No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARTHA ADAMS and all other OBJECTORS,
Petitioners,

v.

ANGELO RESIGNO, SR., as EXECUTOR OF THE ESTATE OF CHERYL B. CANFIELD, and EQUINOR USA ONSHORE PROPERTIES, INC. (f/k/a STATOIL USA ONSHORE PROPERTIES, INC.),
Respondents.

On Petition for Writ of Certiorari
To The U.S. Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition arises out of a class settlement of a claim that the defendant breached a variety of leases by the method it used to pay royalties for natural gas production. The court of appeals affirmed the district court's settlement class certification and settlement approval based on two critical legal determinations. First, the court of appeals made a policy determination, without considering the text of Federal Rule of Civil Procedure 23 as amended in 2018, that settlements of class actions should be strongly favored, with class settlements presumed fair. Two other circuits, the Second and the Ninth, have reached the opposite conclusion after examining the Rule's text. Second, the court of appeals declined to follow this Court's decision in *TransUnion v. Ramirez*, 594 U.S. 413 (2021). Instead, it held that entry of a judgment for a settlement class requires only that the named plaintiff has alleged an individual injury, without any need to determine whether the settlement class excludes the uninjured.

The questions presented are:

1. Does Federal Rule of Civil Procedure 23 as amended in 2018 permit courts to apply a policy favoring settlement in place of a rigorous evidentiary analysis before certifying a settlement class and approving a class settlement?

2. Does Article III of the Constitution permit a court to certify a settlement class and enter judgment where the settlement class definition does not exclude anyone without a concrete injury?

PARTIES TO THE PROCEEDING

Petitioners in this Court (Objectors-Appellants below) are Martha and Melvin, decd., Adams; Alles LP; Linda Ayers; George Baker; Baker Family Royalty MGMT LP; Kimberly Barna; Kyle Bethel; Annie Bonczek; Elizabeth J. Booth; Michael Brilla; Brinton Holdings LLC; Scott Brown; Michelle Brown; Janet Brown; Phillip Brown; Brown Hill Farms; Brucewood Acres; Wynelle Bunnell; Richard Bunnell; Brian E. Burke, II; Pam Burke; Brian Burke; Tammy Canfield; Jerry Cavalier; Mary Clark; Rick Clark; John Clark; Michael Clark; Kimberly Clark; Chris Cole; Jamie Cole; Tama K. Corby; Malcom L. Corby; Cindy Decker; Estate of Elaine Doty (Aaron Doty Adm'r); William F. Earnest; Kathleen Ferguson; Gary Ferguson; Jane Fitch; Adam Fitch; Lillian Gioia; Jackie Greenley; John Greenley; David Griffiths; Mary Beth Harshbarger; Jim "Rick" Harvey; Roberta Harvey; Martin Harvey; Robin Harvey; Hatoky LLC; Virginia Hawk; John Horger; Integrity Land and Minerals LP; Green Newland LLC; Nancy J. Jayne; Nancy Keeler; William Keeler; Barbara Keeney; Dennis Keeney; Jamie Klesh (Cruver FLP); Paul A. Koval, Sr.; William Francis Krall; John Krieg; Abby Kukuchka; Ronald Kukuchka; Robin Lacey; John Lacey; Amanda Landsiedel; Justin Landsiedel; Raymond Lasher; Michelle Lee; Anna M. Life; Zachary Lockburner; Yuri Lockburner; Steven Love; Lyman Walters, FLP; Nicholas Manns; Carol Marbaker; Alan Marbaker; David Maynard; Stacey McClain; Tracie McGavin; Paul McGavin; Marty McGavin; Joseph McLeer; Estate of Marie Mcmicken; Wendy Meehan; Michael R. Miller; Donald Miller; James A. Milliron; Gloria Milliron; Ralph R. Milliron,

Jr.; Mill Iron Farm, FLP; Robert Mishkula; Kenneth Monsey; Montague Partners LP; Dennis Montross; Moody Lands Trust; Cynthia Morrison; David E. Morrison; Judy Murach; Ron Murach; David Novak; Michael Omara; Lloyd Overfield; Scott Overfield; Betty Pedro; Hillary Peopperling; Megan M. Phillips; Jonathan C. Phillips; Lea Ann Phinney; Randy Phinney; Pickering Sisters, LP; Chris Pieszala; Plenary Appalachia, LP; Mitzi V. Poepperling; Paul W. Poepperling, Jr.; Allessio Prizzi; Darlene Reynaud; Sarah Stark Rhinard; S&C Henning LP; David Salsman; Steve Salsman; Lillian Sarnosky; Linda Sheldon; Benjamin Sheldon; Lori Sincavage; Estate of Michael T. Smith; Richelle Stapleton; Gregory Stapleton; Stark Fam LP; Abbie E. Stevens; Estate of Robert Stewart; Robert Stewart; Table Rock Hotel; Catherine Teetsel; James Teetsel; Teetsel Family Trust; Kathleen Tirpak; Kenneth Tirpak; Lisa Townsend; Peter Townsend; Norma Trowbridge; Patricia Trowbridge; Terry Tyler; Cheryl VanDeMark; Donald VanDeMark; Todd C. VanDeMark; Burton Vaow; Ronald Vendetti; Joyce Adams Volutza; Charlene Walters; Ellen Whipple; Whipple Family LP; Boyce J. White Family; Karen Alai Wilson; Joanne R. Yanchick; Andrew T. Yanchick; Mike Yannes; Karen Yasharian; and Glen Yasharian.

Respondents in this Court are Angelo Resigno, Sr. as Executor for the Estate of Cheryl B. Canfield (Plaintiff-Appellee below) and Equinor USA Onshore Properties, Inc. (f/k/a Statoil USA Onshore Properties, Inc.) (Defendant-Appellee below).

Corporate Disclosure Statement

There are no parent companies or publicly held companies owning 10% or more of stock of any Petitioner. Sup. Ct. R. 29.6.

LIST OF PROCEEDINGS[1]

Martha Adams, et al., v. Angelo Rescigno, Sr., v. Statoil USA Onshore Properties, Inc., Case Nos. 20-2431 and 23-1291, U.S. Court of Appeals for the Third Circuit. Judgment entered Sept. 20, 2024.

Angelo R. Rescigno, Sr., as Executor of the Estate of Cheryl B. Canfield v. Statoil USA Onshore Properties, Inc., Case No. 3:16-cv-0085-MEM U.S. District Court for the Middle District of Pennsylvania. Judgment entered Jan. 18, 2023.

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[1] While this Petition only addresses issues relating to the Third Circuit's 2024 decision, an additional appeal was docketed at *Marbaker v. Statoil United States Onshore Props.,* No. 18-3067, U.S. Court of Appeals for the Third Circuit. Judgment entered Feb.13, 2020.

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS – CONTINUED

Page(s)

APPENDIX TABLE OF CONTENTS

FEDERAL OPINIONS AND ORDERS

TABLE OF CONTENTS – CONTINUED

Page(s)

TABLE OF CONTENTS – CONTINUED

TABLE OF CONTENTS – CONTINUED

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Page(s)

Page(s)

State Cases

Federal Statutes

Rules

Page(s)

Constitutional Provisions

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Martha Adams and all other objectors to the class settlement approval, by and through undersigned counsel, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals is unpublished. App.1a-15a. The order denying rehearing and rehearing en banc is unpublished. App.205a-206a. The opinions of the federal district court are unpublished. App.16a-25a, 29a-72a, 74a-81a, 83a-99a, 102a-116a, 132a-204a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on September 20, 2024. Petitioners timely filed a motion for rehearing en banc. The court of appeals denied the motion on October 16, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the U.S. Constitution and Federal Rule of Civil Procedure 23 are reproduced in the Appendix. App.207a-229a.

STATEMENT OF THE CASE

Petitioners are settlement class members who objected to a class settlement about defendant's method of calculating royalties under various gas leases. The case was brought in the United States District Court for the Middle District of Pennsylvania based on jurisdiction under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d).

The district court found as a matter of law that defendant's royalty method complies with named plaintiff's lease, so it dismissed the breach of contract claim. Named plaintiff and defendant could have reached a private bargain about named plaintiff's dismissed individual claim. Instead, they asked the district court to enter a judgment on a class settlement. The settlement releases past and future claims of a broadly defined settlement class made up of anyone in Northeast Pennsylvania who "entered into" a lease with defendant, even if the lease is not the same as named plaintiff's lease.

The United States Court of Appeals for the Third Circuit (the "court of appeals") affirmed settlement class certification and settlement approval because of a policy preference for settling class actions. Federal Rule of Civil Procedure 23 as amended in 2018, though, does not give the settlement proponents the benefit of the doubt or presume that they struck a fair bargain. Instead, the Rule requires settling parties to prove that settlement class certification and settlement approval stand up to a court's rigorous evidentiary analysis of Rule 23's criteria.

In *Amchem v. Windsor*, 521 U.S. 591, 620 (1997), this Court made clear that courts are not free to substitute policy judgments for Rule 23 as written. The court of appeals did not apply Rule 23's text. When the Second and Ninth Circuits analyzed the amended Rule's text, each concluded that the Rule forbids presuming that a settlement is fair. The court of appeals' decision below creates a conflict with Rule 23, this Court's controlling authority, and other circuits.

Moreover, the court of appeals' policy oversteps the constitutional limits on federal court jurisdiction. Jurisdiction does not expand to accommodate a class settlement. The court of appeals rejected *TransUnion v. Ramirez*, 594 U.S. 413 (2021), as controlling. Instead, looking only at whether the named plaintiff had alleged an individual injury, it allowed entry of judgment for an overbroad settlement class without requiring evidence that the class excludes members without an injury.

A. Background

Landowners lease the right to produce and market natural gas from their land in return for royalties. Leases can specify a royalty percentage and point of valuation, e.g., "at the well" where the gas comes up from the ground, or downstream of the well where gas is sold to end users. Leases can also specify a method to calculate the royalty.

Defendant Equinor USA Onshore Properties, Inc. (f/k/a Statoil USA Onshore Properties, Inc.) ("Equinor") internally sets an index-based price for the transfer of gas between production and marketing affiliates at the well for gas produced from Pennsylvania's Marcellus Shale formation. Equinor

has paid royalties using that indexed affiliate transfer price rather than prices the marketing affiliate obtained from sales to unaffiliated third parties downstream of the wellhead (the "index price method").

Named plaintiff is executor of the original plaintiff's estate.[1] The decedent signed a lease different from most class members' leases in at least two respects. It provides that royalties are to be valued "at the well." Joint Appendix to 3rd Cir. Appeal ("J.A.")[2] 147, ECF No. 38; J.A. 1013-15, ECF 39. It also does not have an arbitration clause. *Id.* Before named plaintiff's counsel and Equinor started talking settlement, the district court dismissed the claim that the index price method breached the original plaintiff's express lease terms because her particular lease values royalties "at the well." App.132a-204a. The district court left intact a separate claim whether Equinor was fulfilling an implied duty to market gas at the wellhead. *Id.*

B. The Settlement Class

The Settlement Agreement releases the index price method claims of a settlement class defined as:

> Royalty Owners in Northern Pennsylvania who have entered into oil

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[1] Named plaintiff Angelo Rescigno, Sr., was substituted in when the original named plaintiff Cheryl B. Canfield died after the settling parties reached their agreement. The substitution was made in connection with class counsel's motion seeking preliminary approval of the settlement.

[2] Citations for documents not included in the appendix are to the parties' Joint Appendix for the court of appeals' proceeding below. They are cited by joint appendix page number and docket (ECF) number of the joint appendix volume.

> and gas leases, regardless of the type of lease, that provide that the Royalty owner is to be paid Royalties and to whom Statoil has (or had) an obligation to pay Royalties on production attributable to [Equinor's] working interest. App.248a.

The settlement class does not have start or end dates. Class membership depends upon whether someone "entered into" any type of lease, regardless of lease language or whether someone actually received royalties from Equinor using the index price.

According to class counsel's geologists, settlement class members have 30 different lease forms that differ based on:

> …determination of the point of sale, determination of the price of…gas sold; whether deductions may be made, or not, from the gross amount for post-production expenses…, and terms regarding sales to an affiliate company.

App.232a-233a.

The lease forms are not in the record. There is only a chart class counsel filed under seal as an exhibit to the geologists' report. The chart labels "five groups with reasonably similar terms." App.232a. One group is labeled "Miscellaneous." App.236a; J.A. 1013-15, ECF 39.

Petitioners' leases are not in the same group as named plaintiff's lease. Settling counsel put the groups together. The geologists "render[ed] no

opinion regarding the grouping of these lease forms." App. 232a-233a.[3]

One of the lease groups is "L29." Named plaintiff does not have an L29 lease. Unlike named plaintiff's "at the well" lease, L29 leases require royalties from "Gross Proceeds" received from Equinor's affiliate's gas sales to third parties downstream of the wellhead. The L29 broadly defines "Gross Proceeds." App.127a; App. 252a.

There is a material difference between the L29 lease and named plaintiff's "at the well" lease. An arbitrator found that (i) Equinor's index price method breaches the L29; (ii) Equinor admitted the breach; and (iii) Equinor is forbidden from deducting post-production costs (costs incurred moving gas downstream from the wellhead to the point of sale) unless it can prove it did something out of the ordinary. App.128a-130a. The arbitrator's decision was confirmed in state court. App.121a-131a. Another arbitrator found that this lease construction has preclusive effect. J.A. 764,774, ECF 38.

Named plaintiff's counsel believed that named plaintiff could not represent people with L29 leases so after they negotiated the settlement, they brought in the Stines as representatives of L29s. J.A. 258-261, ECF 38. The Stines did not file a complaint. They showed up in a stipulation attached to the Settlement Agreement. *Id.* The settling parties agreed that the Stines are adequate class representatives with typical

[3] Named plaintiff's lease has an addendum that figured into the district court's decision dismissing the breach of contract claim. App.176a. The record does not show how many leases in any group have addenda, or how any addenda differ, or which addenda have royalty terms.

claims so long as there is a settlement. *Id.* Named plaintiff's court of appeals' brief did not identify the Stines as joining in, or parties to, the brief.

Before the district court dismissed named plaintiff's breach of contract claim, Equinor discussed settlement with other lessors who had filed a class arbitration demand (represented by petitioners' counsel). J.A. 410, ECF 38. Twelve days before the district court dismissed named plaintiff's index price method claim, Equinor made an offer to petitioners' counsel to settle the L29 lease claims for more than class counsel has allocated to them. App.38a-41a, 77a; J.A. 984, ECF 39.

Two courts looking at two other leases different from both named plaintiff's lease and the L29 denied motions to dismiss breach of contract claims about Equinor's index price method. See *Chambers v. Chesapeake Appalachia, LLC*, 359 F. Supp. 268, 280-281 (M.D. Pa. 2019); *Lasher v. EOP*, No. 009-30 (Pa. Ct. Common Pleas Susquehanna Cnty., Nov. 8, 2019). In the *Chambers* case, the district court denied cross motions for summary judgment, finding a triable issue. *See Chambers v. Chesapeake Appalachia, LLC,* 2024 WL 4109340 (M.D. Pa. Sept. 6, 2024). There is no way to know without speculating which of the five groups include leases like the ones from these two cases.

C. The Settlement Terms

The settlement extinguishes both past and future claims. It cements in place for 93 percent of the class (those without L29s) Equinor's index price method — the very method the complaint challenged as improper — for five years after the settlement's Effective Date. App.258a, App. 260a.

For L29s, the settlement changes the royalty term. Equinor can pay royalites in perpetuity using a "Resale Price," which is different from the L29 definition of "Gross Proceeds." App.259a-260a. The "Resale Price" is a narrower "net weighted average sales price" that allows Equinor automatically to deduct routine transportation costs. App.255a-256a.

There is nothing in the record valuing what the class is giving up to Equinor from the post-Effective Date terms. J.A. 827-835, ECF 38. The settlement was negotiated based on data through August 2016. App.235a. Class counsel represented in a declaration that he did not know how actual downstream end user prices could deviate from Equinor's chosen wellhead index prices in the post-Effective Date period. J.A. 266-271, ECF 38.

The total cost to Equinor for the release of past and future claims is $7 million. From that amount, class counsel allocated $1.2 million (before reduction for fees and expenses), to L29 leaseholders, which is substantially less than Equinor offered 12 days before the district court dismissed named plaintiff's index price method claim under his different lease. The remainder of the settlement fund is allocated to all other class members whom class counsel grouped together with named plaintiff, regardless of lease form. Class counsel made the allocation. App.244a.

While the settlement releases claims beyond the settlement Effective Date, class members will be eligible to receive payments only if they received royalties on production through July 2017. App. 279a. If one class member had $100 in royalties before July 2017, and another class member had $50 before July 2017 and $50 thereafter, the first class member is

eligible to receive twice as much as the second. And a third class member who had $100 of royalties but whose well did not produce until after July 2017 gets nothing. Class members are bound by the same release of past and future claims regardless of whether they receive a payment. Distributions to class members remain subject to Equinor's claims for deductions for post-production costs, which were not released.[4] App.257a, 260a.

D. The District Court Proceedings

In connection with settlement class certification and settlement approval, the district court:

- struck from the record objections to class counsel's motion for preliminary approval. App.100a-101a. The stricken objections included a declaration from an economist highlighting the settlement's shortcomings. J.A. 412-418, ECF 38.
- denied a motion to intervene filed by three lessors who are parties to leases different from named plaintiff's lease and who had been in settlement discussions with Equinor following their class arbitration demand. Their leases include two versions of the L29. The district court said the motion was untimely and that intervention was not proper because the three have arbitration clauses. App.88a-96a. The proposed complaint in intervention included a claim for declaratory relief

[4] There is nothing in the record to determine how many class members will receive payments and how many will not.

preventing Equinor from contesting the construction given to the L29 lease in arbitration. The proposed complaint also alleged that Equinor waived arbitration by bringing the claims into federal court.[5] J.A. 542-594, ECF 38.

- denied objecting class members access to any discovery, ruling two days before the final approval hearing that long pending requests including for documents the settling parties had exchanged and relied on for the settlement, the leases included in the class, and the Stines' lease were "farcical" and "nonsensical." App. 74a-81a.
- struck a notice of supplemental authority noting that this Court had granted certiorari in *TransUnion v. Ramirez*, 594 U.S. 413 (2021), which might impact settlement class certification. J.A. 142, ECF 38.

1. "Preliminary" Approval

The same day it struck objections and denied intervention, the district court "preliminarily" certified the class and "preliminarily" approved the settlement. The district court wrote that "the process for certification of a settlement class is not specified in the rule." App.110a. *But see* Fed. R. Civ. P. 23(e).

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[5] Previously, the district court denied a motion by the intervenors to consolidate their case with named plaintiff's case and held that class arbitration was not available under intervenors' leases. The Third Circuit affirmed in an unpublished opinion that concluded that intervention is the proper procedure. *See Marbaker v. Statoil US Onshore Props.,* 801 F. App'x 56, 60–61 (3d Cir. 2020).

Based on that mistake, the district court did not require class counsel to prove that the class likely could be certified, and the settlement likely could be approved. *See* Fed. R. Civ. P. 23(e). Instead, the district court applied case law predating the Rule's amendments. App. 110a-111a.

The district court relied exclusively on representations from class counsel that (i) negotiations had been arm's length, (ii) there was sufficient discovery, and (iii) the settlement proponents had experience in similar cases. App.114a. According to the district court, preliminary approval created a presumption of fairness. App.110a-111a.

2. Final Approval

Class counsel moved for final settlement approval without moving to certify the class. Instead, class counsel treated the preliminary certification as final. As for the settlement's post-Effective Date terms, class counsel said in a declaration that (i) there is a five year post-Effective Date release of index price claims because Equinor demanded a longer period; and (ii) the value of the potential future damages from deviations between end user and index prices is unknown. J.A. 738, ECF 38. There is nothing that explains why the settlement changes the language in L29 leases from "Gross Proceeds" to the narrower settlement-defined "Resale Price."

Undeterred by the gaps in the record, the district court held oral argument on final approval in April 2021. About 21 months later, the district court certified the settlement class and approved the settlement. App.73a. The district court again did not address the standard for approval in amended Rule

23. The district court did not consider either of the two expert declarations Petitioners submitted — one from Prof. Stephen Saltzberg, who had co-chaired the Third Circuit Task Force on Selection of Class Counsel, J.A. 779-808, ECF 38, and one from economist Dr. John Tysseling. J.A. 827-852, ECF 38.[6]

The district court acknowledged that the specific language of individual leases may vary but concluded — without reviewing the leases or considering that it had dismissed named plaintiff's claim — that all class members have the same claim. The district court found the Stines to be adequate class representative even though they were brought in as part of class counsel's deal with Equinor to settle the case for L29s. Although the district court had earlier said that arbitration clauses prevented intervention, App.94a, the district court certified a class predominantly of lessors with arbitration clauses. The Stines' arbitration clause did not prevent the district court from treating them as class representatives.

The district court recognized that class counsel allocated less to L29 leaseholders than Equinor had previously offered. The district court found that class counsel's attempt to attribute the difference to the district court's dismissal of named plaintiff's claim

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[6] Professor Saltzberg opined that "counsel for the plaintiff class have not met the standard of care for adequate representation." J.A. 780, ECF 38. Dr. Tysseling opined that (i) named plaintiff's geology experts had checked Equinor's math without making an independent determination of potential damages from a plaintiff's perspective and (ii) the settlement terms were not economically justifiable particularly considering the lack of an analysis of the value to Equinor of the going forward releases. J.A. 832-835, ECF 38.

under his different lease "appears plausible." App.41a.

The district court's opinion did not consider the value to Equinor of the post-Effective Date bans on claims or whether the settlement fund provides fair value for the release of future claims. Nor did the district court address the odd distribution formula that only provides payments to class members for royalties for production before July 2017. Instead, the district court focused on arbitration as an impediment to individual claims, concluding it could devalue claims because of the costs associated with arbitration. App.43a-44a, 52a-54a.

The district court reaffirmed its class certification when it denied a motion for reconsideration based on *TransUnion*. The district court reinterpreted its class definition to mean that it only applies to "current" lessors, even though that word is nowhere to be found in the class definition. App.21a.

E. The Court of Appeals Decision

The court of appeals affirmed the district court (without oral argument) in a perfunctory 14-page opinion.[7] The court of appeals did not address the text of amended Rule 23. Without otherwise identifying a legal standard, the court of appeals held that there is a policy that favors settlement, which is especially strong in a class action where settlements can be presumed fair. App.12a-13a.

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[7] The court of appeals disregarded Fed. R. App. P. 3(c)(4) when it held that it did not have jurisdiction to determine whether the district court had wrongly denied intervention.

The court held that Article III allows a judgment for the entire settlement class. The court held that the standing inquiry is limited to named plaintiff, with no need to consider whether all settlement class members have an injury. It is sufficient, the court of appeals held, that named plaintiff (presumably meaning the original plaintiff) *alleged* an injury in the complaint. App.8a-9a. The court of appeals rejected *TransUnion v. Ramirez*, 594 U.S. 413 (2021), as controlling even though another Third Circuit panel concluded that "at the remedial stage each class member must establish standing to recover individual damages." *See Huber v. Simon's Agency*, 84 F.4th 132, 154-155 (3d Cir. 2023).

The court of appeals accepted the district court's reimagining of the class definition as limited to "current" lessors. It also determined that the district court did not have to look at the leases — the chart of groups was good enough. App.10a-11a. It did not address the plan of distribution's limitation of payments to class members based on royalties for production until July 2017 or the uncompensated release of future claims without any evidence of the claims' value.

REASONS FOR GRANTING THE PETITION

Class actions serve an important purpose by affording claimants additional power through the aggregation of their claims. In light of the representative nature of class litigation, Rule 23's class certification and settlement approval criteria, *see* Fed. R. Civ. P. 23, ensure that class counsel and a defendant do not use the settlement class device to strike a deal that benefits them to class members'

detriment. *See* Erichson, Howard M., *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 Notre Dame L. Rev. 859, 868 (2016). Courts have an important fiduciary role to ensure that a settlement is not an avenue for a defendant to "buy res judicata on the cheap." *Id.* at 864.

As one law firm that represents class action defendants explained:

> When the defense has decided to settle, a corporation will normally want the most expansive class definition and the broadest release, even though it has vociferously opposed any class certification earlier in the case. When the terms of the settlement are hammered out, the plaintiff's lawyers and defense counsel share a common goal of obtaining approval and will then join forces to this end and against any objectors who oppose the accord.

Duane Morris LLP, Duane Morris Class Action Review 2024 at page 35, available at www.duanemorris classactionreview.com.

A court's rigorous analysis of whether evidence stacks up to Rule 23's criteria stops class members' interests from taking a backseat to the settling parties' joint interest in seeing their deal approved. Class counsel and the defendant each have something to gain when a settlement is approved. When it comes to settling a case, class counsel's self-interested economic incentives do not always fully align with class members' interests. That is especially true in a case like this where class members' mineral interests

in their land can be economically significant on an on-going basis.

The court of appeals here leaned into a policy that strongly prefers class settlements. Rule 23's text does not make that policy judgment or presume that a settlement is fair. This Court in both *Amchem* and *Ortiz v. Fibreboard* rejected the notion that a perceived policy need for a settlement overtakes Rule 23's specifications. *See Amchem*, 521 U.S. at 625-628; *Ortiz v. Fibreboard*, 527 U.S. 815, 861-862 (1999). Approaching settlement approval from a policy judgment that strongly favors approving the settlement class counsel and a defendant negotiated disadvantages class members in exactly the way this Court warned against in *Amchem*. 521 U.S. at 623.

This Court has not addressed the 2018 Amendments to Rule 23. The 2018 amendments "mainly address issues related to settlement…" 2018 Advisory Committee Note to Rule 23. App.217a. Instead of giving settlement class certification and settlement approval favored treatment, the amendments reinforce the need for courts, as skeptical fiduciaries to absent class members, to analyze evidence rigorously.

Class actions hardly ever go to trial, so the Rule's settlement approval requirements are significant for courts, litigants, and absent class members. By granting this Petition, this Court can ensure that lower courts are consistent in applying amended Rule 23 according to its text. Class settlements improve when there is a judge as fiduciary looking over the settlement proponents' shoulders.

By granting this Petition, this Court can also ensure that courts considering class settlements stay within Article III's jurisdictional limits. The court of appeals here seemed to believe that the limits are different when the remedial stage of a class action involves a settlement instead of a trial. It rejected *TransUnion v. Ramirez* as having no bearing. Given that the class remedial stage will more frequently involve a judgment entered by settlement agreement than by trial, there is a significant institutional interest in clarifying the Article III limits on settlement class membership.

It does not matter that the court of appeals here chose to label its decision as unpublished. That does not create a loophole in Rule 23, any more than it creates a loophole in the constitutional limits of federal court jurisdiction. By reviewing this case, this Court can make it clear that there are no loopholes.

A. This Court Should Clarify that Rule 23 as Amended Does Not Allow a Policy that Favors Settlement to Dilute the Need for a Rigorous, Evidence-Based Analysis for Settlement Class Certification and Class Settlement Approval

This Court should grant this Petition to make clear that the 2018 amendments to Rule 23 are consistent with the chain of authority that insists on a meticulous review of a detailed record before a court can approve a class settlement, especially when a court is asked simultaneously to certify a settlement class. The court of appeals' opinion brushing aside defects to pursue a policy goal in favor of settlement broke with that chain of authority. The court of

appeals' policy position created a conflict with other circuits that have addressed Rule 23's 2018 amendments.

The amended Rule specifies how a court must proceed to evaluate settlement class certification and settlement approval. *See* Fed. R. Civ. P. 23(e) ("The following procedures apply to a proposed settlement…); *see also* Advisory Committee Note to Rule 23(e) (amendments "make explicit…procedural requirements apply in instances in which the court has not certified a class…)." The court of appeals validated the district court's mistake that "the process for certification of a settlement class is not specified in the rule." App. 110a.

Significantly, the amendments front load the process. Rule 23 requires as a first step a request to send notice to the class. App.213a. That step is not a light touch moment for the court. Rather, before notice can go to the class, the district court *must* roll up its sleeves to determine both whether the class *likely* can be certified and the settlement *likely* can be approved. The burden falls on the settlement proponents to provide the district court, at the time that they seek permission to send notice, with *all* available evidence they expect to rely on when seeking final certification and approval. *See* Fed. R. Civ. P. 23(e)(1); 2018 Advisory Committee Note to Rule 23(e)(1) (decision to send notice "is an important event" and "should be based on a solid record" proving settlement "likely" can be approved). App.213a, 220a.

The Rule's "will likely be able to" standard for permission to send notice differs materially from pre-2018 cases that held "preliminary approval" required nothing more than a sense that a settlement was in a

range of reasonableness.[8] The new standard places a specific evidentiary burden on the moving party. *See Drazen v. Pinto*, 106 F.4th 1302, 1329 (11th Cir. 2024) (Tjolfat, J.).[9]

When, after striking objections as not permitted,[10] the district court concluded that "preliminary approval" created a "presumption of fairness" for final approval, that presumption rippled through the approval process. *See id.* at 1329. The ripple amplified when the court of appeals presumed fairness as part of a policy determination to favor settlement approval. App.13a.

This Court has made clear that courts must enforce Rule 23 as written and "lack authority to substitute for Rule 23's criteria…" *See Amchem*, 521 U.S. at 622. There is no textual support in Rule 23 for a court to put a thumb on the scale in favor of settlement. The Rule specifies factors that a district court must consider in determining, first, whether a settlement class that likely can be certified should receive notice of a settlement that likely can be approved; and, second, whether both the class and settlement can get final sign off. In contrast to the court of appeals' decision here, both the Second and

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[8] *See, e.g., Krant v. UnitedLex Corp.,* 2024 WL 3511300 (D. Kansas July 23, 2024) (applying preliminary approval standard predating 2018 amendments).

[9] In a per curiam order, the Eleventh Circuit stated that section III.C.iii of the *Drazen* opinion constitutes the opinion of the court.

[10] There is no textual basis for striking objections or for not weighing evidence (here, expert submissions) contradicting the settling parties at any stage in the process. *See* Fed. R. Civ. P 23(e)(5). App. 214a-215a. *See* 2018 Advisory Committee Note to Rule 23(e)(5). App.226a.

Ninth Circuits have held based on the text of Rule 23 that the 2018 amendments preclude a presumption of fairness. *See Moses v. New York Times Co.*, 79 F.4th 235, 243 (2d Cir. 2023) ("…Rule 23(e)(2) prohibits courts from applying a presumption of fairness…"); *Briseno v. Henderson*, 998 F.3d 1014, 1023 (9th Cir. 2021) ("Rule 23(e)(2) assumes that a class action settlement is invalid."); *see also Drazen*, 106 F.4th at 1330 (citing *Briseno*).

In *Moses*, the Second Circuit considered the impact of the 2018 amendments on previous cases that allowed for a presumption of fairness. Based on the amendments, the court concluded that the Rule requires a holistic assessment of the factors the Rule identifies without any one factor given primacy. As a result, fairness cannot be presumed based on whether negotiations were at arm's length because that is only one factor a court must consider. *See Moses*, 79 F.4th at 243 (citing and quoting *Roes,1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1049 n.12 (9th Cir. 2019)); *see also* 2018 Advisory Committee Note to Rule 23(e)(2) (amendments focus inquiry on "a shorter list of core concerns…that should always matter to the decision whether to approve the proposal."). App.223a-224a.

The court of appeals here created a conflict with the Second and Ninth Circuits — and with the Rule itself. The court of appeals did not stick to the Rule's text. It made a policy decision to favor settlement and presume fairness based on factors the Rule does not identify as core concerns. When the Ninth Circuit considered the amendments, that Circuit concluded that a presumption of invalidity flows from the text. *Briseno*, 998 F.3d at 1023.

This Court should confirm that the opinions from other circuits accurately reflect how courts must apply Rule 23 as now written. If the court of appeals' diametrically opposed approach here is allowed to persist, absent class members cannot be assured that their interests will be the prime concern at the class settlement approval stage. *See Drazen*, 106 F.4th at 1329 (fiduciary obligations and Rule 23(e) factors coincide).

1. Rule 23's Amendments Codify *Amchem*

Settlement class certification is a threshold issue. *Ortiz,* 527 U.S. at 832; *Amchem,* 521 U.S. at 612-613. While a settlement class relieves the district court of inquiring whether the case if tried would present manageability issues, "other specifications of the Rule — those designed to protect absentees by blocking unwarranted or overbroad class definitions — *demand undiluted, even heightened, attention in the settlement context*." *Amchem*, 521 U.S. at 620 (emphasis added).[11] By granting this Petition, this Court can clarify that the amendments to Rule 23 did not lower the bar to favor the settling parties' bargain over heightened attention to Rule 23's provisions protecting absent class members.

Rule 23's amended text does not adulterate the need this Court identified in *Amchem* for "heightened attention." An earlier proposed amendment adding a

[11] If the class has not yet been certified for trial, the court may consider whether certification for litigation would be granted were the settlement not approved in assessing settlement fairness. 2018 Advisory Committee Note to Rule 23(e)(2)(C) and (D). App.224a-226a.

Rule 23(b)(4) to allow certification of settlement classes that could not be certified for trial was never adopted. *See* Proposed Amendments to Federal Rules of Civil Procedure, 167 F.R.D. 523 (1996). The amendments as adopted reinforce the need for a rigorous analysis of a complete record by requiring as soon as there is a request to send notice of the settlement "a showing that the court likely will be able to…certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). App.213a.

To put the court of appeals' decision in context, class counsel told the court of appeals that "[w]ere this case to have been fully litigated, no class likely would have been certified…" Rescigno Br. at 2, ECF 48. That representation, from lawyers who moved for final settlement approval but not final settlement class certification, should have (i) raised a red flag for what it says about class counsel's economic incentives to settle, especially after the district court dismissed named plaintiff's index price claim; and (ii) rebutted any presumption of fairness that the court of appeals was inclined to apply. Instead, the court of appeals proceeded as if there were a Rule 23(b)(4) that gives a preference to settlement classes that cannot otherwise meet Rule 23's requirements.

Amended Rule 23(e)(1)(B) requires the same showing that *Amchem* requires. In *Amchem*, this Court:

- held that a common interest in a settlement and the award of damages was not sufficient to satisfy Rule 23(b)(3)'s predominance requirement, *id.* at 623;
- directed that the "inquiry trains on the legal or factual questions that qualify each class

member's case as a genuine controversy, questions that pre-exist any settlement[,]" *id.*; and

- rejected the district court's analysis that the class members' shared experience of asbestos exposure and their common interest in a prompt resolution of claims were sufficient, *id.* at 622.

The lower courts' opinions in this case show how a policy-driven approach favoring settlement goes outside the text of Rule 23(e) to lower the analytical bar.[12] The district court limited its predominance inquiry to the single question: was "[t]he defendant's conduct common to all class members regarding whether [Equinor] used an index pricing methodology to calculate royalties, thereby harming each class member by defendant's conduct." App.42a. That decision was affirmed in one conclusory statement that "the court was justified when it found that '[t]he variations in the lease language are immaterial in light of the fact that the question of [Equinor's] liability [for using the index price] is central to all class members and is subject to generalized proof.'" App.11a.

The record, though, lacked copies of the leases — or even abstracts of the variations in royalty language — necessary for the district court to make the required independent determination of whether all leases are sufficiently similar in their royalty

[12] "Although the standards for certification differ for settlement and litigation purposes, the court cannot make the decision regarding the prospect for certification without a suitable basis in the record." 2018 Advisory Committee Note to Rule 23(e)(1). App.220a-222a.

terms to be in a single class. All there was in the record was a chart submitted with the motion for settlement approval with five categories, including one for "miscellaneous" leases. The chart is accompanied by a disclaimer from class counsel's expert, along with an explanation about how the leases vary in terms. App.232a-233a. Rule 23(e) unadulterated by a settlement policy preference requires more than uncritical acceptance of a chart — which showed differences in lease groups — without an independent review of the underlying leases. Similarly, without a policy preference, there is no basis to conclude that named plaintiff, as the executor of the estate of a decedent with a dismissed breach of contract claim, is a typical or adequate representative of a class that includes 29 other lease forms. It takes a leap of faith far too big for Rule 23 to conclude based on a chart that five separate lease groups share cohesive interests to be joined into a single settlement class with named plaintiff in the lead.

Without lowering the bar to favor settlement, there is not even a basis to conclude that named plaintiff shares a common issue with other class members. Commonality depends on "the capacity of a classwide proceeding to generate common answers…" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-350 (2011) (quoting Nagareda, Richard A., *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). Questions about named plaintiff's lease do not provide answers about other class members' leases. The district court found that the index price method gave named plaintiff the benefit of the lease's express bargain. On the other end of the spectrum, an arbitrator found, and Equinor

admitted, that the index price method breaches L29 leases. App.128a.

The court of appeals' reasoning that it was good enough that named plaintiff had a leftover "implied duty to market claim" for him to represent class members with express breach of contract claims is not consistent with Rule 23 as written. Rule 23 requires that an order certifying a class "must define…the class claims, issues, or defenses…" Fed. R. Civ. P. 23(c)(1)(b). App.210a. There is no such order here. App.73a, 117a-120a. And class counsel was not seeking certification of a class to settle implied duty to market claims. J.A. 728-729, ECF 38 ("The Settlement provides for an all cash payment of $7 million to settle all claims relating to Statoil/Equinor's use of an Index Price Methodology on which to base its calculation of Royalties…").

The problem is not just theoretical. After the district court dismissed named plaintiff's express breach of contract claim, class counsel never could have moved to certify a class to litigate that claim. Class counsel explained the distinction between the express index price method breach claim and the tenuous implied duty to market claim:

> [T]he Court found that Statoil/Equinor complied with the lease terms by using an Index Price Methodology. Putting aside Lead Plaintiff's request for an accounting, after the Court's opinion the only remaining claim was for breach of implied duty to market, through which Lead Plaintiff alleged a "sham transaction" theory.

J.A. 727, ECF 38. It is not evident, absent application of a policy preference for settlement, how someone with an uncertain leftover implied duty to market claim has interests and proofs aligned with others with explicit claims about the index price method under different lease language. *See* App.128a.[13]

Class counsel's last second addition of the Stines supposedly to represent L29 leaseholders underscores the problem. The panel's affirmance of the Stines as representatives conflicts with *Ortiz*, 527 U.S. at 816 n.31 (lending a name after a settlement in principle has been negotiated is not adequate). Adequacy is not assessed retrospectively based on the settlement terms; rather, adequacy of representation requires structural protections in real time. *See id.* at 856-858. The parties' stipulation as part of the settlement that the Stines are adequate as long as there is a settlement is not enough to satisfy the showing Rule 23(e) requires. J.A. 258-264, ECF 38.

The court of appeals' policy-driven conclusion that the class definition is not overbroad also cannot be reconciled with Rule 23 or *Amchem*. Rule 23 requires an order defining the class and a judgment that, among other things, specifies "whom the court finds to be class members." Fed. R. Civ P. 23(c)(1)(b); Fed. R. Civ. P. 23(c)(3). App.210a, 211a-212a. Neither of those exist here. App.27a, 73a. The only place a class definition can be found is in the district court's preliminary approval order.

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[13] The court of appeals, in conflating the two distinct claims, does not explain how a royalty methodology that complies with the express terms of named plaintiff's lease could somehow give rise to a claim that it breaches an implied term.

The Rule's text is consistent with *Amchem*, which directs courts to give class definitions heightened scrutiny. Instead of requiring strict compliance with the Rule, the court of appeals validated the district court's claim that the class only includes "current" lessors. But that is wrong. The class is defined in the preliminary approval order as including anyone who ever entered into a lease "and to whom Statoil has *(or had)*" a royalty obligation. App.118a. The plain meaning of "or had" belies the assertion that the class is limited to "current" lessors. As defined, someone who had a lease that obligated Equinor to pay royalties but whose well was not producing and then transferred the lease before the well first produced is in the class, as is the person to whom the lease was transferred. Even if the class had been limited to "current" lessors, there is nothing that identifies what "current" means — it could be anything from current as of the date of the settlement agreement (or earlier) to current as of today.

Moreover, the court of appeals contradicted itself. In a dismissive footnote, the court of appeals side stepped the lack of a class period by stating that the class must start when Equinor began the index price method. App.11a. That only muddies things further — how can the class be limited to "current" lessors but also include people who had leases in 2010?

In short, the court of appeals' decision affirming settlement class certification shows how an approach that gives a preference to implementing the parties' bargain does not protect absent class members from overreaching settlements. This Court should grant certiorari to make clear that the

amendments to Rule 23 do not obviate the need for a rigorous analysis of a full evidentiary record before a court can certify a settlement class.

2. Rule 23 Does Not Allow Presumed Fairness to Replace Proof of Fairness Based on Specific Factors

Before the 2018 amendments, individual circuits developed their own, differing criteria for evaluating class settlements. Rule 23's 2018 amendments were not intended to displace earlier lists; however, the amendments sharpen the inquiry by requiring all courts to focus on factors the Rule specifies. *See Drazen*, 106 F.4th at 1328-1331 (district courts "must" consider Rule 23(e) factors). The changes are material. *See, e.g. Moses*, 79 F.4th at 244 (finding the Rule 23 amendments change past practice by requiring consideration of attorney fee request as part of settlement fairness assessment). The court of appeals created a circuit conflict when it presumed fairness rather than home in on the Rule 23(e) factors. This Court should grant this Petition to provide needed guidance with respect to Rule 23(e)'s settlement approval requirements.

The court of appeals' disregard of the settlement terms that release future claims without compensation shows how a presumption of fairness cannot coexist with amended Rule 23(e). First, Rule 23(e) requires proof that the class relief is adequate, considering both the "costs, risks, and delay" of litigation and "the effectiveness of any proposed method of distributing relief to the class." Fed. R. Civ. P. 23(e)(2)(C)(i) and (ii). App.213a-214a. Second, the Rule requires proof that the settlement treats class

members equitably. Fed. R. Civ. P. 23(e)(2)(D); accord 2018 Advisory Committee Note to Rule 23(e)(2)(C) and (D). App.214a, 224a-225a.

The settlement releases future claims in two ways. It bans 93 percent of class members from challenging use of the index price method for five years from the Effective Date. It also permanently alters Equinor's royalty obligation to L29 leaseholders by changing the lease defined term "Gross Proceeds" to the narrower settlement-defined net "Resale Price" term. In a footnote, the court of appeals euphemistically described these terms as "provid[ing] clarity" for future royalty obligations. App.4a.

But Rule 23(e) undiluted by a presumption of fairness requires evidence of the benefit to Equinor and the detriment to the class from changing the L29 royalty language and from banning all other lessors from challenging the index price method for five years. The court of appeals did not demand an answer to the simple and obvious question of why the settlement uses a different, narrower definition for Equinor's royalty obligation than do the L29 leases' express terms. *Compare* App.255a, 259a-260a (Settlement Agreement L29 term) *with* App.126a-131a (arbitration decision construing Equinor royalty obligation under L29 lease).

The post-Effective Date settlement terms implicate another Rule 23(e) requirement, which makes adequacy of representation a consideration in approving a settlement. See Fed. R. Civ. P. 23(e)(2)(A). App.213a. Presuming fairness caused the court of appeals to overlook that the post-Effective Date terms do not matter to named plaintiff because

he is not the executor of an estate with an L29 lease and the index price method does not breach the decedent's "at the well" lease. *See Ortiz*, 527 U.S. at 855-856 (citing *Amchem* and addressing need for structural protections relating to releases of past and future claims).

The plan of distribution, which pays class members based on royalties only through July 2017, App.279a, when the settlement releases claims long after, aggravates the problem created when the court of appeals presumed fairness instead of rigorously analyzing the Rule 23(e)(2)(C) factors. The plan of distribution conditions settlement payments on whether there were royalties for production before July 2017. A class member whose well did not produce until August 2017 or later receives nothing for releasing claims before or after the Effective Date. There is no finding that July 2017 is anything other than a random date.

Class counsel's allocation of settlement proceeds to L29s — less than Equinor was willing to pay to L29s just 12 days before the district court dismissed named plaintiff's claim under his different lease — makes matters even worse. There is nothing tying the allocation class counsel made, without procedural safeguards, to any data. J.A. 738-739, ECF 38; J.A. 844, ECF 38; *see Ortiz,* 527 U.S. at857-858. The court of appeals substituted a policy-driven presumption of fairness for a Rule-required, risk-adjusted analysis comparing L29 leaseholders' potential recovery to named plaintiff's potential recovery of $0.00 for his dismissed index price method claim.

The fact that most class members have arbitration clauses does not, as the court of appeals seemed to believe, truncate the factors that a court must consider in assessing fairness. The cost of future litigation is part of, and not the whole of, the inquiry. The court of appeals speculated about the costs to class members who had arbitration clauses without any proof in the record about the potential size of class members' economic interests in their royalties, especially where the settlement impacts class members' future royalty streams. *See* Erichson, 92 Notre Dame L. Rev.at 868 (settlement approval allows a defendant to continue a practice and argue that a court found it to be fair).

An inquiry that starts by presuming fairness and then ends when a court thinks individual claims will be expensive guarantees a short conversation about a class settlement. It all but guarantees approval of any class settlement no matter the terms. That is not how Rule 23(e) directs courts to evaluate settlements. This case provides the Court the opportunity to emphasize that courts must demand proof of each of the factors Rule 23(e) identifies in order to approve a class settlement based on a rigorous evidentiary analysis.

B. This Court Should Confirm that Article III Precludes Certification of Settlement Classes that Include Uninjured Class Members

Article III of the Constitution, App.207a-208a, provides its own check limiting the breadth of any settlement class. The limits on court power apply regardless of whether a court enters judgment because of a class settlement. With class settlements

much more likely than class trials, it is important for courts and litigants to know the jurisdictional limits on settlement classes. This Court should grant this Petition to confirm that there is no settlement exception that expands court power to enter a remedial judgment where the class definition does not exclude those without an injury.[14]

Class action or not, courts cannot order relief for anyone without a concrete injury. *TransUnion LLC v. Ramirez*, 594 U.S. at 431 (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466(2016) (Roberts, C.J., concurring)). *TransUnion* makes clear that the mere threat of a monetary injury is insufficient — standing arises when the injury arises. See *TransUnion*, 594 U.S. at 436-437.

Under the class definition, it does not matter whether someone currently has a lease, has property where a well is producing gas or ever has produced gas, or has ever actually been paid or is owed royalties for gas that has been produced. All that matters is that someone "entered into" a lease with a royalty term that is not in the record, even a lease included in

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[14] While arguments against jurisdiction cannot be waived, *see Ashcroft v. Iqbal,* 556 U.S. 662, 671 (2009) ("Subject matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt."), arguments in support of jurisdiction can be. *E.T v. Paxton,* 41 F.4th 709, 717 (5th Cir. 2022). Equinor did not oppose petitioners' motion asking the district court to reconsider its decision on jurisdictional grounds. Equinor's failure to make *any* jurisdictional arguments in the district court resulted in Equinor's waiving all its arguments. *See, e.g., Taha v. Cnty. of Bucks,* 862 F.3d 292, 299 (3d Cir. 2017) (arguments raised for the first time on appeal are deemed waived absent exceptional circumstances).

the "miscellaneous" group. Entering into a lease with a royalty term is not an injury without more.

The court of appeals did not require any factual finding that the class excludes uninjured members. Instead, it pointedly declined to follow *TransUnion*. The court of appeals stated incorrectly that the only thing that matters at the remedial settlement approval stage is whether *the named plaintiff* has *alleged* an injury. App.8a-9a. But *TransUnion* is clear: Article III requires that every class member must have suffered a concrete injury before a federal court can order relief. In fact, another panel of the Third Circuit correctly affirmed as much in *Huber v. Simon's Agency*, 84 F.4th 132,154-155 (3d Cir. 2023): "…at the remedial stage each class member must establish standing to recover individual damages." The court of appeals in this case inexplicably took the opposite, jurisdictionally infirm position. The court of appeals' failure in this case to follow *TransUnion* creates a circuit conflict. *Harvey v. Morgan Stanley Smith Barney*, 2022 WL 3359274 at *3 (9th Cir. 2022) (vacating class settlement on jurisdictional grounds where settlement class definition may have included uninjured members and district court had not made "a factual finding that every class member suffered some injury…").

At this stage, where the district court is asked to enter judgment, the burden to establish jurisdiction is evidentiary. "[A] plaintiff must demonstrate standing *with the manner and degree of evidence required at the successive stages of the litigation*." *TransUnion*, 594 U.S. at 431 (emphasis added). Settlement class certification and settlement approval are evidentiary matters, not pleading

matters. It was named plaintiff's *evidentiary* burden to prove that the district court had the power to enter the judgment for the class.

The text of Rule 23 confirms that settlement approval is evidentiary. Rule 23(e)(1)(A) states that the parties "must provide the court with information sufficient to determine whether" the class should receive notice of a proposed settlement. Fed. R. Civ. P. 23(e)(1)(A). App.213a. Rule 23(e)(1)(B) states that the showing that must be made includes that "the court will likely be able to…certify the class for purposes of *judgment* on the proposal." Fed. R. Civ. P. 23(e)(1)(B) (emphasis added).

The court of appeals' assertion that it was Petitioners' burden to disprove standing is contrary to Rule 23(e)(1). It is also contrary to settled law, including *TransUnion*. Jurisdiction cannot be presumed; if anything, the presumption is against jurisdiction.[15] *See, e.g., Kokkenen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Moreover, the parties cannot confer Article III jurisdiction by agreement. *Sosna v. Iowa*, 419 U.S. 393, 398 (1975). The burden falls on named plaintiff at the remedial stage to prove that the class does not include any uninjured members so that a remedial judgment can be entered. *TransUnion*, 594 U.S. at 430-431.

The lack of an order under Rule 23 specifying the class claims compounds the jurisdictional problem. "[S]tanding is not dispensed in gross;" each

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[15] The court of appeals in effect made the presumption irrebuttable. Without explanation it affirmed in a footnote the district court's refusal to give Petitioners access to any information. App.13a.

claim — and each form of relief — must be separately considered. *TransUnion*, 594 U.S. at 431. The settlement here provides two forms of "relief": a monetary payment to some class members based on royalties through July 2017 and injunctive relief that causes all class members to release claims beyond July 2017 to well after the settlement's Effective Date. Even if the inquiry is limited to named plaintiff, each form of relief and each claim has to be separately assessed. In particular, the alleged duty to market claim does not give named plaintiff (or anyone else) standing to obtain relief on his separate and dismissed breach of contract claim. The court of appeals leaned into the duty to market claim but that is not the claim that was settled — the settlement addresses the index pricing breach of contract claim.

Further, there is no way to tell whether, as executor of an estate of a decedent whose breach of contract claim has been dismissed, named plaintiff has any continuing stake in claims, including any claims beyond the settlement Effective Date. As for the Stines, the parties' stipulation adding them as class representatives only for purposes of the settlement is not enough to reach any conclusion about whether they have a personal stake in either the settlement's backward-looking or forward-looking terms.

In short, the court of appeals disregarded controlling authority from this Court that maps the boundaries of Article III jurisdiction to enter a class judgment. The policy decision to presume settlement approval overlooked jurisdictional defects in an overbroad class definition. This Court should grant certiorari to clarify that *TransUnion's* holding about

the requirement of Article III standing for all class members at the remedial stage applies when courts are considering the certification of a settlement class, not just when judgment is entered in a class action after trial.

CONCLUSION

For these reasons, the Court should grant this Petition to address whether Rule 23 as amended permits courts to apply a policy favoring settlement in place of a rigorous evidentiary analysis and to address whether judgment can be entered for a settlement class absent proof that the class excludes uninjured members.

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