

No. 26-244

IN THE
Supreme Court of the United States

THE KROGER CO., DBA FRED MEYER INC.,
Petitioner,

v.

ELISHA SOLANO, KATHLEEN ZACK, AND
DENISE CONROY, INDIVIDUALLY AND ON BEHALF OF
OTHER CUSTOMERS,
Respondents.

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

**BRIEF OF THE RETAIL LITIGATION CENTER,
INC. AS *AMICUS CURIAE* IN SUPPORT OF
PETITIONER**

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INTEREST OF AMICUS CURIAE¹

The Retail Litigation Center, Inc., (RLC) is a 501(c)(6) nonprofit trade association that represents national and regional retailers, including many of the country's largest and most innovative retailers, across a breadth of retail verticals. The RLC is the only trade organization solely dedicated to representing the retail industry in the courts. The RLC's members employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for hundreds of billions of dollars in annual sales.

The RLC offers retail-industry perspectives to courts on important legal issues and highlights the industry-wide consequences of significant cases. Since its founding in 2010, the RLC has filed more than 250 amicus briefs on issues of importance to the retail industry. Its amicus briefs have been helpful to courts throughout the United States, as evidenced by citation to the RLC's amicus briefs in numerous precedential opinions, including from this Court. *See, e.g., South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 184 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542-43 (2013); *Chewy, Inc. v. U.S. Dep't of Lab.*, 69 F.4th 773, 777-78 (11th Cir. 2023); *State v. Welch*, 595 S.W.3d 615, 630 (Tenn. 2020).

RLC's members are frequent defendants in consumer class actions like this one. RLC and its members accordingly have a strong interest in

¹ No party or counsel for any party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to this brief's preparation and submission. Counsel of record for the parties received timely notice of the filing of this amicus brief.

ensuring that courts apply the proper legal standards governing class certification because of the undue pressure that certification of overly broad classes places on corporate defendants.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an important and recurring question: whether a federal court may certify a class action under Federal Rule of Civil Procedure 23(b)(3) when some members of the proposed class lack any Article III injury. The Ninth Circuit erroneously holds that courts may grant class certification in these circumstances. But other courts of appeals hold the opposite. The Court has twice before granted certiorari to resolve this circuit conflict. It should do so again here.

Article III does not permit federal courts to exercise judicial authority over persons who lack standing, but courts that certify classes that include uninjured members purport to do exactly that. Under this Court's precedents, both the certification itself and any further orders applicable to the class represent unlawful exercises of Article III jurisdiction.

Even if there were no Article III obstacle, certifying a class defined to include uninjured members would still violate Rule 23. Under Rule 23(a), a class may be certified only if it presents common questions of law or fact. And under Rule 23(b)(3), a damages class may be certified only when common questions will predominate and a class action offers a superior method of adjudication. This Court has recognized that Rule 23(a) "requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338,

349-50 (2011) (citation omitted). Where some class members have suffered *no* injury, the question of injury is obviously not common—and the individualized inquiry required to identify which class members have been injured will overwhelm any common questions in any event. This Court’s precedents bar certification under those circumstances.

Class certification in violation of those principles—which the district court granted here—produces “serious real-world consequences” for class-action defendants. *Lab’y Corp. of Am. Holdings v. Davis*, 605 U.S. 327, 333 (2025) (per curiam) (Kavanaugh, J., dissenting from dismissal of writ as improvidently granted). Certification of a class action often imposes dramatic pressure on defendants to settle. That pressure may be particularly acute where a certified class includes substantial numbers of uninjured members. Such bloated classes can “coerce” companies into “costly settlements that they sometimes must reluctantly swallow rather than betting the company on the uncertainties of trial.” *Id.* Indeed, those settlements may be especially costly because the inclusion of uninjured members artificially inflates the expected value of a trial verdict.

These problems specifically affect retailers, whose scale and visibility make them frequent targets of large class-action lawsuits. Class actions against retailers are also especially likely to include uninjured class members. For instance, whether a consumer can claim injury from a product that did not match his expectations will often turn on individualized factors such as his exposure to challenged messaging or his purpose in purchasing the product. Moreover, as this case illustrates, retailers are often not required to

maintain individualized records of which customers purchased (or were refunded for) which products. That can leave defendant retailers at the mercy of individual class members to accurately and honestly identify their own injuries; and it means that retailers must bear the costs of any efforts to verify those assertions.

This Court recently acknowledged the importance of resolving the entrenched circuit conflict on the question presented by granting certiorari in *Laboratory Corporation*. Although the Court ultimately dismissed the petition there as improvidently granted, this case presents a clean vehicle for the Court's review. The Ninth Circuit squarely decided the question presented in the context of a Rule 23(f) petition before the case proceeded to trial. And the district court has stayed further proceedings through this Court's disposition of the petition for certiorari—thus reducing the risk that subsequent developments would impede this Court's ability to answer the question presented. The Court need not, and should not, wait to resolve this enormously consequential issue for businesses across the national economy, including in the retail sector.

ARGUMENT

I. COURTS MAY NOT CERTIFY A DAMAGES CLASS THAT INCLUDES UNINJURED MEMBERS

Class certification is a pivotal moment in litigation. While the denial of certification often sounds the death knell for plaintiffs, a grant of certification can coerce defendants to settle. Accordingly, the rules governing class certification are exceedingly important to class-action litigation.

This case presents an opportunity for the Court to finally clarify one such rule: Both Article III and Rule 23 prohibit certification of a class that includes uninjured members. First, federal courts lack constitutional jurisdiction to adjudicate claims brought by plaintiffs who cannot satisfy the prerequisites for Article III standing. Nothing about Rule 23's mechanism for aggregating common claims alters that bedrock principle. Second, a class that includes uninjured members cannot satisfy the conditions under Rule 23. At a minimum, all class members must "possess the same interest and suffer the same injury." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348-49 (2011) (citation omitted). That requirement cannot be met when some class members lack *any* injury whatsoever; nor can Rule 23(b)(3)'s predominance and superiority requirements be met in those circumstances.

A. Article III Bars Federal Courts From Adjudicating the Claims of Uninjured Individuals

Like any other plaintiff, class members must establish Article III standing before they can obtain relief from a federal court. The question here is *when* a court must determine class members' standing: Must that determination be made at class certification, or can it be made after certification, so long as it precedes the distribution of remedies?

Article III provides a clear answer: the standing determination must be made at class certification. Article III jurisdiction is a "threshold" constitutional requirement that must be satisfied before a federal court may "entertain" the "merits of [a] dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498

(1975). In a class action, a federal court first exercises authority over claims of absent class members when it certifies a class. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013). Thus, before taking that step, the court must assure itself of Article III jurisdiction over the claims of each absent class member.

A court cannot wait to determine class members' standing at the point of awarding remedies. In *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), this Court held that "[e]very class member must have Article III standing in order to recover individual damages." *Id.* at 431; *accord Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring). It follows that a class member without standing cannot be included in the certified class to begin with. After all, "[c]oncerns of justiciability go to the power of the federal courts to entertain disputes" in the first instance. *Renne v. Geary*, 501 U.S. 312, 316 (1991). Those concerns must therefore be addressed at the first possible opportunity—not simply as an afterthought at the end of a case. *See Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 435 (2017) (holding that "an intervenor must meet the requirements of Article III if the intervenor wishes to *pursue* relief not requested by a plaintiff" (emphasis added)).

Use of the class-action device does not alter the analysis. A class action is simply a "method[] for bringing about aggregation of claims." *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 291 (2008). It does not change what individual class members must show to invoke federal-court jurisdiction. And where, as here, class members seek "additional relief beyond that which the [named] plaintiff requests"—in the form of individual

damages—they must “demonstrate Article III standing.” *Laroe*, 581 U.S. at 439. In short, “a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves.” *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010).

B. Classes That Include Uninjured Class Members Cannot Satisfy Rule 23

Certifying a class whose definition includes uninjured members also violates Rule 23. “[C]ertification is proper only if ‘the trial court is satisfied, after a rigorous analysis, that the prerequisites’” of Rule 23 “have been satisfied.” *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (citation omitted). Those prerequisites seek to “effectively ‘limit the class claims to those fairly encompassed by the named plaintiff’s claims.’” *Wal-Mart*, 564 U.S. at 349 (citation omitted). And in cases seeking monetary relief, Rule 23(b)(3) imposes an additional “demanding” requirement that common questions predominate over individualized ones. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997).

It is well established that Rule 23 “requires the plaintiff to demonstrate that the class members ‘have suffered the same injury.’” *Wal-Mart*, 564 U.S. at 349-50 (citation omitted). That requirement plainly cannot be satisfied if some class members have suffered *no* injury at all. In that circumstance, Rule 23(b)(3)’s predominance requirement cannot be satisfied either. Where a class definition encompasses uninjured members, the proceedings to determine which members are injured will frequently require intensive, individualized investigations. Those inquiries will

invariably predominate over any questions that might be adjudicated on common proof.

This case exemplifies the problem. Members of the certified class allege that they were charged a bottle fee in violation of Oregon law. But many class members received a refund of the fee before the operative complaint was filed, thereby curing any possible injury. As the petition explains (at 8-9), Fred Meyer was not required to maintain individually identifying records of refunds. Identifying the many class members who received refunds—and thus lack Article III injury—will accordingly require substantial individualized investigation and analysis. Rule 23(b)(3) does not permit certification in this circumstance. This Court should grant certiorari to correct the Ninth Circuit’s contrary holding.

II. THE NINTH CIRCUIT’S ERRONEOUS RULE HARMS RETAILERS

This Court has already acknowledged the importance of the question presented by twice granting certiorari to resolve it. *See Lab’y Corp. of Am. Holdings v. Davis*, 605 U.S. 327 (2025) (per curiam); *Tyson Foods*, 577 U.S. at 460-61. The question is especially important to the retail businesses that form the backbone of the American economy.

A. Artificially Inflated Class Sizes Create Undue Settlement Pressure

Class certification marks an important tipping point in litigation. Faced with the risk of exorbitant class liability—and the certainty of costly discovery—companies who lose at class certification are frequently forced to settle rather than proceed to trial. Class actions thus entail “the risk of ‘in terrorem’ settlements.” *AT&T Mobility LLC v. Concepcion*, 563

U.S. 333, 350 (2011). As this Court has recognized, “[c]ertification of a large class may so increase the defendant’s potential damages and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.” *Microsoft Corp. v. Baker*, 582 U.S. 23, 29 (2017) (citation omitted) (alteration in original); *see also* Fed. R. Civ. P. 23 advisory committee’s note to 1998 amendment (justifying Rule 23(f)’s expansion of appellate rights on the ground that “granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability”).

That settlement pressure “can be magnified unfairly if it results from a class defined so broadly as to include many members who could not bring a valid claim even under the best of circumstances.” *Messner v. Northshore Univ. Healthsystem*, 669 F.3d 802, 825 (7th Cir. 2012). The opportunity to apply such pressure frequently incentivizes plaintiffs’ attorneys to include large numbers of uninjured members in proposed classes in an effort to tip the settlement scales in their favor.

This case is a prime example: Fred Meyer refunded more than 1,200 of the allegedly unlawful ten-cent bottle deposit charges. Pet. 8. The many people who received those refunds before the operative complaint was filed therefore lack Article III standing. But the complaint seeks statutory damages under Oregon’s consumer protection statute for *all* class members—including those who received refunds. *Id.* at 7. Thus, in assessing its settlement position, petitioner will have to contend with the possibility of paying statutory damages to the entire class if it is unable to prove that particular class members received refunds

and thus should not be awarded damages. And that is to say nothing of the litigation costs necessary to conduct individualized inquiries into whether each class member received a refund. To avoid placing petitioner in that untenable position, the lower courts should have excluded uninjured individuals from the definition of any certifiable class.

It is cold comfort for defendants that individuals will be required to prove injury before they are awarded damages. As a practical matter, petitioner (and other defendants in its position) will face tremendous pressure to settle well before then. And once a case has settled, the process of administering claims to distribute the settlement payment typically gives defendants little if any recourse in the event of overpayment. Rather, the defendant usually pays a lump sum into a settlement fund that an administrative entity will be responsible for distributing. If the number of injured individuals identified through that process is lower than the parties anticipated, the excess funds rarely come back to the defendant. Such funds are instead either distributed to the identified class members on a pro rata basis or otherwise used as a *cy pres* award. See Barbara J. Rothstein & Thomas E. Willging, Fed. Jud. Ctr., *Managing Class Action Litigation: A Pocket Guide for Judges* 30 (3d ed. 2010); see also *Marek v. Lane*, 571 U.S. 1003, 1006 (2013) (Roberts, C.J., statement respecting denial of certiorari) (noting that “[c]y pres remedies” are “a growing feature of class action settlements”).

Excluding uninjured individuals from the class definition would materially improve the parties’ ability to negotiate a fair settlement. At the point of post-certification settlement negotiations, the key

figure is the number of class members. A clear holding from this Court that the class definition must exclude uninjured members would ensure that figure is accurate.

B. Certification of Oversized Classes Acutely Harms Retailers

The question presented is exceedingly important to American retailers. The question has consistently recurred in published decisions. *See* Pet. 13 (citing cases). And those decisions are just the tip of the iceberg because they do not include the untold cases in which certification of an oversized class coerced a defendant to settle before the issue could be litigated on appeal. For example, in *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084 (N.D. Cal. 2018), the district court certified a Rule 23(b)(3) class of consumers challenging various statements on cereal packaging suggesting that Kellogg cereal is healthy—despite no common method to determine which class members even saw the statements (some of which were “in miniscule font”) before purchasing. *Id.* at 1098-99. After the Ninth Circuit denied review under Rule 23(f), *see Hadley v. Kellogg Sales Co.*, No. 16-cv-04955 (N.D. Cal. Nov. 8, 2018), Dkt. No. 236, the parties ultimately settled for \$13 million, *see id.* at Dkt. No. 401 at 7 (motion for final approval); *id.* at Dkt. No. 407 (order granting final approval). Such “coerced settlements substantially raise the costs of doing business.” *Lab’y Corp.*, 605 U.S. at 333 (Kavanaugh, J., dissenting from dismissal of writ as improvidently granted).

Similarly, in *Stillmock v. Weis Markets, Inc.*, 385 F. App’x 267 (4th Cir. 2010), the Fourth Circuit reversed the district court’s denial of class certification in a case

involving approximately one million class members whose credit-card numbers were printed on their receipts. *Id.* at 270. “The putative class expressly excluded customers . . . who suffered actual damages due to identity theft.” *Id.* at 268-69. Yet given the possible statutory damages at issue, the defendant grocery store faced potential liability “of between \$100 million and \$1 billion dollars.” *Id.* at 279 (Wilkinson, J., concurring). As Judge Wilkinson pointed out, “[c]ertifying a class action that would impose annihilative damages where there has been no actual harm from identity theft could raise serious constitutional concerns.” *Id.* at 278 (Wilkinson, J. concurring). To avoid that “devast[ating]” result, *id.*, the grocery store settled on remand, *see Stillmock v. Weis Mkts., Inc.*, No. 1:07-cv-01342, Doc. 120-1 at 3 (D. Md. Mar. 31, 2011).

Retailers are particularly vulnerable to the types of lawsuits that can result in the certification of overinflated classes under the Ninth Circuit’s rule. Retailers’ scale and direct services to customers create visibility that makes them the frequent targets of litigation. Large retailers like RLC’s members sell huge volumes of products to many millions of customers each year, both through physical stores and online. Such retailers thus regularly face large class action lawsuits raising a broad spectrum of claims, from antitrust, to products liability, to data privacy. *See, e.g., Apple Inc. v. Pepper*, 587 U.S. 273, 276 (2019) (describing overcharge claims against retailers as “a classic antitrust claim”); *Panelli v. Target Corp.*, 172 F.4th 1120, 1128 (9th Cir. 2026) (reversing dismissal of putative class action related to alleged advertising of bed sheets); *Esgate v. Home Depot U.S.A., Inc.*, No. 24-cv-01806-MTK, 2025 WL 1207217, at *1 (D. Or.

Apr. 24, 2025) (denying motion to dismiss in putative class action challenging Home Depot’s and its Blinds.com-related sites’ price-display policies); *Castillo v. Costco Wholesale Corp.*, No. 23-cv-01548-JHC, 2024 WL 4785136, at *1, 17 (W.D. Wash. Nov. 14, 2024) (granting in part and denying in part motion to dismiss putative class action challenging data collection practices by pharmacy webpages).

Class actions against retailers also frequently involve uninjured putative class members. For instance, many claims against retailers allege injuries that depend on an individual’s subjective preferences or exposure to particular content; if class members in fact lacked those preferences or were never exposed to the relevant content, they will not have suffered Article III injury. *See, e.g., In re Folgers Coffee Mktg.*, 159 F.4th 1151, 1156 (8th Cir. 2025) (reversing certification of putative class action alleging that defendant misrepresented the amount of coffee in a canister because “many people in [the] proposed class” nevertheless “got exactly what they had bargained for when they purchased the Folgers products at issue”); *Shaulis v. Nordstrom, Inc.*, 865 F.3d 1, 11 (1st Cir. 2017) (affirming dismissal of consumer’s putative class action against clothing retailer regarding representations on price tags after determining that the named plaintiff received what she paid for). When the class definition sweeps in individuals who were not injured by whatever problem is alleged about the product in question, retailers face the risk of overinflated liability—and the guarantee of expensive and lengthy investigations into whether individual class members in fact suffered injury.

The problem of individualized investigations and proof is particularly acute for brick-and-mortar stores,

which do not necessarily track each customer's specific purchases (or, as relevant here, their refunds). The absence of such preexisting transaction records makes it difficult to affirmatively disprove class members' claims of injuries. And that difficulty underscores the significant practical difference between excluding uninjured individuals in the class definition, as opposed to during an individualized process after a verdict or settlement: while a retailer's general business records may suffice to accurately assess the size of a class, more evidence is often needed to assess the validity of any specific individual's claim at the remedies phase.

These dynamics have serious implications for retailers, many of whom operate on thin margins. In 2025 alone, large companies responding to a survey reported over \$4.5 billion in annual spending on class-action lawsuits. See Carlton Fields, *2026 Carlton Fields Class Action Survey* at 6-7 (2026), <https://perma.cc/W6US-WQUR>. More than 22% of that spending came in consumer-fraud cases, where consumers claim to have relied on a retailer's or manufacturer's allegedly misleading, exaggerated, or false statements about a product. *Id.* at 9. Those figures comport with a recent LexisNexis report finding that online retailers (alongside large technology companies) are the most frequent defendants in class action lawsuits. See Adam Mills Masarek, LexisNexis, *Lex Machina Class Action Litigation Report 2026* at 13 (Apr. 2026), <https://perma.cc/529C-RXUU>. Indeed, one national retailer alone faced more than one hundred putative class action lawsuits between 2023 and 2025. *Id.*

As those statistics make clear, resolution of the question presented is of utmost importance to retailers

across the country. Excluding uninjured individuals from the class definition before certification—in accordance with Article III and Rule 23—would substantially lessen the burden of class action litigation on retailers by ensuring that the size of classes is accurately measured from the outset. In turn, that would reduce the risk that retailers will be subjected to undue settlement pressures and excessive litigation costs. The Court should grant review to resolve this issue of surpassing importance to retailers and businesses across the economy.

III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THE QUESTION PRESENTED

The Court should grant certiorari now, rather than waiting for a future case presenting the question here. The question is cleanly presented and essential to the outcome below. The Ninth Circuit squarely rejected petitioner’s arguments that (1) “Article III precludes class certification because the class includes unnamed members who have not suffered an injury” and (2) “common issues do not predominate over individual issues” under Rule 23(b)(3). Pet. App. 2a. The court explained that it 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.’” *Id.* at 3a (citation omitted). And it further reasoned that “[t]he possibility that a class ‘potentially includes more than a de minimis number of uninjured class members’ does not preclude certification” under its precedents. *Id.* at 4a (quoting *Olean Wholesale Grocery Coop. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022) (en banc)). Accordingly, the question presented was outcome determinative in the court of appeals.

Nor is there meaningful risk that changed circumstances will impede this Court's review (as they did in *Laboratory Corporation*). Following the district court's order certifying the class, the Ninth Circuit granted review under Rule 23(f). At that point, the district court stayed all proceedings, and it has now extended that stay at least through this Court's disposition of the petition for a writ of certiorari. D. Ct. Dkt. 198. Unlike in *Laboratory Corporation*, then, it appears highly unlikely that the district court would modify the class-certification order while the case is pending in this Court. Thus, this case cleanly presents the critical legal question that the Court has twice granted certiorari to consider. It should grant review again here and finally resolve that question.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

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