LabCorp Pet. at *19, remains deeply flawed. Entrenched circuit precedent rejects the view that Rule 23(b)(3) “does not permit the certification of a class that potentially includes more than a de minimis number of uninjured class members.” *Olean*, 31 F.4th at 669. “Put affirmatively,” *Olean* means “a class containing *more than a de minimis number of uninjured* class members *may be certified* pursuant to Rule 23.” *Weiner v. Ocwen Fin. Corp.*, 343 F.R.D. 628, 632 (E.D. Cal. 2023) (emphasis added). That “more than ... de minimis” language has been cited more than 60 times within the Ninth Circuit to date. *Id.* More broadly, it reflects a certify-first, winnow-later approach that contorts core tenets of both Rule 23(b)(3) predominance and Article III standing.

1. Rule 23(b)(3) predominance is a *threshold* bar—a stringent one, by design. Because “Rule 23(b)(3) ... is an ‘adventuresome innovation’ ... framed for situations ‘in which class-action treatment is not as clearly called for,’” it rests on a basic give-and-take: “it allows class certification in a much wider set of circumstances [than with (b)(1) or (b)(2) classes] *but with greater procedural protections*.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011) (emphasis added) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614-15 (1997)). Chief among those protections is the “prerequisite[]” that common questions of law or fact predominate over individual questions. *Id.* That threshold is “demanding” and

entails a “close look,” *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013), and class plaintiffs must affirmatively, “actually prove” its satisfaction “before class certification,” *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275-76 (2014).

Rule 23’s plain text—“predominate”—reflects that high bar, connoting that individualized issues should be de minimis. A “straightforward” application of “Rule 23 and this Court’s precedents,” moreover, compels the view that “when a damages class includes both injured and uninjured members, common questions do not predominate.” *LabCorp*, 605 U.S. at 328, 332 (Kavanaugh, J., dissenting); *see also In re Rail Freight Fuel Surcharge Antitrust Litig. - MDL No. 1869*, 725 F.3d 244, 252 (D.C. Cir. 2013) (“Meeting the predominance requirement demands common evidence[] that all class members were in fact injured” and “suffered *some* injury”). Only when the court is persuaded that class members “possess the same interest and suffer the same injury” is there the kind of cohesion justifying the exceptional treatment of class-wide adjudication over the norm of litigation by and on behalf of individuals. *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977).

The Ninth Circuit’s approach to predominance, however, waters down that threshold. In the decision below, the Ninth Circuit took as a given “that any class member who received a refund has not suffered an injury.” App.4a. It did not deny the premise that many class members were uninjured—at least 1,275 refunds having been issued. *See* App.19a (“about 1,275 customers received refunds of FNOJ 564 and 567 bottle deposits”). Yet its rejoinder was simply that the uninjured did not matter: Under circuit precedent,

“even assuming that some class members were adequately compensated through refunds,” and even assuming “individualized questions relat[ing] to the injury status of class members,” the prospect of “more than a de minimis number of uninjured class members’ does not preclude certification.” App.4a (quoting *Olean*, 31 F.4th at 669). Absent any such obstacle, the district court remained free to reason “within a broad range of permissible conclusions” in weighing “common” against “individualized” issues. App.5a (quoting *Olean*, 31 F.4th at 669). And the district court could “permissibl[y]” conclude, as it did, that the “common conduct”—of “[a]ll class members ... each pa[y]ing a 10-cent premium for their orange juice products”—predominated over any individualized issues surrounding the at least 1,275 refunds, none of which struck the Ninth Circuit as “particularly ‘involved.’” App.5a.

By unmooring the predominance analysis from even a de minimis limit on the uninjured, the Ninth Circuit’s approach encourages courts to certify first, and punt issues of injury down the line. Without any obligation to grapple with and weigh the numbers and proportion of uninjured members, courts can sidestep thorny questions about “assessing how many individual adjudications are too many” and “when ... the need for individualized proof of injury ... destroy[s] predominance[.]” *In re Rail Freight Fuel Surcharge Antitrust Litig. - MDL No. 1869*, 934 F.3d 619, 624 (D.C. Cir. 2019). In effect, they get a free pass to simply declare one “common” thread or another to trump the individualized ones—and get deference, rather than the customary “demanding” “close look.” *Comcast*, 569 U.S. at 34; *cf.* App.5a (“the district

court’s predominance determination ‘falls within a broad range of permissible conclusions’” (quoting *Olean*, 31 F.4th at 669)). Indeed, the Ninth Circuit offered little explanation for why the “common conduct” of a 10-cent loss at the point-of-sale would resolve liability class-wide, let alone predominate over individualized issues surrounding refunds. Pet. 29-30. And that barebones analysis does not even approach the rigorous gatekeeping that Rule 23(b)(3) requires.

2. The Ninth Circuit’s freewheeling approach similarly runs roughshod over Article III standing. The conflict is again straightforward: when a damages class includes both injured and uninjured members, grouping the two together in a proposed class does not obviate or erase the Article III defects of the latter. That is as true for a single member lacking an injury-in-fact as it is for the scores of members lacking *any* stake in these claims, by the time the litigation commenced, due to Kroger’s issuance of at least 1,275 refunds pursuant to its no-questions-asked, full-refund policy.

“[T]o avoid a dismissal based on a lack of standing, the court must be able to find that *both* the class *and* the representatives have suffered [an Article III] injury.” 7AA Charles Alan Wright et al., *Federal Practice and Procedure* § 1785.1 (3d ed. 2024) (emphases added). As this Court clarified in *TransUnion LLC v. Ramirez*, “standing is not dispensed in gross” and “[e]very class member must have Article III standing in order to recover individual damages.” 594 U.S. 413, 431 (2021). Critically, moreover, “Article III standing requires a concrete injury even in the context of a statutory violation.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 331 (2016).

Where it is clear that many class members encompassed in the class definition have no identifiable concrete harm nor entitlement to relief, those members may not simply glom onto the injury-in-fact of their representatives. *See Johannesson v. Polaris Industries Inc.*, 9 F.4th 981, 987-88 (8th Cir. 2021) (“a class cannot be certified if it contains members who lack standing”); *Drazen v. Pinto*, 41 F.4th 1354, 1361 (11th Cir. 2022) (“[W]hen a class seeks certification for the sole purpose of a damages settlement ... the class definition must be limited to those individuals who have Article III standing.”). Article III requires that every class member—not just named plaintiffs—possess an actual, non-speculative injury at the time the complaint is filed. Standing, like predominance, is a “threshold” requirement going to the very justiciability of the action, *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94-95 (1998), and a showing that must be supportable with evidence, not assumed by virtue of the class device.

The Ninth Circuit got this precisely backwards. In one paragraph, the Ninth Circuit summarily dismissed the notion of any Article III problem, invoking circuit precedent that “Article III’s requirements are satisfied before a class is certified as long as at least one named plaintiff has standing[.]” App.3a (quoting *Healy v. Milliman, Inc.*, 164 F.4th 701, 706 (9th Cir. 2026)); accord *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc). The Ninth Circuit reasoned that “even if the class contains uninjured, unnamed members, at class certification, our standing inquiry focuses on the *named plaintiffs*” alone. App.3a. And it again took a certify-first approach that left glaring, threshold

standing problems merely tabled to be resolved on some later date “prior to trial at summary judgment.” *Id.*

That reasoning runs afoul of this Court’s clear direction. As is abundantly clear, the procedural mechanism of Rule 23 serves to aggregate claims, not conjure them into existence. The class-action device cannot manufacture an injury-in-fact or stake that does not otherwise exist. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010); William G. Beatty, *Winnowing the Wheat from the Chaff: The Continuing Controversy over Article III Standing and the Certification of Rule 23(b)(3) Damages Classes Containing “Uninjured” Members*, 17 Wm. & Mary Bus. L. Rev. 253, 317 (2026) (“Allowing certification of a class action case in which more than a few uninjured members are present frustrates both the ‘concrete harm’ standard of Article III as well as the commonality and predominance requirement of Rule 23(a)(3).”). Indeed, the Rules Enabling Act forbids Rule 23 from “abridg[ing], enlarg[ing] or modify[ing] any substantive right.” 28 U.S.C. § 2072(b). Article III problems—which go to the very authority of the court to hear the dispute—must be policed at the threshold, not waved aside for future, post-certification winnowing.

The end result of the errors below was a certified class of thousands of consumers of orange juice, of which up to 1,275 were uninjured. The alleged “injury” related to a grocer’s purportedly improper charging, pursuant to a state-law recycling directive, of a 10-cent bottle deposit for various orange juice containers when, as it turned out, the state law did not require it for these specific containers. But even

accepting that 10-cent “injury,” at least 1,275 refunds of the full 10-cents (or even of the full purchase price) were issued before the lawsuit was even filed. These refunds left a sizeable fraction of the class with no such economic injury from the get-go. And it certainly left them with no entitlement to obtain damages amounting to *two thousand-fold* multiples of that supposed loss. *See* Pet. 7 (plaintiffs seek \$200 in statutory damages for each 10-cent loss).

Stitching together the injured and uninjured—those consumers left 10 cents down and those put right by 10-cent (or full-purchase-price) refunds—was error. It was all the more erroneous, moreover, given the known numbers of the uninjured. And at minimum, the breezy, injury-optional analysis of predominance that is the norm in the Ninth Circuit reduces the threshold Rule 23(b)(3) and Article III bars to little bar at all.

II. If Left Uncorrected, the Ninth Circuit’s Approach Will Continue to “Raise the Costs of Doing Business.”

1. In any event, the practical harms of this errant approach are stark. Blessing “overbroad and incorrectly certified classes” will continue to “substantially raise the costs of doing business.” 605 U.S. at 333 (Kavanaugh, J., dissenting). Sprawling class actions that are “overinflated with *uninjured* members raise the stakes for businesses” with targets on their backs, threatening them with “massive liability.” *Id.* Nowhere is this more clearly on display than in the Ninth Circuit, where example after

example of classes have been certified without any serious grappling with acknowledged injury gaps.²

Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC, 31 F.4th at 686, *cert. denied*, 143 S. Ct. 424 (2022)—the progenitor of the premise that uninjured members are no obstacle to certification—entailed a class of tuna consumers who alleged price-fixing by producers of canned tuna. The “thousands” of proposed class members, *In re Packaged Seafood Prods. Antitrust Litig.*, 332 F.R.D. 308, 329 (S.D. Cal. 2019), ranged from “multi-billion dollar chain retailers” to “small mom-and-pop stores,” and thus exercised dramatically different degrees of negotiating power on list prices, *Olean*, 31 F.4th at 686 (Lee, J., dissenting). That sprawling class was nonetheless certified despite expert testimony that “*almost a third* of the class members may not have suffered injury.” *Id.* at 685-86 (emphasis added). By the Ninth Circuit’s view, a remarkable “one out of three members” could simply be “winnow[ed] out ... later at trial,” rather than grappled with at the certification stage. *Id.* at 686.

Davis v. Laboratory Corp. of America Holdings, No. 22-55873, 2024 WL 489288 (9th Cir. Feb. 8, 2024), *cert. granted but dismissed as improvidently granted*, 605 U.S. 327 (2025), meanwhile, entailed a class of “hundreds-of-thousands of people” seeking “*half a billion dollars* a year” for merely being exposed to self-service kiosks that were allegedly inaccessible to the

² The Ninth Circuit decisions affirming certification in both *Falcone v. Nestle* and *Drake v. Bayer* are the subjects of pending petitions for certiorari. See *Bayer v. Drake*, No. 26-376 (S. Ct.) (petition filed September 15, 2026); *Nestle v. Falcone*, No. 26-400 (S. Ct.) (petition filed September 18, 2026).

legally blind. LabCorp Pet. at *3. LabCorp had noted that many class members may have visited treatment centers that had such kiosks, but “would not use kiosks anyway because they dislike kiosks or prefer to speak with a front-desk employee when checking in,” 605 U.S. at 329 (Kavanaugh, J., dissenting). Yet the Ninth Circuit deemed it of no moment if “some potential class members may not have been injured.” *Davis*, 2024 WL 489288, at *2 n.1. Binding circuit precedent, it explained, permits “certification of a class that potentially includes more than a de minimus [sic] number of uninjured class members.” *Id.* (quoting *Olean*, 31 F.4th at 669). And in its view, the injury of even one named plaintiff sufficed to “convey Article III standing” for the class of hundreds-of-thousands of others. *Id.* at *1.

Lytle v. Nutramax Laboratories, Inc., 114 F.4th 1011 (9th Cir. 2024), followed suit, this time with respect to a class of consumers of dog products marketed as promoting healthy joints. The Ninth Circuit specifically reasoned that certification was consistent with the possibility that “*an ascertainable portion* of the class may be unable to recover” and “suffered no injury” because they were “not exposed to a statement with any attributable overcharge.” *Id.* at 1026-27 (citing *Olean*, 31 F.4th at 669) (emphasis added). Affirming the certification, the Ninth Circuit described the defendant’s concerns about permitting a class to be certified “where it is uncertain that a damages model will show any injury at all” as “largely irrelevant.” *Id.* at 1029. And fast-forwarding to the present day, an \$11.5 million class settlement in this matter awaits final approval. *See* Order at 7, No. 19-

0835, *Lytle v. Nutramax Laboratories, Inc.* (C.D. Cal. Feb. 2, 2026), Dkt. No. 218.

Noohi v. Johnson & Johnson Consumer Inc., 146 F.4th 854 (9th Cir. 2025), similarly affirmed certification, this time of a class of consumers of Johnson & Johnson products who took issue with a representation that the products were “oil-free.” The Ninth Circuit found no error in the district court’s acceptance of the class’s intended but not-yet-executed damages model as “sufficient for purposes of class certification.” *Id.* at 861. Specifically, the district court had acknowledged that the model “may show that *no class members* were actually harmed by the allegedly deceptive packaging language” yet nonetheless proceeded to certify. *Noohi v. Johnson & Johnson Consumer, Inc.*, No. 20-03575, 2022 WL 22278783, at *6 (C.D. Cal. Nov. 30, 2022), *aff’d*, 146 F.4th 854 (9th Cir. 2025) (emphasis added). Citing circuit precedent, it reasoned that Rule 23 “permit[s] the certification of a class that potentially includes more than a *de minimis* number of uninjured class members.” *Id.* (quoting *Olean*, 31 F.4th at 669).³

Falcone v. Nestle USA, Inc., No. 24-7707, 2026 WL 74510 (9th Cir. Jan. 9, 2026), *cert. pending*, took a similar tack. There, the Ninth Circuit affirmed certification of a sweeping class of consumers of Nestlé chocolate. The claims concerned allegedly deceptive labels about the products being “sustainably” or “responsibly” sourced—labeling that purportedly

³ Both *Lytle v. Nutramax Laboratories* and *Noohi v. Johnson & Johnson Consumer* culminated in petitions for certiorari, but neither petition presented the instant question as to uninjured class members.

deceived class members into buying the chocolate and entitled members to full refunds. *Id.* at *1. Yet as Judge Clifton noted in dissent, the notion that “the discovery of the alleged misrepresentations regarding sustainability would render the purchased Nestle chocolate products to become *entirely valueless* to ... *every purchaser*” is “highly implausible” on its face. *Id.* at *3 (Clifton, J., dissenting). Many consumers of Nestlé chocolate who are putative members of the class will invariably not “be entitled to a full refund.” *Id.* Yet the named plaintiff’s testimony was deemed “sufficient to confer Article III standing” on the class, and circuit precedent was again marshaled for the proposition that the mere “possibility that some class members suffered no injury” does not defeat class certification. *Id.* at *1 & n.1 (citing *Olean*, 31 F.4th at 669, 680-81). Any concerns about the damages theory, the Ninth Circuit maintained, were merits issues that need not be decided at the certification stage and could be deferred until “an appropriate time.” *Id.* at *2 n.2; *but see id.* at *4 (“Class certification is to be based on evidence, not a promise that flaws will somehow be fixed later.”) (Clifton, J., dissenting).

Drake v. Bayer Healthcare LLC, No. 24-7158, 2026 WL 1079027 (9th Cir. Apr. 21, 2026), *cert. pending*, is more of the same. There, the Ninth Circuit affirmed certification of a class of “thousands” of purchasers of “Natural Fruit Bites” multivitamins. *Drake v. Bayer Healthcare LLC*, No. 22-CV-1085, 2024 WL 4204921, at *4 (S.D. Cal. Sept. 16, 2024); Bayer Appellant Br. at 8, No. 24-7158, *Drake v. Bayer Healthcare LLC* (9th Cir. Apr. 23, 2025). Their claim was that the word “Natural” misleadingly conveyed that the product was 100% natural, and they sought tens of millions of

dollars in damages. *Id.* Bayer contended that “the proposed classes include uninjured plaintiffs.” 2026 WL 1079027, at *2. In fact, as Judge Forrest noted in dissent, there was “undisputed evidence that *a substantial proportion* of class members was not misled” and “suffered [no] legal injury.” *Id.* at *4-5 (Forrest, J., dissenting) (emphasis and alteration added). Yet the Ninth Circuit proceeded to grant certification nonetheless, “consistent with this court’s reasoning in *Olean*.” *Id.* at 2 (citing *Olean*, 31 F.4th at 668-69, 669 n.14, 673).

Nor are opinions in this vein remotely limited to the Ninth Circuit. Similar district court rulings abound, yet often do not even reach the appellate stage because class actions, once certified, so overwhelmingly settle. In fact, even pre-*Olean*, district courts in the Ninth Circuit maintained that lack of injury was “not an obstacle to class certification.” *Wortman v. Air New Zealand*, 326 F.R.D. 549, 560 (N.D. Cal. 2018). *Wortman* was a price-fixing class action alleging unlawfully inflated airline prices. The defendant argued that “large percentages” of the class—estimated at more than “15%”—“did not suffer an antitrust injury” at all because those passengers either did not pay “higher” prices or “paid *lower prices*.” *Id.* (emphasis added); All Nippon Airways Def. Opp. to Class Cert. at 6, MDL No. 1913, *In re Transpacific Passenger Air Transp. Antitrust Litig.* (N.D. Cal. May 7, 2018). The district court, however, reasoned that “fortuitous non-injury to a subset of class members does not necessarily defeat certification of the entire class.” *Wortman*, 326 F.R.D. at 560. “[F]or now,” it held, plaintiffs would be treated as having satisfied predominance, leaving the

defendant to “present evidence on the merits ... during the trial.” *Id.*

In *Weiner v. Ocwen Financial Corp.*, 343 F.R.D. 628, 633 (E.D. Cal. 2023), another class action involving allegations that a loan servicer assessed illegal service fees, a district court candidly acknowledged that some borrowers “suffered *no concrete harm*” because they did not pay the fees. *Id.* at 632 (emphasis added). The district court declared, however, that “such individual determinations ... do not predominate,” reasoning that “a class containing *more than a de minimis number* of uninjured class members may be certified pursuant to Rule 23.” *Id.* at 633 (citing *Olean*, 31 F.4th at 669) (emphasis added). Any uninjured members could just be “weeded out at the claims phase.” *Id.* at 632-33.

In *Bush v. Rust-Oleum Corp.*, No. 20-CV-03268-LB, 2024 WL 422080, at *5 (N.D. Cal. Feb. 5, 2024), meanwhile, the district court certified a class of purchasers of Rust-Oleum cleaning products. Rust-Oleum argued that by including “every purchaser,” the class was not limited to “those who were misled by the labels, i.e., those who suffered an injury.” *Id.* at *5. Yet the district court paid no heed because “for purposes of the predominance requirement, a class definition is not automatically overbroad when it ‘potentially includes more than a de minimis number of uninjured class members.’” *Id.* (quoting *Olean*, 31 F.4th at 669).

In *Pampena v. Musk*, No. 22-CV-05937-CRB, 2024 WL 4331811, at *6 (N.D. Cal. Sept. 27, 2024), the district court certified a securities class action relating to alleged misstatements depressing Twitter’s stock price. While the defendant argued that some members

of the class “made money—and perhaps even made a *net profit*—as a result of Twitter’s lower stock price,” the district court gave this “fortuitous non-injury” by a subset of the class the back of the hand. *Id.* at *6-7 (emphasis added). There was not, the district court reasoned, “*such ‘a great number of members’* who were not harmed” as to render the class definition overbroad, making it “appropriate to wait ... to ‘winnow out those non-injured members.’” *Id.* at *7 (citing *Olean*, 31 F.4th at 669) (emphasis added).

De Coster v. Amazon.com, Inc., 350 F.R.D. 293 (W.D. Wash. 2025), was to similar effect. The district court certified a sprawling class of millions of purchasers of goods from third-party sellers on Amazon. It did so, moreover, despite Amazon’s expert evidence that “12.7% of the class would not have been injured,” amounting to “*millions of* uninjured members.” *Id.* at 312 (emphases added). Again, the district court reasoned that there was not “*such a great number*” of uninjured members as to render the class overbroad. *Id.* at 312-13 (citing *Olean*, 31 F.4th at 669 n.14) (emphasis added).

Still more recently, *In re JUUL Labs, Inc. Antitrust Litig.*, No. 20-CV-02345-WHO, 2026 WL 539344 (N.D. Cal. Feb. 26, 2026), teed up a dispute over whether, within a sweeping class of “hundreds of thousands” of JUUL e-cigarette purchasers, “anything more than a de minimis number of indirect plaintiffs were uninjured.” *Id.* at *2, *15. Rather than grapple with what share of members was uninjured or not, the district court sidestepped the dispute by simply underscoring that certified classes can “potentially include[] more than a de minimis number of uninjured

class members.” *Id.* at *15 (quoting *Olean*, 31 F.4th at 669).

At bottom, case after case reflects what is by now an almost-reflexive rinse-and-repeat of *Olean*’s takeaway that uninjured members—even *many* uninjured members—are no obstacle to class certification. What began with the Ninth Circuit’s resistance to *capping* the uninjured at a de minimis number has hardened into an affirmative endorsement of *including* more-than-de-minimis numbers of the uninjured in certified classes. Perversely, the uninjured seemingly need to predominate—in “great number[s]”—to *defeat* predominance. That turns bedrock burdens and principles of Rule 23(b)(3) upside down. And it markedly augments the Ninth Circuit’s admitted “lean[] toward approving class certifications and class settlements,” *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 582 (9th Cir. 2019) (Ikuta, J., dissenting), putting a further thumb on the scale of certification.

2. In any event, the “widespread” and “serious real-world consequences” of treating glaring injury gaps as no obstacle to certification are far from circuit-specific. *LabCorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting).

More businesses than ever face putative class-action lawsuits. “[A]round 10,000 class action lawsuits are filed annually.” *Class Actions 2021* at 91 (Jonathan D. Polkes & David J. Lender, eds. 2021). A remarkable 74.7% of companies—three of four—have reported managing class actions, a steep increase from 54.4% in 2018. *See* 2026 Carlton Fields Class Action

Survey at 8, <https://www.carltonfields.com/insights/class-action-survey>.

Meanwhile, spending on class-action defense has grown from about \$2 billion in 2011 to \$4.53 billion in 2025, with \$4.8 billion projected for 2026. *See id.* at 6-7. Such defense typically takes years, imposing protracted burdens on businesses irrespective of the merits of any claim. *See* Adam Mills & Laura Hopkins, *Lex Machina Class Action Litigation Report 2026* (April 2026) at 18 (“the median time to class certification was over two years, and the median time to class action settlement was over two and a half years”); Cornerstone Research, *2025 Review & Analysis of Securities Class Action Settlements*, at 13, <https://www.cornerstone.com/wp-content/uploads/2026/02/Securities-Class-Action-Settlements-2025-Review-and-Analysis.pdf> (“median duration from case filing to settlement hearing was 3.5 years”). And where businesses are compelled to treat these significant costs as an inevitable part of the “costs of doing business,” the costs will undoubtedly redound “to consumers in the form of higher prices; to retirement account holders in the form of lower returns; and to workers in the form of lower salaries and lesser benefits.” *LabCorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting).

Class-certification rulings, moreover, often prove outcome-dispositive. As scholars have acknowledged, “class certification sets the litigation on a path toward resolution by way of settlement.” Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009). The catastrophic liability threatened by class actions, coupled with the heavy costs of defending against

them, “coerce businesses into costly settlements[.]” *LabCorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting). As this Court has recognized, class actions can “unfairly ‘place pressure on the defendant to settle even unmeritorious claims.’” *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 524 (2018); *see also* Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973) (describing, as “blackmail settlements,” those induced by a small chance of a very large judgment in a class action). But even those settlements have become more difficult and expensive to come by, as plaintiffs’ counsel have been emboldened in their litigation strategy. *See* 2026 Carlton Fields Class Action Survey at 24 (noting recent drop in settlements).

In circuits that avowedly “lean[]” toward certification, *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d at 582 (Ikuta, J., dissenting), the hydraulic pressures on businesses to resolve away class claims are only further intensified. Thus, where courts are routinely certifying classes that sweep in uninjured members in reliance on presumed later-stage opportunities to winnow them out, that stage will in all statistical likelihood never come to pass. All this only further underscores the urgent need for the Court’s intervention on this important issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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