No. 26-

IN THE

Supreme Court of the United States

THE KROGER CO., dba FRED MEYER,
Petitioner,

v.

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

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented in this case is the same as the one this Court granted certiorari to resolve in *Lab'y Corp. of Am. Holdings v. Davis*, 145 S. Ct. 1133 (2025):

Whether a federal court may certify a class action pursuant to Federal Rule of Civil Procedure 23(b)(3) when some members of the proposed class lack any Article III injury.

PARTIES TO THE PROCEEDING

Petitioner is The Kroger Co., dba Fred Meyer, defendant and appellant below (stock ticker: KR).

Respondents are Elisha Solano, Kathleen Zach, and Denise Conroy, plaintiffs and appellees below.

CORPORATE DISCLOSURE STATEMENT

The Kroger Co., dba Fred Meyer has no parent corporation, and no publicly held corporation owns more than 10% of its stock.

RELATED PROCEEDINGS

United States District Court (D. Or.):

Solano v. The Kroger Co., dba Fred Meyer, No. 3:18-cv-01488-AR (July 16, 2024) (Findings and Recommendation recommending class certification)

Solano v. The Kroger Co., dba Fred Meyer, No. 3:18-cv-01488-AR (Sep. 27, 2024) (order adopting Findings and Recommendation and certifying class)

United States Court of Appeals (9th Cir.):

Solano v. The Kroger Co., dba Fred Meyer, No. 24-6235 (Jan. 24, 2025) (granting Rule 23(f) interlocutory appeal)

Solano v. The Kroger Co., dba Fred Meyer, No. 25-536 (May 19, 2026) (affirming class certification)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Constitutional Provisions

Rules

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner The Kroger Co., dba Fred Meyer ("Fred Meyer") respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, App. 1a-5a, is not reported but is available at 2026 WL 1396385. The Findings and Recommendation of the magistrate judge of the United States District Court for the District of Oregon, App. 11a-54a, is available at 2024 WL 4040444. The order of the United States District Court for the District of Oregon adopting the Findings and Recommendation, App. 8a-10a, is available at 2024 WL 4333378.

JURISDICTION

The Ninth Circuit issued its decision on May 19, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III §§ 1-2 of the United States Constitution is reproduced at App. 53a. Federal Rule of Civil Procedure 23 is reproduced at App. 55a.

INTRODUCTION

Twice before, this Court has granted certiorari to determine whether either Article III or Rule 23(b)(3) permit federal courts to certify a class seeking damages when many of the class members lack standing. Both times, unanticipated procedural obstacles prevented the Court from answering that question. This case provides the Court with the opportunity to finally resolve it.

The need for this Court's resolution is as great as ever. The circuit courts remain starkly divided—and the split has deepened since this Court last attempted to address this question. Some circuits hold that Article III precludes the certification of damages classes containing any members who lack standing. Others consider the issue under the rubric of Rule 23(b)(3)'s predominance requirement, holding that no class can be certified if it contains more than a de minimis number of uninjured members. And still others permit certification of classes under Rule 23(b)(3) even if a substantial proportion of the class has suffered no cognizable injury.

The Ninth Circuit has spearheaded the last approach, as this case once again demonstrates. Here, Plaintiffs—on behalf of a class of thousands of consumers—allege that Fred Meyer improperly collected 10-cent bottle deposits for orange juice containers that, under Oregon law, should not have been subject to a deposit requirement. But Fred Meyer offered refunds to customers for all bottle deposits, including any deposits paid on the specific orange juice containers that are the subject of Plaintiffs' claims. And before Plaintiffs filed suit, Fred Meyer had already paid out more than a thousand full refunds of the 10-cent deposits at issue. That left class members who received such refunds without any injury that a federal court might redress. Nevertheless, the district court certified a class containing these uninjured purchasers, allowing each of them to seek substantial statutory damages. In then affirming, the Ninth Circuit applied established circuit precedent and held that neither Article III nor Rule 23(b)(3) prevents certification of a class in which more than a thousand members have no Article III injury at all.

This Court's intervention is necessary to make clear that a federal court cannot sweep aside the fundamental limits on its jurisdiction simply because a claim comes before it as part of a class action. Standing is a threshold issue that must be resolved before a court can entertain a claim. Rule 23, in turn, merely allows for the *aggregation* of justiciable claims—it does not create them. Article III therefore requires classes to be defined in such a way as to exclude the claims of individuals who lack the standing required to invoke federal-court jurisdiction.

Even if Article III itself does not compel this conclusion, Rule 23(b)(3)'s predominance requirement leads to much the same result. That is because individualized inquiries into each class member's standing will swamp any common issues whenever a significant portion of the class is uninjured. As Justice Kavanaugh has succinctly put it: "when a damages class includes both injured and uninjured members, common questions do not predominate." *Lab'y Corp. of Am. Holdings v. Davis*, 605 U.S. 327, 328 (2025) (Kavanaugh, J., dissenting).

Proper recognition of the limits on federal-court authority has enormous practical consequences. It is no exaggeration to say that billions of dollars may be at stake. District courts' class-certification decisions are frequently outcome-determinative. Because certification dramatically escalates the stakes of litigation, defendants almost always settle if a class is certified; the class-action trial is "almost extinct." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 685 (9th Cir. 2022) (en banc) (Lee, J., dissenting). And the inclusion of uninjured members in a class only further increases the potential lability for a defendant. Allowing improperly inflated classes thus gives plaintiffs an unearned cudgel with which to threaten defendants into settlements that bear little relationship to the underlying merits of their claims.

This case offers the Court the ideal vehicle to set things right. It features none of the procedural defects that have thwarted the Court's prior efforts to address this issue. The case arises on interlocutory appeal directly from the district court's certification order, so no post-judgment complexities could hinder resolution of the question presented. *Cf. Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 460-62 (2016). The district court has also stayed all proceedings since Fred Meyer first sought permission to appeal, meaning no subsequent developments threaten to moot review of whether the district court properly certified the underlying class. *Cf. Lab'y Corp.*, 605 U.S. at 327. And the Ninth Circuit's decision squarely conflicts with both contrary lines of authority in the circuits that have correctly restricted the certification of damages classes containing uninjured members, cleanly presenting the issues that have divided the courts of appeals. The Court should grant review and reverse.

STATEMENT OF THE CASE

A. Factual Background

Fred Meyer is a leading grocer in the Pacific Northwest. It participates in Oregon's "Bottle Bill" program, which requires retailers to collect 10-cent deposits from customers in connection with the sale of beverages in certain types of containers. App. 12a-13a. Customers can later return these beverage containers and redeem their 10-cent deposits. *Id.* Fred Meyer both sells beverages subject to the Bottle Bill deposit and accepts returns of beverage containers in exchange for 10 cents. 3-ER-348-49.[1] Fred Meyer does not retain any of the bottle deposits it collects, instead keeping them in a separate account and then remitting them to Oregon state authorities. 3-ER-422.

In January 2018, the Oregon Legislature expanded the Bottle Bill program to cover additional containers in an effort to encourage more recycling. App. 13a. Leading up to the amendment, the Bottle Bill's administering agency, the Oregon Liquor and Cannabis Commission ("OLCC"), repeatedly emphasized that "[a]ll beverage containers . . . will be covered," subject only to exceptions not relevant here.

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[1] Citations to "ER" are to Appellant's Excerpts of Record filed with the Ninth Circuit below. 9th Cir. No. 25-536, Dkts. 14 & 17. Citations to "SER" are to Appellee's Supplemental Excerpts of Record. *Id.*, Dkts. 25 & 29. Citations to "FER" are to Appellant's Further Excerpts of Record. *Id.*, Dkts. 37 & 40.

3-ER-350, 3-ER-355. The OLCC warned that failure to comply with the Bottle Bill could result in civil penalties of up to $500 per day. 3-ER-355.

To comply with this expansion, Fred Meyer recoded a substantial number of beverages—including the Florida's Natural Orange Juice containers at issue in this litigation—as subject to the Bottle Bill's deposit and redemption requirements. 3-ER-351-53. Later, however, the OLCC issued conflicting guidance suggesting that certain containers, including the Florida's Natural Orange Juice containers, were not redeemable after all. 3-ER-350-51.

Fred Meyer anticipated that confusion might result from the rollout of the new law. Beginning in late 2017, Fred Meyer made sure that it compensated customers for deposits collected on non-redeemable containers. 3-ER-352-53, 3-ER-369-70.

Fred Meyer issued refunds for any 10-cent deposit, even if customers had no receipt and whether or not the containers were redeemable under the Bottle Bill. 3-ER-352-53. For customers who had receipts, Fred Meyer would note the 10-cent return in its database under a code associated with Bottle Bill charges. *Id.* If a customer did not have a receipt, Fred Meyer would refund the customer through its general "I Can Make It Right" program, under which Fred Meyer accepts returns of items, no questions asked, if there is any issue at all. *Id.*

Fred Meyer issued at least 1,275 refunds for Florida's Natural Orange Juice containers in 2018. App. 19a, 25a-28a, 40a; 1-FER-4, 1-FER-7.

Approximately 765 of these refunds were under the "I Can Make It Right" program. 1-FER-7. Customers could receive refunds for the full purchase price of the Florida's Natural Orange Juice through the "I Can Make It Right" program—not just the 10-cent bottle-bill deposit. 3-ER-352, 3-ER-369, 3-ER-416.

B. Procedural Background

1. Plaintiffs' Complaint

Plaintiffs filed this putative class action in August 2018, asserting claims for unjust enrichment and violations of Oregon's Unlawful Trade Practices Act, Or. Rev. Stat. §§ 646.605-646.656 (UTPA). 2-ER-134-35. Their claims rest on the allegation that Fred Meyer charged 10-cent deposits on Florida's Natural Orange Juice containers that were not redeemable. 2-ER-80. As their sole identified injury, Plaintiffs advance a "diminished value theory of ascertainable loss," where the "[t]he ascertainable loss is the difference between the price as misrepresented and the actual value: ten cents." App. 36a (quotation marks omitted). Plaintiffs seek $200 in statutory damages for each 10-cent loss. *Id.* (citing Or. Rev. Stat. § 646.638(8)(a)).

2. Plaintiffs' Class Certification Motion

Plaintiffs moved for certification of the following class under Rule 23(b)(3):

> Oregon Fred Meyer customers who, (a) on or after January 1, 2018, and on or before November 1, 2018, (b) paid an additional 10-cent deposit charge to Fred Meyer, (c) for a Florida

> s Natural 100% Premium "No Pulp" (UPC 1630016564) or No Pulp with Calcium (UPC 1630016567) orange juice product, which was not redeemable for a refund of the 10-cent deposit charge under Oregon law.

App. 15a. This class definition encompasses all customers who purchased the relevant Florida's Natural Orange Juice products, whether or not they obtained a 10-cent refund (or a refund of the entire purchase price). In their motion, Plaintiffs rested their theory of standing on the assertion that each class member had "suffered a concrete economic injury in fact, at the moment they paid Fred Meyer's 10-cent 'deposit' charge." 1-SER-187.

Fred Meyer opposed Plaintiffs' motion and also separately moved to deny class certification. In relevant part, Fred Meyer contended that Plaintiffs could not show class-wide injury-in-fact given Fred Meyer's issuance of at least 1,275 Bottle Bill deposit refunds for Florida's Natural Orange Juice containers between January 2018 and November 2018, amounting to 11.6% of all deposits collected on those containers during the class period. 3-ER-328-29, 3-ER-352-53; 1-FER-4, 1-FER-7. As Fred Meyer explained, class members who received a refund in an amount greater than or equal to the 10-cent deposit lack Article III standing. 3-ER-326-30.

Fred Meyer further detailed that determining which class members had obtained refunds was not possible through any administrable means. Although Fred Meyer had general accounting information indicating instances of deposits and refunds, it did not retain (and was not required to retain) specific identifying information about individuals who sought or obtained refunds. App. 27a; 3-ER-329, 3-ER-352-53, 3-ER-418. After all, Fred Meyer's liberal refund policies authorize its associates to provide automatic full refunds for any customer, without receipts or identification, and regardless of a container's actual redeemability under the Bottle Bill. 3-ER-352-53. Determining whether any given class member could even bring a claim would therefore require member-by-member inquiries.

3. The District Court's Class Certification Order

The magistrate judge issued a Findings and Recommendation supporting certification of the proposed Rule 23(b)(3) class. Dismissing the proposition that individualized adjudications were necessary to determine each class member's standing, the magistrate judge concluded that even those class members who received full refunds had suffered a cognizable injury-in-fact. App. 43a-44a. Rather than addressing whether these class members had such an injury at the time Plaintiffs filed their lawsuit, the magistrate judge focused on the time of purchase, reasoning that "all class members suffered the same injury at the same time—at the point-of-sale." App. 44a.[2]

[2] The magistrate judge declined to address Plaintiffs' contention—raised only after they filed their motion for class certification—that all class members had standing based on the lost "time-value" of the 10-cent deposits. App. 22a n.7. Not only had Plaintiffs failed to plead such a theory of injury or present evidence to support the contention that it could be determined classwide, but they also could not explain how class members

Fred Meyer timely objected to the magistrate judge's Findings and Recommendation, explaining that whether each class member suffered such an injury could not be evaluated "at the time of sale" because standing is instead measured at the time the complaint is filed. 2-ER-56-58; *see, e.g.*, *Davis v. FEC*, 554 U.S. 724, 734 (2008). As Fred Meyer detailed, by the time Plaintiffs filed their amended complaint, a substantial portion of the class had already secured full refunds for their purported loss, eliminating any injury. 2-ER-49-50, 3-ER-352-53; 1-FER-4, 1-FER-7.

The district court adopted the magistrate judge's Findings and Recommendation in full. App. 8a-10a. Its order provided no material discussion of Fred Meyer's objections. *Id.*

The district court stayed further proceedings while Fred Meyer petitioned the Ninth Circuit for permission to appeal the class-certification order under Rule 23(f). *See Solano v. The Kroger Co., dba Fred Meyer*, No. 3:18-cv-01488-AR (D. Or.), Dkt. 175. After the Ninth Circuit granted the petition, the district court extended its stay through the resolution of appellate proceedings—a stay that remains in effect. *Id.*, Dkts. 179 & 198.

4. The Ninth Circuit's Decision Affirming

The Ninth Circuit affirmed the district court in an unpublished opinion. App. 1a-5a. The court held that the named Plaintiffs—who had not obtained

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who received full-purchase-price refunds could have suffered such an injury: class members who received refunds for the 10-cent charge *plus* the full purchase price of the product were fully reimbursed for any lost time-value of their 10-cent deposits.

refunds of their 10-cent deposits—had demonstrated their Article III standing. App. 3a-4a.

By contrast, for the unnamed class members who *had* received refunds, the Ninth Circuit adhered to circuit precedent holding that a class may be certified even though it contains uninjured class members. App. 3a. The court acknowledged the Second Circuit's contrary precedent holding that "[n]o class may be certified that contains members lacking Article III standing." *Id.* (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006)). But, the court continued, the Ninth Circuit had "squarely held that 'Article III's requirements are satisfied before a class is certified as long as at least one named plaintiff has standing,' regardless of 'whether the class action seeks money damages or equitable relief.'" *Id.* (quoting *Healy v. Milliman, Inc.*, 164 F.4th 701, 706 (9th Cir. 2026)). "Thus," the court held, "even if the class contains uninjured, unnamed members, at class certification, our standing inquiry focuses on the named plaintiffs." *Id.*

The court similarly rejected Fred Meyer's argument that Plaintiffs had not satisfied Rule 23(b)(3)'s predominance requirement given the presence of a significant number of uninjured class members. App. 4a-5a. As the court explained, the Ninth Circuit has held that "[t]he possibility that a class 'potentially includes more than a de minimis number of uninjured class members' does not preclude certification." App. 4a (quoting *Olean*, 31 F.4th at 669). The court recognized that assessing whether a given class member here had suffered an injury-in-fact could require determining whether that class member "(i) received no refund; (ii) received a refund of 10 cents; or (iii) received a refund for the entire purchase price." App. 5a. But the court declared that while this determination "may be an individualized inquiry, . . . it is not a particularly involved one." *Id.* (internal quotation marks omitted). The court did not address Fred Meyer's evidence showing it had no records that could be used to determine which class members received refunds. *See supra* p. 9. Nor did it otherwise explain how this inquiry could be conducted without class-member-by-class-member mini-trials. *See* App. 5a.

REASONS FOR GRANTING THE WRIT

Less than two years ago, this Court granted review to determine whether the Ninth Circuit was correct to hold—as it again held here—that federal courts may certify damages classes containing uninjured members. But because the district court had since modified its class-certification order, the Court dismissed the writ as improvidently granted. *Lab'y Corp. of Am. Holdings*, 605 U.S. at 327. That dismissal followed another missed opportunity roughly eight years earlier, when the Court also found itself unable to address the same issue after having granted certiorari to resolve it. *Tyson Foods, Inc.*, 577 U.S. at 460-61.

As the Court recognized at that time, the question "is one of great importance." *Id.* If anything, the significance of this question has only increased in the ensuing years, as the divisions in the courts of appeals have solidified and defendants' potential exposure from such class-certification decisions has further skyrocketed. The Court should grant this petition to finally answer this question once and for all.

I. THE CIRCUITS REMAIN SPLIT ON THE TREATMENT OF CLASSES CONTAINING UNINJURED MEMBERS

The federal courts are deeply divided regarding whether and under what circumstances a court may certify a damages class that includes uninjured members. As the Fifth Circuit recently observed, there are (at least) "two competing approaches to class standing: the 'more forgiving 'class certification' approach' and 'more intensive 'standing approach[,]'" and "[t]here is a circuit split regarding which of these is the appropriate test." *Wilson v. Centene Mgmt. Co., LLC*, 168 F.4th 217, 230 (5th Cir. 2026) (quoting 1 William B. Rubenstein, Newberg and Rubenstein on Class Actions § 2:6 (6th ed. 2022)); *see also, e.g.*, *In re Asacol Antitrust Litig.*, 907 F.3d 42, 46 (1st Cir. 2018) ("the presence of uninjured class members" is a "problem that has been the source of much debate among the circuits"). Even in the short time since this Court granted certiorari to resolve these questions in *Laboratory Corp.*, the courts of appeals have issued numerous opinions continuing to wrestle with these issues. *Compare Speerly v. Gen. Motors, LLC*, 143 F.4th 306, 346 (6th Cir. 2025) (en banc) (Nalbandian, J., concurring) (advocating view that "a class cannot be certified with members who have not suffered an injury in fact"); *with id.* at 336 (Thapar, J., concurring) ("Courts should look to Rule 23, not Article III, in determining whether a named plaintiff may represent a class of members who assert different injuries—or no injury at all."); *see also*, *e.g.*, *Clippinger v. State Farm Auto. Ins. Co.*, 173 F.4th 817, 843 (6th Cir. 2026) (en banc) (Bush, J., concurring) (noting open question); *Generation Changers Church v. Church Mut. Ins. Co.*, 168 F.4th 354, 362 (6th Cir. 2026) (declining to resolve question); *Mr. Dee's Inc. v. Inmar, Inc.*, 127 F.4th 925, 934 (4th Cir. 2025) ("Whatever the resolution of the question posed in *Laboratory Corp.*, the presence of 32% of uninjured members in a proposed class strikes us as much too high.").

The Ninth Circuit's decision in this case once again brings the split into stark relief. Adhering to circuit precedent, the court expressly declined to follow the Second Circuit's approach, which requires that all class members have Article III standing. App. 3a. The court also approved certification of a class containing a substantial number of members who lack any cognizable injury, applying Ninth Circuit precedent that rejects other circuits' contrary holdings that Rule 23(b)(3) precludes certification if more than a de minimis number of class members lack standing. App. 4a-5a (citing *Olean*, 31 F.4th at 669).

The Ninth Circuit's decision thus implicates both of the key fault lines that have divided the courts of appeals. Broadly speaking, the circuits have split into three blocs. Some circuits hold that Article III prohibits courts from certifying any damages class that includes class members who lack standing. Other circuits approach the issue through the lens of Rule 23(b)(3)'s predominance requirement, holding that a class cannot be certified when more than a de minimis number of class members are uninjured. The final camp—which, as exemplified by its decision here, includes the Ninth Circuit—allows for certification of damages classes containing large numbers of uninjured members so long as the uninjured class members can be filtered out before judgment. Only this Court can resolve this division and provide the clarity that courts and litigants require.

A. Some Circuits Mandate That All Class Members Satisfy Article III's Standing Requirements At Certification

The first group of circuits holds that individuals cannot be part of a certified damages class if they lack Article III standing.

The Second and Eighth Circuits. The Second Circuit issued the seminal case establishing that all unnamed class members must have Article III standing. As the Second Circuit held, "no class may be certified that contains members lacking Article III standing." *Denney*, 443 F.3d at 264. The Eighth Circuit then adopted the Second Circuit's approach. *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) (citing *Denney*, 443 F.3d at 264); *see also Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981, 987-88 & n.3 (8th Cir. 2021); *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013) ("In order for a class to be certified, each member must have standing . . . .").[3]

[3] Reflecting the unsettled nature of the question presented, this approach is not free from intra-circuit criticism. *See Johannessohn*, 9 F.4th at 989 (Kelly, J., concurring) ("In my view, to conclude that the plaintiffs lack standing simply because there is no evidence that all potential class members experienced the alleged heat defect is to conflate the requirements for standing with those for class certification.").

In these courts' view, the "filing of suit as a class action does not relax [Article III's] jurisdictional requirement." *Denney*, 443 F.3d at 263. Rather, because Rule 23 is merely a procedural mechanism for aggregating claims, "a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves." *Avritt*, 615 F.3d at 1034. A "class must therefore be defined in such a way that anyone within it would have standing." *Denney*, 443 F.3d at 264.

The Fifth and Sixth Circuits. Other circuits have adopted this approach, albeit less definitively. The Sixth Circuit has cited and applied the Second and Eighth Circuit's decisions requiring standing for all class members, but it did so in an unpublished opinion that did not finally settle the issue. *In re Carpenter Co.*, 2014 WL 12809636, at *2 (6th Cir. Sep. 29, 2014) (certification turns on "whether the definition of the class is sufficiently narrow to exclude uninjured parties") (citing *Halvorson*, 718 F.3d at 778-79 & *Denney*, 443 F.3d at 264); *cf. Clippinger*, 173 F.4th at 843 (Bush, J., concurring) (noting open question).

The Fifth Circuit has also lent support to the Article III approach, although with a similar lack of definitiveness. In *In re Deepwater Horizon*, the Fifth Circuit declared that "the district court had no authority to approve the settlement of a class that included members that had not sustained losses at all." 732 F.3d 326, 343 (5th Cir. 2013); *see id.* ("[T]he goal of global peace does not trump Article III or federal law . . . ."); *accord Flecha v. Medicredit, Inc.*, 946 F.3d 762, 770-71 (5th Cir. 2020) (Oldham, J., concurring) ("If anything, I'd think our standing analysis would be particularly rigorous at this stage, given the transformative nature of the class-certification decision."). Other Fifth Circuit decisions, however, call that holding into question. *E.g.*, *Mims v. Stewart Title Guar. Co.*, 590 F.3d 298, 308 (5th Cir. 2009) ("Class certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct."). The court's most recent pronouncement is that the question remains open in the circuit. *See Wilson*, 168 F.4th at 230 ("This court has so far declined to determine the correct approach. We continue to decline.").

B. Some Circuits Prohibit Classes With More Than A De Minimis Number Of Uninjured Members

A second group of circuits instead focuses on Rule 23(b)(3)'s predominance requirement, holding that a class cannot meet that requirement if more than a de minimis number of class members lack injury.

The First Circuit. The First Circuit has most explicitly adopted this standard. The court has rejected the proposition that Article III requires that *all* members of a certified class have standing, holding instead that it is sufficient if each class member's standing is determined before he or she "secures a recovery." *In re Nexium Antitrust Litig.*, 777 F.3d 9, 14, 32 (1st Cir. 2015). But the court has also held that, under Rule 23(b)(3), a class may be certified only if it contains "a very small absolute number" of uninjured class members. *Asacol*, 907 F.3d at 53. Thus, the First Circuit has held that a class containing "thousands who in fact suffered no injury" cannot be certified, reversing certification where (as here) "around 10%" of the class was uninjured. *Id.* at 47, 52-53.

The D.C. Circuit. The D.C. Circuit has not directly resolved whether, under Article III, all members of a certified damages class must have standing. Instead, it has addressed the issue by taking a strict view of Rule 23(b)(3) predominance—one that comes close to the Article III approach. The court has held that "[m]eeting the predominance requirement demands" that plaintiffs "show that they can prove, through common evidence, that all class members were in fact injured." *In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869*, 725 F.3d 244, 252 (D.C. Cir. 2013). The court has been willing to entertain the idea that the presence of a small number of uninjured class numbers might not preclude class certification. *See In re Rail Freight Fuel Surcharge Antitrust Litig. - MDL No. 1869*, 934 F.3d 619, 624 (D.C. Cir. 2019) (assuming "[f]or the sake of argument . . . that the district court correctly recognized a de minimis exception to the general rule that, for claims under section 4 of the Clayton Act, causation and injury must be capable of classwide resolution") (internal quotation marks omitted). But it has expressly rejected the proposition that this de minimis exception could be satisfied where nearly 13 percent of the class was uninjured. *Id.* at 625.

The Third Circuit. The Third Circuit appears to follow a similar approach. Like the First Circuit, the Third Circuit has held that Article III itself does not impede certification of a class containing uninjured members. *See Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 362 (3d Cir. 2015) ("We now squarely hold that unnamed, putative class members need not establish Article III standing."). But the Third Circuit has likewise consistently concluded that Rule 23(b)(3) precludes certification of classes containing a significant number of uninjured members. *See In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 192-95 (3d Cir. 2020) (reversing certification where "up to one-third of the entire class[,]" in defendants' estimation, may have been uninjured); *see also Drummond v. Progressive Specialty Ins. Co*, 142 F.4th 149, 159 (3d Cir. 2025) (concluding that question whether class members were injured defeated Rule 23(b)(3) predominance); *Huber v. Simon's Agency, Inc.*, 84 F.4th 132, 156-57 (3d Cir. 2023) (observing that "predominance concerns can arise when unnamed class members must submit individualized evidence to satisfy standing" and remanding due "to the lack of evidence in the record indicating how many members of [the] class are likely to have standing and how burdensome that showing will be").

The Fourth Circuit. The Fourth Circuit also appears to be moving toward a de minimis approach. The Fourth Circuit has concluded that if "a class includes some percentage of uninjured class members, then the proposed class may lack predominance." *Spurlock v. Wexford Health Sources, Inc.*, 175 F.4th 232, 252 (4th Cir. 2026) (affirming certification of a damages class where "the district court narrowed the class definition to reduce or eliminate altogether the potential for uninjured class members"). And it has held that class certification is improper where a class contains a significant number of uninjured members. *E.g.*, *Freeman v. Progressive Direct Ins. Co.*, 149 F.4th 461, 468-69 (4th Cir. 2025) (fact that class contained members who could not "claim injury . . . alone justifies reversal of the class certification order"); *Mr. Dee's Inc.*, 127 F.4th at 934 (affirming denial of certification where roughly a third of the class was uninjured).

C. Other Circuits Permit The Certification Of Damages Classes Containing Numerous Uninjured Members

By contrast, under the permissive approach adopted by the Ninth Circuit and others, courts may certify a damages class even if it contains a significant number of uninjured class members. These circuits not only reject the Second and Eighth Circuit's view that all unnamed class members must have Article III standing at certification, but they also hold that plaintiffs can satisfy Rule 23(b)(3)'s predominance requirement even where a class contains a significant number of members who lack standing.

The Ninth Circuit. In *Olean Wholesale Grocery Coop. v. Bumble Bee Foods LLC*, the en banc court expressly rejected the argument that "Rule 23 does not permit the certification of a class that potentially includes more than a de minimis number of uninjured class members." 31 F.4th at 669. As Judge Lee observed in dissent, the majority opinion thus "allow[ed] the district court to certify a class, even though potentially about one out of three class members suffered no injury." *Id.* at 685 (Lee, J., dissenting); *see also*, *e.g.*, *Davis v. Lab'y Corp. of Am. Holdings*, 2024 WL 489288, at *2 n.1 (9th Cir. Feb. 8, 2024) ("LabCorp's allegation that some potential class members may not have been injured does not defeat commonality at this time."). Here, adhering to that precedent, the Ninth Circuit saw no problem with a class in which roughly a tenth of the members are uninjured. App. 3a-5a; *see* 1-FER-4, 1-FER-7.

The Seventh Circuit. Like the Ninth Circuit, the Seventh Circuit rejects the proposition that a class cannot be certified if it contains uninjured members. *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 676 (7th Cir. 2009). Also like the Ninth Circuit, the Seventh Circuit has rejected the de minimis approach, holding that Rule 23(b)(3) requires the denial of class certification only if a "great many persons who have suffered no injury" are encompassed in the class. *Id.* at 677. As the court has since held, "[t]here is no precise measure for 'a great many.'" *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012).

The Tenth and Eleventh Circuits. The Tenth Circuit likewise follows this permissive approach, recently affirming the certification of a class that contained potentially thousands of uninjured members. *Rider, Tr. of Cherry Rider Fam. Tr. v. OXY USA, Inc*, 175 F.4th 1214, 1232 (10th Cir. 2026) (declining to "require certainty that every class member could have suffered an injury to satisfy predominance") (citing *Olean*, 31 F.4th at 669). The Eleventh Circuit appears to follow suit, discussing *Kohen* favorably and holding that a district court must reject predominance only "when it appears that a large portion of the class does not have standing." *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1277 (11th Cir. 2019).

II. THE NINTH CIRCUIT'S DECISION CONTRAVENES ARTICLE III AND RULE 23(B)(3)

The permissive approach the Ninth Circuit applied here is wrong for two independent reasons. First, as the Second and Eighth Circuits have correctly recognized, Article III prohibits the certification of classes containing uninjured members, as federal courts have no power to entertain the claims of class members who lack Article III standing. Second, and in any event, as the First and D.C. Circuits have recognized, a plaintiff cannot satisfy Rule 23(b)(3)'s predominance requirement when a class contains a significant number of uninjured members: adjudication of the class's claims will necessarily devolve into a quagmire of "individualized mini-trials to figure out who suffered an injury." *Olean*, 31 F.4th at 691 (Lee, J., dissenting).

Article III. Two established principles dictate the conclusion that a federal court cannot certify a class containing members who do not satisfy the threshold requirement of demonstrating "the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). First, Article III requires that each litigant demonstrate his standing to pursue each claim for relief he seeks. Second, a class action is simply a mechanism for aggregating such individual claims.

As this Court has repeatedly emphasized, "standing is not dispensed in gross." *Murthy v. Missouri*, 603 U.S. 43, 61 (2024) (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021)). That is, simply because a court has the authority to entertain *some* of a litigant's claims does not mean it has jurisdiction to decide *all* claims before it. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006). Instead, "plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek." *TransUnion*, 594 U.S. at 431. Courts, in turn, must determine "whether the particular plaintiff is entitled to an adjudication of the *particular claims* asserted." *Cuno*, 547 U.S. at 352 (internal quotation marks omitted).

These same fundamental principles apply when the claims of different parties are advanced in the same case. Thus, for example, when intervenors seek to join a suit alongside an existing plaintiff, they must establish their own Article III standing if they request "additional relief beyond that which the plaintiff requests," such as individual damages. *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 439 (2017).

Class actions are no different. A class action is just "[o]ne of several methods by which multiple similarly situated parties get similar claims resolved at one time and in one federal forum." *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 291 (2008). A class action "enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits," while leaving their "legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion). Thus, "[t]hat a suit may be a class action adds nothing to the question of standing." *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (ellipsis and internal quotation marks omitted).

Consistent with this straightforward reasoning, this Court in *TransUnion* held that "[e]very class member must have Article III standing in order to recover individual damages." 594 U.S. at 431. As it explained, "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Id.* (internal quotation marks omitted).

TransUnion did not decide "whether every class member must demonstrate standing *before* a court certifies a class." *Id.* at 431 n.4. But the conclusion that they must follows directly from the nature of Article III standing. Standing is a "threshold" requirement that must be satisfied before a court can "proceed at all." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). "Concerns of justiciability go to the power of the federal courts to entertain disputes" in the first place, not merely to award judgments at the end. *Renne v. Geary*, 501 U.S. 312, 316 (1991). And class certification is the point at which the claims of unnamed class members come within the jurisdiction of the court: among other things, members of a certified class may be bound by the court's decision and have the right to appeal. *Devlin v. Scardelletti*, 536 U.S. 1, 7-10 (2002). If, however, an unnamed class member lacks standing, the court cannot entertain that individual's dispute at all. Federal courts have an obligation—at every stage of the litigation, not simply when rendering a final judgment—to filter out claims for which Article III standing is absent. *See* Fed. R. Civ. P. 12(h)(3). Class certification should not be the lone exception.

That is not to say that the process for filtering out such claims at class certification must be onerous. *See Denney*, 443 F.3d at 263 ("We do not require that each member of a class submit evidence of personal standing."). Instead, a plaintiff need only "demonstrate standing with the manner and degree of evidence required at the successive stages of the litigation." *TransUnion*, 594 U.S. at 431 (internal quotation marks omitted). Courts that enforce Article III's requirements at certification hold that a class must "be defined in such a way that anyone within it would have standing." *Denney*, 443 F.3d at 264. If a plaintiff cannot show that its proposed definition satisfies that requirement (while also satisfying Rule 23's other requirements), then either the definition must be narrowed or certification must be denied. But just as at any other stage of litigation, a federal court must guard its jurisdiction against claims that cannot properly be brought before it.

Rule 23(b)(3). Even if certifying a damages class containing uninjured class members were consistent with Article III, Rule 23(b)(3)'s predominance requirement would preclude the certification of any such class that contains "more than a de minimis number of uninjured class members." *Contra Olean*, 31 F.4th at 669. A class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979). To invoke this exception, "a party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with Rule 23." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). And for damages classes in particular, Rule 23 affords defendants even "greater procedural protections." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011). Chief among these is the requirement that plaintiffs demonstrate 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). This requirement "is far more demanding" than other Rule 23 factors. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997).

Plaintiffs cannot satisfy this requirement where a class contains a significant number of uninjured members because determining individual standing issues will necessarily require consideration of evidence that varies by class member. As Justice Kavanaugh has observed, "if there are members of a class that aren't even injured, they can't share the same injury with the other class members." *Lab'y Corp. of Am. Holdings*, 605 U.S. at 332 (Kavanaugh, J., dissenting) (internal quotation marks omitted). These "[u]ninjured class members cannot prevail on the merits, so their claims must be winnowed away" before judgment. *Rail Freight*, 934 F.3d at 624. And any "winnowing mechanism" would have to somehow be both "truncated enough to ensure that the common issues predominate, yet robust enough to preserve the defendants' Seventh Amendment and due process rights to contest every element of liability and to present every colorable defense." *Id.* at 625.

Accordingly, if plaintiffs cannot use common evidence to prove that all class members suffered injury, they will instead be forced to present proof of injury on a class-member-by-class-member basis. But a defendant will be entitled to contest this showing, including by presenting evidence and cross-examining those who claim a right to monetary relief. *Wal-Mart*, 564 U.S. at 366-67. Such individualized mini-trials might not derail the proceedings where a class contains only a small handful of individuals whose claims of injury must be litigated. But no procedure that protects defendants' constitutional rights while at the same time winnowing out uninjured class members can satisfy the predominance requirement when the class contains a significant number of uninjured members. *Asacol*, 907 F.3d at 52-53.

This case confirms the problems with the Ninth Circuit's contrary approach. The court blithely declared that the inquiry into whether each class member had received a refund and thus lacked standing "may be an individualized inquiry, but it is not a particularly involved one." App. 5a (internal quotation marks omitted). Yet the court identified no administrable means to filter out the more than a *thousand* uninjured class members. *See id.* To the extent Plaintiffs attempted to do so, they asserted that class members could submit affidavits that "verif[y]" they suffered an injury. *See* 9th Cir. No. 24-6235, Dkt. 4 (Answ. in Opp. to Rule 23(f) Pet.) at 16. But while there are records identifying many customers who purchased the orange juice products at issue, no records show who received refunds, and there is no reason to think that a given class member would now accurately remember having received a 2018 refund. Still more important, Fred Meyer is entitled to *contest* any class member's verification that he received no refund, including through cross-examination. *Wal-Mart,* 564 U.S. at 367. Determining which class members received such refunds, and therefore lack standing, would thus require precisely the sort of fact-intensive individual inquiries that necessarily defeat predominance. *See Rail Freight*, 934 F.3d at 624-25.

III. THIS CASE IS AN EXCELLENT VEHICLE TO RESOLVE THIS IMPORTANT QUESTION

This case enables the Court to address a question that is of undoubted importance. Plaintiffs file "around 10,000 class action lawsuits" every year. *Olean*, 31 F.4th at 686 (Lee, J., dissenting). Given the enormous stakes involved in such suits, the class-certification determination is generally dispositive. The "[c]ertification of the class is often, if not usually, the prelude to a substantial settlement by the defendant because the costs and risks of litigating further are so high." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 485 (2013) (Scalia, J., dissenting). Indeed, simply defending against class actions cost businesses more than $4 billion last year. Carlton Fields, 2025 Carlton Fields Class Action Survey, at 6.[4] And after certification, "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 163 (2008). That is all the more true where, as here, the class seeks statutory damages—allowing plaintiffs to demand damages thousands of times larger than any actual injury suffered (if class members have suffered any injury at all). *See* Or. Rev. Stat. § 646.638(8)(a).

These concerns are heightened when courts certify damages classes without carefully scrutinizing class members' standing. "Classes that are

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[4] Available at https://www.carltonfields.com/getmedia/5c94a1c8-3263-48c9-91b3-9f3900a9dc76/2025-carlton-fields-class-action-survey.pdf.

overinflated with uninjured members raise the stakes for businesses that are the targets of class actions." *Lab'y Corp. of Am. Holdings*, 605 U.S. at 333 (Kavanaugh, J., dissenting). They allow plaintiffs to "inflate the potential liability (and ratchet up the attorney's fees based in part on that amount) to extract a settlement, even if the merits of their claims are questionable." *Olean*, 31 F.4th at 692 (Lee, J., dissenting). Such "coerced settlements substantially raise the costs of doing business." *Lab'y Corp. of Am. Holdings*, 605 U.S. at 333 (Kavanaugh, J., dissenting).

This case presents an ideal vehicle for this Court to address these issues and mitigate the costs stemming from such overstuffed class actions. To start, it arises from the Ninth Circuit, whose class-action precedent is most clearly in conflict with that of the other circuits. And as the largest circuit, the Ninth Circuit's permissive approach to class actions imposes particularly significant costs.

The Ninth Circuit's decision here also cleanly frames both aspects of the divide between its permissive approach and the contrary precedent in other courts of appeals. The Ninth Circuit relied on both of the propositions—that Article III permits the certification of classes with uninjured members, and that Rule 23(b)(3) permits the certification of classes containing more than a de minimis number of uninjured members—that other circuits have squarely rejected. App. 3a-5a; *see supra* pp. 15-20.

There also is no question that many members of the certified class lack standing. The Ninth Circuit tacitly recognized as much in acknowledging the need to determine which class members secured refunds.

App. 5a. The magistrate judge concluded otherwise only on the manifestly erroneous basis that all class members had suffered a 10-cent loss *at some point*—i.e., at the time they purchased the orange juice containers at issue. App. 43a-44a. But to have standing, a plaintiff must have "had the requisite stake in the outcome when the suit was filed," and not simply sometime in the past. *Davis*, 554 U.S. at 734. Those class members who received full refunds redressing their injuries before the filing of this action thus lacked standing even if they were initially harmed by paying the 10-cent deposit.

Nor—unlike in another case in which this Court recently denied certiorari—does any doubt exist as to whether the number of uninjured class members is substantial: at least 1,275 class members received such refunds. 3-ER-328-29, 3-ER-352-53; 1-FER-4, 1-FER-7; *cf. Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharm. Co. Ltd.*, 2025 WL 1683472, at *4 (9th Cir. June 16, 2025) (affirming class certification where evidence demonstrated each class member had at least a 98.5% chance of having suffered injury), *cert. denied*, 146 S. Ct. 1817 (2026). Only under the Ninth Circuit's approach allowing "more than a de minimis number of uninjured class members" could such a class be certified. App. 4a (internal quotation marks omitted).

The procedural posture here also offers the Court the ability to address the standalone legal issues pertaining to class certification itself. Because this cases arises from a Rule 23(f) appeal, no post-verdict issues threaten to complicate this Court's review. *Cf. Tyson Foods*, 577 U.S. at 460 (declining to address this question and remanding where petitioner reframed merits brief to focus on issues specific to jury's verdict). Perhaps more important, all proceedings in the trial court are stayed—and have been since Fred Meyer first petitioned for permission to file an interlocutory appeal of the class-certification order. *See Solano*, No. 3:18-cv-01488-AR, Dkts. 175, 179, 198. Unlike in *Laboratory Corp.*, the district court has done nothing to alter the class definition since, and no other subsequent development could threaten to moot this Court's resolution of the question presented. *Lab'y Corp.*, 605 U.S. at 327; *cf. also Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharm. Co. Ltd.*, 2026 WL 325419, *1 (C.D. Cal. Feb. 3, 2026) (noting that district court had lifted stay of proceedings in August 2025, more than six months before this Court later denied certiorari).

That the Ninth Circuit's decision here is unpublished does not matter. If anything, that simply confirms that the Ninth Circuit law on the question presented is settled and ripe for this Court's review. Indeed, the court of appeals' decision in *Laboratory Corp.* was likewise unpublished, yet this Court did not hesitate to grant review. 145 S. Ct. at 1133-34. And while a jurisdictional issue ultimately prevented the Court from resolving the question presented there, it remains the case here that "[t]he Ninth Circuit's decision is incorrect under Rule 23 and this Court's precedents, and it will generate serious real-world consequences." *Lab'y Corp.*, 605 U.S. at 333 (Kavanaugh, J., dissenting). This Court's review is needed to definitively resolve this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

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