No. 21-0874

In the Supreme Court of Texas

AMERICAN CAMPUS COMMUNITIES, INC., ET AL.,
Petitioners,

v.

BETH BERRY, BROOKE BERRY, YAEL SPIRER, AND HAILEY HOPPERSTEIN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for Review from the Court of Appeals for the Third Judicial District, Austin, Texas, No. 03-21-00119-cv

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BRIEF FOR *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE TEXAS ASSOCIATION OF BUSINESS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[*]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million 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 curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Texas Association of Business is the leading employer organization in the State. Representing companies from the largest multi-national corporations to small businesses in nearly every community across Texas, the Association has worked for more than 100 years to improve the State's business climate and to help make Texas's economy the strongest in the world. The Association regularly files

[*] No counsel for a party authored this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. No person other than *amici curiae*, their members, or their counsel made any monetary contribution to the preparation or submission of this brief. *See* Tex. R. App. P. 11.

amicus curiae briefs to provide courts with insight about how a given decision will affect Texas businesses, job creation, and the broader Texas economy.

Amici seek to promote a predictable, rational, and fair legal environment for their members and for the broader business community. And many of their members and affiliates are or may end up defending against putative class actions. *Amici* therefore have a strong interest in ensuring that Texas courts rigorously and consistently analyze and enforce the requirements of Rule 42—before certifying a class.

That didn't happen here. Instead, the trial court kicked the can down the road—deferring resolution of no fewer than seven critical "[s]tatutory construction" issues until "the trial proceedings." CR1631–32. This Court should vacate the class-certification order and remand for the trial court to conduct the rigorous analysis required by Rule 42.

INTRODUCTION

When courts adopt a "certify now and worry later" approach to class actions, Texas businesses, Texas consumers, and the Texas economy all pay the price. By dramatically increasing a defendant's potential liability, class certification often places immense pressure on defendants to settle even meritless claims. And even for cases that don't settle, allowing them to proceed as class actions while deferring resolution of critical threshold issues risks wasting judicial and litigant time and resources.

That's what happened here. Rather than construing the statutes at issue to determine what plaintiffs will need to prove to prevail—as is necessary to figure out whether common issues would predominate over individual issues—the lower courts kicked the can down the road, leaving critical "[s]tatutory construction" issues to be addressed during "the trial proceedings." CR1631–32. That's precisely the type of "certify now and worry later" approach this Court unequivocally rejected over two decades ago. *Sw. Ref. Co., Inc. v. Bernal*, 22 S.W.3d 425, 435 (Tex. 2000).

Of equal concern, the courts below failed meaningfully to engage with plaintiffs' standing even to bring this suit. To recover, plaintiffs would need to show that each class member was "*concretely harmed* by

[the] statutory violation[s]." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021). But plaintiffs haven't attempted to identify any harm caused by the omission of the allegedly required information—much less explained how they could show such harm on a class-wide basis.

This Court should firmly reject the kind of lackadaisical approach toward class standing and class certification undertaken by the lower courts. Class certification is a pivotal moment in a case, and it should be treated as such. Predominance cannot be assessed without understanding the elements plaintiffs will need to prove at trial. And standing cannot be ignored, given both the *in terrorem* effect that large, improperly defined classes can have on defendants and the important separation-of-powers principles that the standing doctrine serves.

This Court should reaffirm its repudiation of the "certify now and worry later" approach to class actions, vacate the certification order, and remand for the trial court to conduct the rigorous analysis required by Rule 42.

ARGUMENT

I. The trial court erred by certifying the class without first determining what plaintiffs must prove to prevail.

It should go without saying, but it's impossible to determine that common issues will predominate at trial without first identifying those issues. *See* Tex. R. Civ. P. 42(a), (b)(3); *see also Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011) ("Considering whether 'questions of law or fact common to class members predominate' begins, *of course*, with the elements of the underlying cause of action.") (emphasis added). Yet that is just what the trial court did here, with the court of appeals' approval. *See* CR1631–32 (deferring until trial a number of statutory-construction issues that go to the heart of plaintiffs' claims).

This Court repeatedly has made clear that a trial court "must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." *Union Pac. Res. Grp., Inc. v. Hankins*, 111 S.W.3d 69, 72 (Tex. 2003) (quoting *Bernal*, 22 S.W.3d at 435); *see also Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 672 (Tex. 2004) ("courts can hardly evaluate the claims, defenses, or applicable law without knowing what that law is"). And understanding the applicable law

often requires construing the statutes at issue. *See Cleven v. Mid-Am. Apartment Cmtys., Inc.*, 20 F.4th 171, 176 (5th Cir. 2021) ("the proper construction [of the governing statute] is a necessary antecedent to the predominance issue").[2]

So it comes as no surprise that this Court repeatedly has vacated certification orders, like the one here, that defer judgment on what law will govern at trial. *Compaq*, 135 S.W.3d at 672–73; *State Farm Mut. Auto. Ins. Co. v. Lopez*, 156 S.W.3d 550, 556–57 (Tex. 2004); *cf. Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740–45 (5th Cir. 1996) (reversing certification order deferring resolution of whether and how reliance must be proved and impact of variations in state law).

The trial court here nevertheless charged ahead and certified the class while deferring resolution of a number of critical "[s]tatutory construction" issues—including what plaintiffs must prove to prevail at trial—by adopting a bifurcated trial plan. CR1631–32. The trial plan embraces rather than eschews the possibility that the defendant's statutory interpretation is correct, which would confront the court with

[2] "Because Rule 42 is patterned after Federal Rule of Civil Procedure 23, federal decisions and authorities interpreting current federal class action requirements are instructive." *Riemer v. State*, 392 S.W.3d 635, 639 (Tex. 2013).

the "difficult choice of decertifying the class after phase 1 and wasting judicial resources, or continuing with a class action that would have failed the predominance requirement." *Castano*, 84 F.3d at 739–40, 745.

The court of appeals blessed this tactic by conflating the legal merits of the defendant's statutory-interpretation arguments with the factual merits of plaintiffs' statutory claims. Op. 9–10. But there's an obvious distinction between the two: The former goes to what plaintiffs must show to prevail, while the latter asks whether plaintiffs made that showing.

Evaluating statutory-interpretation arguments at the class-certification stage isn't just appropriate—it's essential. *Exxon Mobil Corp. v. Gill*, 299 S.W.3d 124, 126 (Tex. 2009) ("the substantive law . . . must be taken into consideration in determining whether the purported class can meet the certification prerequisites") (alteration in original); *Cleven*, 20 F.4th at 176 (interpreting statute is "necessary" to "determining whether the . . . prerequisites for class certification are satisfied"). A trial court must consider *all* issues relevant to class certification after all—even if they overlap with the underlying merits of the plaintiffs' claims. *Bernal*, 22 S.W.3d at 435 ("Courts must perform a 'rigorous analysis' before ruling on class certification to determine

whether *all* prerequisites to certification have been met.") (emphasis added); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351–52 & n.6 (2011) ("Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped."); *see also Comcast Corp. v. Behrend*, 569 U.S. 27, 33–36 (2013) (same).

It's no answer to say that a class can always be decertified. Class certification isn't supposed to be a conditional step, and defining a class isn't intended to be an iterative process. *See Bernal*, 22 S.W.3d at 434–35 (rejecting the view that the "predominance requirement is not really a preliminary requirement at all because a class can always later be decertified").

Certainly, a class may be narrowed as litigation proceeds, but that shouldn't be the result of superficial analysis at the class-certification stage. A class trial that ends up right back at the certification stage eviscerates the judicial economy class actions are designed to promote. Defendants bear the brunt of this inefficiency, as they're subject to extreme costs, massive liability exposure, and immense, *in terrorem* settlement pressures.

II. Certification is improper for the independent reason that class members can't establish standing by common proof.

Perhaps owing to their failure to undertake any real analysis of plaintiffs' claims, the courts below also overlooked a crucial jurisdictional issue: standing.[3]

Even if the Court agreed with plaintiffs' interpretation of the relevant statutes, certification still would be improper. "Every class member must have . . . standing in order to recover individual damages." *TransUnion*, 141 S. Ct. at 2208. Here, that requires proving that section 92.056(b) was violated—otherwise, plaintiffs are left to complain that they didn't receive information about remedies to which they weren't entitled in all events. Because establishing a section 92.056(b) violation requires "highly individualized" proof, Op. 9, class certification is precluded.

"Texas's standing test parallels the federal test for Article III standing," *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018), and the U.S. Supreme Court has recently reiterated that a bare statutory violation—even when accompanied by statutory damages—isn't enough to confer standing. *TransUnion*, 141 S. Ct. at 2204–07

[3] Because standing is jurisdictional, the trial court, like this Court, was "duty-bound" to evaluate standing, "even when not urged by the parties." *Garcia v. City of Willis*, 593 S.W.3d 201, 206 (Tex. 2019).

(legislatures "may enact legal prohibitions and obligations" but "an injury in law is not an injury in fact"); *see also Spokeo, Inc. v. Robins*, 578 U.S. 330, 339–42 (2016).

To establish standing, a plaintiff must establish that she's "been *concretely harmed* by a defendant's statutory violation." *TransUnion*, 141 S. Ct. at 2205. That's no less true in the class-action context. *Id.* at 2208 (courts can't "order relief to any uninjured plaintiff, class action or not"); *cf. Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 450 (Tex. 2007) (class actions do not "exist 'in some sort of alternate universe outside [Texas's] normal jurisprudence'").

Here, the only class-wide injury identified by plaintiffs is a so-called informational injury—their leases allegedly didn't include information about the remedies available if their landlord is liable under section 92.056(b). *See* Tex. Prop. Code § 92.056(g). But as *TransUnion* makes clear, an "informational injury that causes no adverse effects" cannot confer standing. 141 S. Ct. at 2214. Instead, plaintiffs must identify some "downstream consequences" caused by "failing to receive the required information." *Id.*

Plaintiffs' argument (at 21–22) that the "informational injury" alleged here is sufficient to confer standing—even absent any adverse effects of downstream consequence—is meritless. As *TransUnion* explains, both *FEC v. Akins*, 524 U.S. 11 (1998), and *Public Citizen v. DOJ*, 491 U.S. 440 (1989), did in fact involve "downstream consequences." 141 S. Ct. at 2214. Indeed, that's precisely the ground on which *TransUnion* (and the circuit cases it cites approvingly) distinguished *Akins* and *Public Citizen*. *Id.*; *see*, *e.g.*, *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1004 (11th Cir. 2020) ("the plaintiffs in *Public Citizen* and *Akins* identified consequential harms from the failure to disclose the contested information").

So even if plaintiffs were correct that a bare statutory violation were sufficient to establish liability under section 92.056(g), they'd still need to establish that not receiving information about the remedies available for a section 92.056(b) violation caused each class member some adverse effect or downstream consequence. *See TransUnion*, 141 S. Ct. at 2214.[4]

[4] *See also Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 338 (7th Cir. 2019) (no standing where plaintiff "did not allege that she would have used the information at all"); *Trichell*, 964 F.3d at 1004 (no standing because allegedly misleading information "had no impact" on plaintiffs); *Huff v. TeleCheck Servs., Inc.*, 923 F.3d 458, 467 (6th Cir. 2019) (no standing because defendant's "incomplete report had no effect on [plaintiff] or his future conduct").

As a practical matter, the only class members who could likely make that showing are those who, at a minimum, could establish a violation of section 92.056(b). It's highly unlikely that other class members could demonstrate that they were harmed by not learning about remedies to which they were not even entitled. The takeaway is that regardless of which party prevails on the statutory-interpretation questions that were deferred until trial, plaintiffs will need to establish that section 92.056(b) was violated—both to prove the elements of the claim if defendant is correct, and to prove standing in any event.

The likely need to show a section 92.056(b) violation to establish standing defeats predominance and precludes certification because "proof of such violation would necessarily entail individual proof by every tenant of facts such as the tenant's notification to their landlord of a condition requiring repair, the tenant's being current on rent, and the landlord's failure to make diligent efforts to repair the condition." Op. 9; *see Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1277 (11th Cir. 2019) ("the district court must consider . . . before certification whether the individualized issue of standing will predominate over the common issues in the case"); *cf. Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th

Cir. 2003) (predominance not satisfied "where fact of damage cannot be established for every class member through proof common to the class").[5]

Rigorous enforcement of standing is critical to maintaining a robust separation of powers. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881–85 (1983); *see also Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) ("One limit on courts' jurisdiction under both the state and federal constitution is the separation of powers doctrine."). And in Texas, the "separation-of-powers doctrine [has] a special vigor" in light of "its explicit treatment in our constitution." *City of Dallas v. Stewart*, 361 S.W.3d 562, 573 (Tex. 2012) (quoting Harold H. Bruff, *Separation of Powers under the Texas Constitution*, 68 Tex. L. Rev. 1337, 1348 (1990)); *see also Van Dorn Preston v. M1 Support Servs., L.P.*, 642 S.W.3d 452, 458 (Tex. 2022) ("the Texas Constitution expressly enshrines the separation of powers as a fundamental principle of limited government") (citing Tex. Const. art. II, § 1).

[5] So too for plaintiffs' "anti-waiver" claim. The "anti-waiver" provision doesn't apply unless there's a duty to repair under section 92.052(a). *See Phila. Indem. Ins. Co. v. White*, 490 S.W.3d 468, 491 (Tex. 2016); *see also* Tex. Prop. Code §§ 92.0563(b), 92.006(c). And section 92.052(a) requires the same "highly individualized" proof as section 92.056(b).

Texas courts don't "possess a roving commission to publicly opine on every legal question." *TransUnion*, 141 S. Ct. at 2203; *Morath v. Lewis*, 601 S.W.3d 785, 789 (Tex. 2020) ("a judiciary with unbridled power to decide any question it deems important . . . is not the role assigned to the courts by our constitution"). Nor do they "exercise general legal oversight of the Legislative and Executive Branches, or of private entities." *TransUnion*, 141 S. Ct. at 2203; *In re Abbott*, 601 S.W.3d 802, 809 (Tex. 2020) ("Our standing jurisprudence ensures that the executive and judicial branches resolve matters of public importance through the adversary system of justice in particular cases involving parties who are genuinely, personally affected.").

Instead, the judiciary's "proper function in a limited and separated government" is to "decide only 'the rights of individuals.'" *TransUnion*, 141 S. Ct. at 2203 (quoting *Marbury v. Madison*, 1 Cranch 137, 170 (1803), and John G. Roberts Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1224 (1993)). That principle is also expressly enshrined in the Texas Constitution's open-courts provision, "which contemplates access to the courts only for those litigants suffering an injury." *Tex. Ass'n of Bus.*, 852 S.W.2d at 444 (citing Tex. Const. art. I,

§ 13); *see also Data Foundry, Inc. v. City of Austin*, 620 S.W.3d 692, 700 (Tex. 2021) (same).

The standing doctrine keeps courts in their constitutionally prescribed lane and prevents improper encroachment into the Executive's realm. *Van Dorn Preston*, 642 S.W.3d at 458 ("Texas state courts decline to exercise jurisdiction over questions committed to the executive and legislative branches"). By requiring a concrete, redressable injury, standing prevents courts from issuing advisory opinions—which are "the function of the executive rather than the judicial department." *Tex. Ass'n of Bus.*, 852 S.W.2d at 444 ("An opinion issued in a case brought by a party without standing is advisory because rather than remedying an actual or imminent harm, the judgment addresses only a hypothetical injury."); *see* Tex. Const. art. IV, § 22.

It also keeps the Legislature in its lane. Although the Legislature is free to create statutory requirements that are enforceable by the Executive, it cannot "freely authorize *unharmed* plaintiffs to sue defendants who violate" its statutes. *TransUnion*, 141 S. Ct. at 2207; *Firemen's Ins. Co. of Newark, N.J. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1968) ("the Legislature could not . . . empower[] the district courts to

render advisory opinions"); *see also Garcia*, 593 S.W.3d at 206 (separation of powers prohibits "legislative enlargement of a court's power"). That would improperly delegate executive power to the public at large. *TransUnion*, 141 S. Ct. at 2207. "Private plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law"—that task "falls within the discretion of the Executive Branch." *Id.*; *see* Tex. Const. art. IV, § 10.

Given the paramount importance of the separation of powers, this Court should insist that all plaintiffs—whether individual, named, or absent—establish the irreducible constitutional minimum of standing.

III. Deferring an assessment of the elements of a claim or standing until after certification harms Texas businesses.

By deferring resolution of essential statutory-construction issues—and by failing to assess whether plaintiffs can establish standing on a class-wide basis—the trial court unnecessarily placed the defendant here in a predicament all too common for class-action defendants. It must decide whether to risk massive liability at trial or capitulate to what Judge Friendly called "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973).

This predicament is all the more unjustifiable because it so easily could have been avoided. The stakes the defendant now faces—i.e., the claims of more than 80,000 former tenants collectively seeking tens of millions of dollars in statutory damages—are artificially buoyed by a sea of claims that couldn't stand on their own.

By aggregating the claims of tens of thousands (or millions) of plaintiffs, class certification dramatically inflates potential liability a class-action defendant faces—regardless of the merits of the claims (or the lack thereof). This is particularly true where the class seeks statutory damages—simple arithmetic can quickly transform these actions into "bet-the-company" cases. *See* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 103–07 (2009); *see also Parker v. Time Warner Ent. Co.*, 331 F.3d 13, 22 (2d Cir. 2003) ("the aggregation in a class action of large numbers of statutory damages claims potentially distorts the purpose of both statutory damages and class actions").

Consider this case. Statutory damages are limited to one month's rent plus $500, *see* Tex. Prop. Code § 92.0563(a)(3)—a manageable exposure for most businesses. But certifying a class of 80,000 plaintiffs

immediately changes the stakes from a few thousand dollars to more than ***$100 million***.

It's no surprise that this exponentially increased exposure creates an overwhelming pressure on defendants to settle. Even if the merits of a class claim are weak to non-existent, "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

Indeed, the prospect of protracted litigation and the risk of massive, class-wide judgments from a jury are often enough to persuade defendants to abandon even meritorious defenses and give in to "*in terrorem*" settlement pressures. *Id.* at 350; *see Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.").[6]

[6] *See also* U.S. Chamber Institute for Legal Reform, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* 1, 5 (Dec. 2013), https://t.ly/h-6I ("Approximately 14 percent of all class action cases remained pending four years after they were filed, without resolution or even a determination of whether the case could go forward on a class-wide basis.").

Actual settlement rates bear this pressure out. *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (2010) ("virtually all cases certified as class actions and not dismissed before trial end in settlement"). In 2021, for example, companies reported settling 73.1 percent of class actions—a figure that's up significantly from around 60 percent in 2019 and 2020. *See* Carlton Fields, *2022 Class Action Survey* 26 (2022), https://t.ly/D4IJr.

The class-action system, including *in terrorem* settlements, imposes enormous costs on businesses, employees, and consumers. Class-action defendants reported spending about $3.37 billion to defend against class actions in 2021 alone. *Id.* at 7. The burden of that expense falls disproportionately on small businesses. *See* U.S. Chamber Institute for Legal Reform, *Tort Liability Costs for Small Business* 2, 12–13 (Oct. 2020), https://t.ly/K7BR (small businesses earn only 19 percent of total business revenues but bear more than half of the costs of business tort liability). And these costs are inevitably passed along to consumers and employees through higher prices and lower wages. *Willett v. Baxter Int'l, Inc.*, 929 F.2d 1094, 1100 n.20 (5th Cir. 1991).

Improperly certified class actions only exacerbate these costs. Indeed, Judge Easterbrook has explained that "allowing even modest compensation for uninjured class members could easily double a defendant's total liability for a product that rarely malfunctions or injures anyone, a result that 'overcompensates buyers and leads to excess precautions by manufacturers.'" U.S. Chamber Institute for Legal Reform, *Unfair, Inefficient, Unpredictable: Class Action Flaws and the Road to Reform* 40 (Aug. 2022) (quoting *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 n.1 (7th Cir. 2002)), https://t.ly/zZbk. A similar effect could be seen in the rental market.

Meanwhile, the settlement pressure that accompanies class certification underscores the dangers of the "certify now and worry later" approach adopted by the trial court. In all likelihood, there will be no "later" because the certification decision is "the whole ballgame" to defendants. *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 n.2 (3d Cir. 2012). Indeed, the settlement pressure is only magnified when a class is "defined so broadly as to include many members who could not bring a valid claim even under the best of circumstances." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012). Such

large classes increase both the litigation costs and the potential exposure to a defendant, creating an artificial settlement pressure that could have easily been avoided.

That's what happened here. The class was certified based on a reading of the statute that neither of the lower courts was prepared definitively to embrace at the class-certification stage. Worse, plaintiffs have not established that the class members have suffered any cognizable injury. Indeed, they haven't even alleged that absent class members have a claim under section 92.056(b), even though the crux of their claim relates to information about remedies for such violations. *See Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 691 (Tex. 2002) ("actual, not presumed, conformance" with Rule 42 is required for certification).

Absent this Court's intervention, the defendant now faces quite the dilemma. Does it allow potentially sympathetic named class members to present their case to a jury? Or does it attempt to settle the case, and potentially be forced to pay large sums both to class counsel and renters from up to eight years ago who "would first learn that they were 'injured' when they received a check compensating them for their supposed 'injury'"? *TransUnion*, 141 S. Ct. at 2212.

This plight is not unique. When trial courts postpone decisions that go to the heart of standing or the class-certification requirements, businesses (and ultimately consumers) end up paying the price, either in litigation costs and liability risks or in settlement dollars. As this Court has observed, "class actions are extraordinary proceedings with extraordinary potential for abuse." *Gen. Motors Corp. v. Bloyed*, 916 S.W.2d 949, 953 (Tex. 1996). This Court can curb that potential by reversing certification here and emphasizing the need for a rigorous analysis of both predominance and standing at the class-certification stage.

PRAYER

For the foregoing reasons, the Court should reverse the court of appeals' judgment, vacate the class-certification order, and remand the case to the trial court for further proceedings.

Dated: September 19, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(2), I certify that this brief contains 4,326 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

/s/ *Allyson N. Ho*
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CERTIFICATE OF SERVICE

I certify that, on September 19, 2022, a true and correct copy of this Brief for *Amici Curiae* was served via electronic service on all counsel of record.

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