No. 22-131

IN THE

Supreme Court of the United States

STARKIST CO.;
DONGWON INDUSTRIES CO., LTD.,

Petitioners,

v.

OLEAN WHOLESALE GROCERY,
COOPERATIVE, INC., et al.,

Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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September 8, 2022

QUESTIONS PRESENTED

1. Whether, and when, the presence of uninjured class members precludes the certification of a class under Federal Rule of Civil Procedure 23(b)(3).

2. Whether, and when, a plaintiff may rely on representative evidence such as averaging assumptions to establish class-wide proof of injury to satisfy Rule 23's requirements.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE**

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. For decades WLF has appeared as an *amicus curiae*, in important class actions, to combat attempts to abuse Rule 23 and the class mechanism. *See, e.g.*, *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

At the root of much class litigation is the plaintiffs' bar's resistance to a basic truth: some claims simply aren't amenable to class treatment. A class action is "an exception to the usual rule that litigation is conducted by and on behalf of individual named parties only." *Dukes*, 564 U.S. at 348 (cleaned up). Rule 23 thus "imposes stringent requirements for certification that in practice exclude most claims." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013). That is no tragedy. On the contrary, it is a virtue of our legal system. The "stringent requirements" for class certification are a salutary product of society's commitment to due process and the rule of law.

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* No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, paid for this brief's preparation or submission. After timely notice, all counsel of record consented in writing to WLF's filing this brief.

There is an "inherent tension" between "representative suits" and "our deep-rooted historic tradition that everyone should have his own day in court." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999). When that tension runs too high, it is the *privilege* of bringing a class action that must give way, and the *right* to a fair legal process that must stand firm. A plaintiff may combine only those claims truly "capable of class-wide resolution"—claims that can be resolved "in one stroke." *Dukes*, 564 U.S. at 350. Contrary to the Ninth Circuit's en banc holding, this case is not one where such a resolution can be achieved.

SUMMARY OF ARGUMENT

There are many well-known examples of the "wisdom of the crowd" effect. Ask people at the fair to guess the weight of a cow, for instance, and the average of their guesses will often be astonishingly close to the cow's true weight. The technique works by negating underlying idiosyncrasies. Many people will overestimate the cow's weight. Many will undershoot it. Averaging the various wrong answers tends to produce a single number near the right answer.

As with the weight of cows, so with injuries in litigation? Of course not. If Bill takes $100 from Frank and nothing from Jack, no reasonable person will say that Frank and Jack each have lost $50. If, citing the $100 taken from Frank, Jack sues Bill for $50, he'll be laughed out of court. And nothing changes if a lawyer tries to get the $50 for Jack by stamping "CLASS ACTION" at the top of the complaint. In a lawsuit—certainly one in federal court—*each* plaintiff must have suffered a concrete injury.

Under Article III, a plaintiff without an injury has no suit, and slipping her into a class cannot *create* a suit for her.

Even when class-wide standing is not in question, class actions don't proceed by the wisdom of the crowd. Like Tolstoy's quip about unhappy families, every injured antitrust plaintiff is injured in its own way. A crowd of antitrust plaintiffs clamoring to average their injuries calls to mind the statistician's joke about a man with his head in an oven and his feet in a freezer who insists that, overall, he's quite comfortable. So while averaging estimates of a cow's weight at a fair may remove unwanted noise, averaging the antitrust harms suffered by class members obscures crucial factual distinctions and unfairly alters defendants' substantive rights.

The named plaintiffs here seek to press antitrust claims on behalf of three classes of purchasers of packaged tuna. To do so, they must establish that each class meets Rule 23(b)(3)'s "predominance" requirement. Affirming the district court, an en banc majority of the Ninth Circuit allowed the plaintiffs to manufacture the required predominance by simply assuming away the very distinctions that make it impossible to meld the various purchasers into three uniform classes.

The plaintiffs' three experts each took it as given that all direct purchasers of the petitioners' packaged tuna paid the same average anticompetitive overcharges. Two of those experts then accepted without question that this assumed harm trickled down the supply chain and was borne by two classes of indirect purchasers. Overlooked at all points was

that direct purchasers took negotiated prices. Because the direct purchasers differed greatly in size, in buying power, and in negotiating skill, to assume that each of them paid the same overcharge was untenable. Unsurprisingly, the plaintiffs could not, even in their own modeling, show that all direct purchasers did so. Yet the trial court certified all three classes, and the en banc majority affirmed.

The Ninth Circuit's approval of plaintiffs' use of an averaging technique raises an array of concerns that demand this Court's review. *First*, to have standing to sue under Article III, a plaintiff must have suffered an injury in fact. Averaging a class's injuries may improperly hide the fact that many class members have no injury. *Second*, Rule 23(b)(3) demands a showing that "the questions of law or fact common to class members predominate over any questions affecting only individual members." To retreat to an averaging method that obscures individual class members' lack of injury is, in effect, to admit *a lack of* predominance. *Third*, the Due Process Clause protects basic procedural rights, including the right to put on a defense and the right to be held liable only for harms one has caused. Averaging violates due process by depriving the defendant of the chance to raise individual defenses showing that the defendant has not harmed some plaintiffs. *Finally*, the Rules Enabling Act ensures that the Federal Rules of Civil Procedure do not "enlarge or modify any substantive right." Yet the trial court's class-certification order relieves class members of the need to show that they *each* suffered an injury under the antitrust laws.

Class certification here stands on a baseless fallacy. This Court should grant review and vindicate both the Constitution and the rule of law.

ARGUMENT

THIS COURT SHOULD CLARIFY THAT AVERAGING CLASS-WIDE INJURIES IS INCOMPATIBLE WITH THE CONSTITUTION AND THE RULE OF LAW.

"*If Tom [Hanks] wins tonight, that means that between Tom and myself, we will have three Best-Actor Awards.*"

—Steve Martin, host of the 2001 Academy Awards, who to this day has zero Best-Actor Awards

A. Review Is Needed To Clarify Article III's Case-or-Controversy Requirement.

Article III "extend[s]" the federal "judicial Power" only to "Cases" and "Controversies." Const. art. III, § 2, cl. 1. The case-or-controversy clause limits the federal courts to resolving lawsuits in which the plaintiff has suffered an "injury in fact" that is "fairly traceable to the challenged action of the defendant." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Grounded in the Constitution, the case-or-controversy requirement is, of course, not subject to congressional or judicial repeal or amendment. "The requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute" or rule. *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). And Federal Rule of Civil Procedure 82 confirms that Rule 23 "do[es] not extend . . . the jurisdiction of the district courts." Fed. R. Civ. P. 82.

"Rule 23's requirements must," in short, "be interpreted in keeping with Article III constraints." *Amchem Prods.*, 521 U.S. at 612–13. "A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality). "And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Id.*

Just like a named plaintiff, an absent class member who lacks an injury in fact cannot proceed with (or get carried along in) a lawsuit in federal court. Yet *averaging* injuries allows uninjured class members to do just that—to partake in a federal suit by appropriating injuries they did not suffer. This "borrowing" of others' injuries as a source of standing is no less ridiculous than Steve Martin's "borrowing" of another's Oscars as a brag—except in the latter case, the jesting "borrower" understands the absurdity.

Contrary to the Ninth Circuit's view, *Tyson Foods, Inc. v. Bouaphako*, 577 U.S. 442 (2016), supports the petitioners. Although it affirmed the certification of a class of workers owed overtime wages for time spent donning and doffing gear, it confirmed that class certification cannot stand on "representative evidence that is statistically inadequate or based on implausible assumptions." *Id.* at 459. If "no reasonable juror" could believe, based on the representative evidence, that each class member was injured, class certification is improper. *Id.* That is this case. The trial court certified the classes, and the

Ninth Circuit's en banc majority affirmed, based on implausible assumptions about the reliability and accuracy of an average applied at a granular level. But certification was based on evidence that no reasonable juror could believe established *each* purchaser's injury.

In a concurring opinion in *Tyson Foods*, Chief Justice Roberts, joined by Justice Alito, made explicit *Tyson Foods*'s consistency with Article III. "Article III," the Chief Justice wrote, "does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Id.* at 466. If on remand the trial court could find "no way to ensure that the jury's damages award [went] only to injured class members," Article III would require that the award "not stand." *Id.*

In *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021), the full Court embraced Chief Justice Roberts's view and clarified that "[e]very class member must have Article III standing in order to recover individual damages." *TransUnion* left for another day, however, "whether every class member must demonstrate standing before a court certifies a class." *Id.* at 2208 n.4. For classes that include more than a *de minimis* number of uninjured class members, the petition offers the Court an ideal vehicle for resolving that debate.

B. Review Is Needed To Vindicate Rule 23(b)(3)'s Predominance Requirement.

If a class would be entitled to "individualized" money awards, the plaintiff seeking class certification must satisfy Rule 23(b)(3)'s "predominance" re-

quirement. *Dukes*, 564 U.S. at 362. To meet that requirement, the plaintiff must show not only that the class "suffered the same injury," *id.* at 349–50—a separate prerequisite imposed by Rule 23(a)(2)—but also that "the questions of law or fact common to class members predominate over any questions affecting only individual members," Fed. R. Civ. P. 23(b)(3).

Predominance is usually missing when there are "material variations" in "the kinds or degrees of reliance" that putative class members placed on a defendant's alleged misconduct. Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment. That is exactly the problem here. Direct purchasers conducted discrete purchasing negotiations with the petitioners. Pet. App. 94a. The prices the petitioners charged thus varied according to each direct purchaser's buying power and negotiating skill. *Id.*; *see* Defs.' C.A. Br. 6 (collecting record cites). So there is no way to show that the class members "suffer[ed] the same injury," *Dukes*, 564 U.S. at 350, let alone a way to show that "the questions of law or fact common to class members *predominate* over any questions affecting only individual members," Fed. R. Civ. P. 23(b)(3) (emphasis added).

Nor is this a case in which a defendant "might attempt to pick off the occasional class member." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276 (2014). A substantial issue exists as to how *each* direct purchaser fared in its negotiations with the petitioners. At trial, the petitioners would seek to show, transaction by transaction, that *many* direct purchasers negotiated a competitive price (or lower)

for themselves, and thus neither suffered an injury nor passed one through to others.

This case thus strongly resembles *Dukes*, in which a group of Title VII plaintiffs sought to certify a class of employees subjected to Wal-Mart's policy of delegating pay and promotion decisions to site managers. This Court held that no class could be certified, because individualized issues would exist as to whether, how, and why any given manager wielded his delegated discretion in a discriminatory manner. 564 U.S. at 355–56. The Court further said that the plaintiffs could not overcome this problem with anecdotal evidence, because such a "trial by formula" could not support an inference that "*all* the individual, discretionary personnel decisions [we]re discriminatory." *Id.* at 358 (emphasis added); *see also id*. at 367. Here, likewise, individualized issues exist as to each direct purchaser's ability to negotiate a competitive price. And like a "trial by formula" based on representative evidence, a "trial by formula" based on an averaging method would create only the illusion of predominance, by concealing individual differences behind a single statistical figure.

Dukes confirms, in short, that class certification under Rule 23 may not stand on a device that masks some class members' lack of injury. *Id.* at 367. And along with many other authorities, it shows that an averaging method is just such a masking device. *See id.*; *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013) ("for purposes of Rule 23(b)(3)," a model must "establish that damages are susceptible of measurement across the entire class"); *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53–54 (1st Cir. 2018) ("The need to identify those [uninjured] individuals

will predominate and render [a class] adjudication unmanageable[.]"); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252–53 (D.C. Cir. 2013) ("common evidence" must show that "all class members were in fact injured"); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008) ("We reject plaintiffs' propos[al] . . . [to base class certification on an] estimate of the average loss for each plaintiff[.]"), *abrogated on other grounds*, *Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639 (2008); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) ("Courts considering class certification must rigorously apply the requirements of Rule 23 to avoid the real risk, realized here, of a composite case being much stronger than any plaintiff's individual action would be."). The Ninth Circuit's en banc holding stands athwart every one of those authorities.

Were still more evidence needed that Rule 23 does not bless the use of averaging methods in this way, it could be found in the various ways that those methods distort the class-action process. First, by welcoming uninjured parties into the lawsuit, averaging creates conflicts of interest within the class. After all, any award to the class members that suffered no injury will likely come at the expense of the class members who suffered a greater-than-average injury.

What's more, averaging falsely inflates the size of the class, along with administrative costs and lawyers' fees, thereby increasing the plaintiffs' leverage over the defendant. This problem is especially pronounced when, as here, the measure of total damages is tied to the number of individual class

members. *In re Asacol*, 907 F.3d at 55 ("[P]roving that the defendant is not liable to a particular individual because the individual suffered no injury reduces the amount of the possible total damage."). And courts have long noted "the risk of 'in terrorem' settlements that class actions entail." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). Averaging makes that problem even worse than it otherwise would be.

Finally, averaging is often, at bottom, no more than an attempt to pull the wool over people's eyes. It is generally for the judge to evaluate the opaque mathematics involved. Yet if a plaintiff's lawyer can gin up complexity, get the busy trial judge to (incorrectly) abandon recondite issues to the vagaries of trial, and arrive before a jury, he has largely managed to transform the case from a dispute over law, data, and competing analyses into a dispute over optics, emotions, and competing narratives. From there the case turns less on the merits than on the defendant's willingness to gamble.

"Actual, not presumed, conformance" with Rule 23 is "indispensable." *Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 160 (1982). Yet averaging methods that sneak uninjured entities into a class cannot even be "presumed" to conform with Rule 23. Not even close. Unless this Court intervenes, Rule 23's stringent requirements will remain a dead letter in the Ninth Circuit.

C. The Court Should Prevent The Ninth Circuit's Erosion Of Defendants' Due Process Rights.

"Well-established common-law protection[s] against arbitrary deprivations of property" are "presumpti[vely]" part of "the Due Process Clause." *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1994). Using an averaging process to bring uninjured persons into a class deprives a defendant of at least two such well-established protections.

First, the right to defend oneself. "The fundamental requisite of due process of law is the opportunity to be heard." *Mullane v. C. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). "A hearing, in its very essence, demands that he who is entitled to it shall have the right to support [himself] by argument." *Londoner v. Denver*, 210 U.S. 373, 386 (1908). In the context of civil litigation, this means that a defendant must be allowed "to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972).

When averaging is used to "mask the prevalence" of class members' "individual issues," the defendant is deprived of the ability "to challenge the allegations of individual plaintiffs." *McLaughlin*, 522 F.3d at 232. That is "an impermissible affront" to the defendant's "due process rights." *Id.*; *see also Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013). Yet that is precisely what the district court allowed, and the Ninth Circuit's en banc majority blessed, here.

Second, there is the right to be held accountable for only a harm one has caused. "For centuries, it

has been a well-established principle of the common law, that in all cases of loss, we are to attribute it to the proximate case, and not to any remote cause." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014) (quoting *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213, 223 (1837)). It is hard to imagine a liberty more "deeply rooted in this Nation's history and tradition," *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997), than a blameless defendant's right to exoneration. For about as long as there have been trials, the point of most trials has been to determine whether the defendant caused the harm alleged. Discarding that principle, divorcing cause from effect, transforms the law into a vehicle for arbitrary results.

Averaging injuries enables a plaintiff to smuggle into a class people who suffered no injury at all, much less an injury *caused* by the defendant. That is what happened here: the direct-purchaser plaintiffs were allowed to include, in their class, entities that negotiated prices equal to or below the plaintiffs' predicted competitive prices. Those entities suffered no injury caused by the petitioners. The indirect-purchaser plaintiffs were then allowed to build two more classes on this same warped foundation.

It is no answer that the injured might be sorted out from the uninjured at the lawsuit's tail end. Promises that any such process will fix the problem are illusory. Precisely because a certified class is assumed to be uniform, discovery directed at absent class members is rare. *See* 3 William Rubenstein, *Newberg on Class Actions* § 9:16 (5th ed. 2013). The Ninth Circuit's view thus revives the specter of the

same win-against one, lose-against-all unfairness that was once a hallmark of one-way intervention. But Rule 23 was amended "specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments." *In re Citizens Bank, N.A.*, 15 F.4th 607, 617 (3d Cir. 2021) (quoting *Am. Pipe & Constr. Co. v. Utah.*, 414 U.S. 538, 547 (1974)).

And in any event, most certified class actions promptly end. "Empirical studies . . . confirm what most class action lawyers know to be true: almost all class actions settle." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1292 (2002). A trial court must therefore "determin[e] . . . at *the class certification stage*" whether "class members can be identified without extensive and individualized fact-finding or 'mini-trials.'" *Carrera*, 727 F.3d at 307–08.

D. The Decision Below Flouts The Rules Enabling Act.

The Rules Enabling Act declares that the Federal Rules of Civil Procedure "shall not . . . enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Congress has required, in other words, that the Rules "really regulate procedure—the judicial process for enforcing rights and duties recognized by substantive law." *Shady Grove*, 559 U.S. at 407 (plurality). They may not alter "the rules of decision by which the court will adjudicate those rights" and duties. *Id.*

This Court has found it increasingly necessary to remind the lower courts that when they apply Rule 23, they must comply with the Act. *See Amchem Prods.*, 521 U.S. at 612–13, 628–29; *Ortiz*, 527 U.S. at 845; *Dukes*, 564 U.S. at 367; *Italian Colors*, 570 U.S. at 234. The Act ensures that "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). The Act thus *mandates* that a class "not be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *Dukes*, 564 U.S. at 367.

A plaintiff proceeding under the state or federal antitrust laws must establish that it suffered damage as a result of the petitioners' alleged anticompetitive conduct. Yet averaging the class's harm relieves many plaintiffs of the need to do precisely that. Using Rule 23 as a vehicle to slip uninjured plaintiffs into an antitrust lawsuit violates the Rules Enabling Act. Such violations are sure to continue until this Court intervenes.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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