No. 26-376

IN THE

Supreme Court of the United States

BAYER HEALTHCARE LLC,

Petitioner,

v.

DONIECE DRAKE and DEBORAH BOWLING, individually and on behalf of all others similarly situated,

Respondents.

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, BUSINESS ROUNDTABLE, AND THE RETAIL LITIGATION CENTER, INC. AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici represent a diverse array of businesses and business interests across the United States whose members are frequent targets of class-action lawsuits. They support the petition because they have a strong interest in ensuring that lower courts comply with the rigorous analysis required by Federal Rule of Civil Procedure 23 and Article III of the Constitution before permitting a case to proceed as a class action.

The organizations joining this brief are:

The Chamber of Commerce of the United States of America. The Chamber is the world's largest business organization. As the nation's leading advocate for business, the Chamber represents companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases that raise issues of concern to the nation's business community.

American Tort Reform Association. ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of

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[1] Pursuant to Rule 37.6, amici state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from amici, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties received timely notice of this brief under Rule 37.2(a).

the civil justice system with a goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed amicus briefs in cases involving important liability issues.

Business Roundtable. Business Roundtable represents the chief executive officers of America's leading companies. Business Roundtable's CEO members lead U.S.-based companies that support one in four American jobs and almost a quarter of U.S. gross domestic product. Business Roundtable was founded on the belief that businesses should play an active and effective role in the formulation of public policy, and Business Roundtable members develop and advocate for policies to promote a thriving U.S. economy and expanded opportunity for all. Business Roundtable participates in litigation as amicus curiae when important business interests are at stake.

The Retail Litigation Center, Inc. The 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 courts. The RLC's members employ millions of people throughout the U.S., 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, and has filed more than 250 amicus briefs on issues of importance to the retail industry.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should follow through on what it has already recognized twice before: lower courts need clarity on whether they may certify a class containing members with no concrete injuries. Although the Court ultimately sidestepped that question in *Laboratory Corp. of America Holdings v. Davis*, 605 U.S. 327 (2025) ("*LabCorp*"), and *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016), before that, the considerations that warranted review on each occasion are as compelling as ever.

In the absence of guidance from this Court, numerous appellate courts have codified what is effectively an injury-optional analysis of Rule 23(b)(3) predominance. Such courts permit the certification of classes that sweep in scores of uninjured members—in this case, potentially *all* uninjured members—with no firm limits on how high that number can go. But these courts' certify-first, winnow-later approach cannot be reconciled with threshold requirements of Rule 23(b)(3) predominance or Article III injury-in-fact. It permits plaintiffs who lack evidence of harm to drive the evaluation of whether aggregation of claims is merited and allows plaintiffs to pad classes with members who have no concrete stake in the litigation. It blurs the jurisdictional limits imposed on federal courts by Article III and enables serious standing questions to be punted to another day. And it entrenches lax gatekeeping at the certification stage, as exemplified in the Ninth Circuit, which has now spawned *LabCorp*, the pending petition in *Kroger Co. v Solano*, No. 26-244, and this case.

As amici have already argued, *Kroger* presents a clean opportunity to bring the Ninth Circuit's approach in line with baseline limitations on deploying the class-action device and the other circuits that heed those limits.

In addition, this Court might see benefits to addressing the same question through this petition in the context of consumer protection law. That context is one in which the Ninth Circuit's especially lax class-certification approach has demonstrated particularly stark contravention of Article III: California's product-labeling cases allow a "presumption of reliance" akin to what this Court applies in the securities-fraud context, and have propagated the rise of "price-premium" damages models that courts routinely treat as common proof of injury, even for consumers who were not deceived. But those premises cannot elide the minimum requirements of Article III. In an individual suit, Article III requires a plaintiff to show *reliance* on the purported misrepresentation on the label. A reliance showing is no less critical in a class action, where the very existence of injury-in-fact should be supported by some evidence, not simply presumed. And its absence is particularly glaring here, where class representatives have no evidence that any absent class member gave weight to the "Natural" label and suffered concrete injury.

The erroneous approach below has paved the way for certification of overbroad classes filled with uninjured members. Sprawling class actions are being put on the glidepath to extracting *in terrorem* settlements, ratcheting up the costs of doing business. Those costs affect countless American businesses and ultimately find their way to the consumers and

workers that depend on them. Unless this Court intervenes, the Ninth Circuit will continue to function as a veritable conveyor belt of candidates for certiorari.

ARGUMENT

I. Review is Needed to Clarify that Federal Courts May Not Certify a Rule 23(b)(3) Class Containing Uninjured Class Members.

A. This Court Has Twice Granted Certiorari to Answer This Question.

This Court correctly judged 11 years ago in *Tyson Foods* and again two years ago in *LabCorp* that whether a class may be certified under Rule 23(b)(3) when it sweeps in uninjured class members warrants resolution. Neither case produced that resolution. In *Tyson Foods,* the Court held that the petitioner's reframing of the question presented in its merits brief marked an "abandonment of its argument from the petition," removing the basis on which the Court had waded in. 577 U.S. at 460. And in *LabCorp*, the Court dismissed the writ as improvidently granted after the respondents argued that the class-certification order had been mooted by subsequent clarification of the class definition. *See* 605 U.S. at 330–31 (Kavanaugh, J., dissenting).

However, what prompted the Court to grant certiorari in the first place was the "important class-action question" presented. *Id.* at 330. As LabCorp's petition argued, "It is hard to imagine a better issue for this Court's review" than one that "sharply divides the circuits, implicates billions of dollars, and has already … captured this Court's attention." LabCorp Pet.*13, No. 24-304, 2024 WL 4241232 (Sept. 13,

2024). The same considerations apply here with even greater force.

Though the circuit divisions on the question have been acknowledged for over a decade, *see, e.g., In re Deepwater Horizon*, 739 F.3d 790, 800-01 (5th Cir. 2014), more courts have joined that chorus since *LabCorp*, *see, e.g., Wilson v. Centene Mgmt. Co., LLC*, 168 F.4th 217, 230 (5th Cir. 2026) (noting "split" among "competing approaches to class standing"). Courts remain split along "three blocs" as to how many uninjured members can be encompassed in a certified class: *none*, per the courts that focus on Article III standing at certification; a *de minimis* number, per the courts that construe Rule 23(b)(3) predominance as allowing nothing more; and *many*, per the courts like the Ninth Circuit that reject even a de minimis cap. Pet.3, 15-20.

Sharpening the divisions, the Fourth and Tenth Circuits have recently solidified their positions within those camps. The Fourth Circuit aligned itself with the second bloc in *Spurlock v. Wexford Health Sources, Inc.*, holding that "some uninjured individuals may be encompassed within the proposed class" without defeating predominance, so long as they are "outliers." 175 F.4th 232, 252 (4th Cir. 2026). And the Tenth Circuit joined the third bloc in *Rider, Tr. of Cherry Rider Fam. Tr. v. OXY USA, Inc.*, brushing aside a complaint that many "putative members cannot have a claim" on grounds that "includ[ing] more than a de minimis number of uninjured class members'" is permitted by Rule 23. 175 F.4th 1214, 1226, 1232 (10th Cir. 2026) (quoting *Olean Wholesale Grocery Coop. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022) (en banc)).

The continued splintering over when, if ever, a certified Rule 23(b)(3) class may encompass uninjured members cries out for resolution. Two vehicles before this Court present all the upsides of review from *Tyson Foods* and *LabCorp* and none of their pitfalls: the *Kroger* petition cleanly tees up the question in a Rule 23(f) interlocutory ruling issued while district court proceedings were stayed. *See* Brief for Chamber of Commerce, ATRA, and Business Roundtable as Amici Curiae Supporting Petitioner, *Kroger Co. v. Solano*, No. 26-244 (Oct. 5, 2026); Brief for Retail Litigation Center as Amici Curiae Supporting Petitioner, *Kroger Co. v. Solano*, No. 26-244 (Oct. 5, 2026). This petition arises in that same posture, and offers an opportunity to resolve the issue against the problematic backdrop of consumer-protection laws, which have spawned countless class actions and indefensible decisions running roughshod over Article III. This Court should not hesitate to grant certiorari in at least one (and preferably both) of these cases before the circuit divisions further metastasize.

B. The Ninth Circuit's Approach Is Wrong, and Compounded By the Flawed "Presumption of Reliance" in California Consumer Protection Cases.

1. On the merits, the Ninth Circuit's "hyper-permissive approach to certification," LabCorp Pet.*19, contorts core tenets of both Rule 23(b)(3) predominance and Article III standing. Entrenched Ninth Circuit precedent—cited more than 60 times within the circuit to date—rejects the view that Rule 23(b)(3) "does not permit the certification of a class that potentially includes more than a de minimis number of uninjured class members." *Olean,* 31 F.4th

at 669. "Put affirmatively," *Olean* means "a class containing *more than a de minimis number* of uninjured class members *may be certified* pursuant to Rule 23." *Weiner v. Ocwen Fin. Corp.*, 343 F.R.D. 628, 632 (E.D. Cal. 2023) (emphasis added).

Rule 23(b)(3) predominance is a stringent threshold bar. Because "Rule 23(b)(3) … is an 'adventuresome innovation' … framed for situations 'in which class-action treatment is not as clearly called for,'" it rests on a give-and-take: "it allows class certification in a much wider set of circumstances [than with (b)(1) or (b)(2) classes] but with greater procedural protections." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614-15 (1997)). Chief among those protections is the "prerequisite[]" that common questions of law or fact predominate. *Id.* That threshold is "demanding" and entails a "'close look,'" *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013), and class plaintiffs must affirmatively, "actually prove" its satisfaction "before class certification," *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275-76 (2014).

Rule 23's plain text—"predominate"—reflects that high bar, connoting that individualized issues should be de minimis. A "straightforward" application of "Rule 23 and this Court's precedents" compels the view that "when a damages class includes both injured and uninjured members, common questions do not predominate." *LabCorp*, 605 U.S. at 328, 332 (Kavanaugh, J., dissenting). Only when the court is persuaded that members "possess the same interest and suffer the same injury" is the exceptional treatment of class-wide adjudication justified over the

norm of litigation by and on behalf of individuals. *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 402 (1977).

So too with Article III standing, a "threshold" requirement going to the justiciability of claims. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). "[T]o avoid a dismissal based on a lack of standing, the court must be able to find that both the class and the representatives have suffered [an Article III] injury." 7AA Charles Alan Wright et al., Federal Practice and Procedure § 1785.1 (3d ed. 2024). As this Court clarified in *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), "standing is not dispensed in gross" and "[e]very class member must have Article III standing in order to recover individual damages." *Id.* at 431. Critically, "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 331 (2016).

Where proposed class members lack evidence that they suffered concrete harm, those members may not simply glom onto the injury-in-fact of representatives. *See Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981, 987-88 (8th Cir. 2021) ("a class cannot be certified if it contains members who lack standing"); *Drazen v. Pinto*, 41 F.4th 1354, 1361 (11th Cir. 2022) ("class definition must be limited to those individuals who have Article III standing"). The class-action device cannot manufacture an injury-in-fact that does not otherwise exist. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010); William G. Beatty, *Winnowing the Wheat from the Chaff: The Continuing Controversy over Article III Standing and the Certification of Rule 23(b)(3)*

Damages Classes Containing "Uninjured" Members, 17 Wm. & Mary Bus. L. Rev. 253, 317 (2026) ("Allowing certification of a class action case in which more than a few uninjured members are present frustrates both the 'concrete harm' standard of Article III as well as the commonality and predominance requirement"). Indeed, the Rules Enabling Act forbids Rule 23 from "abridg[ing], enlarg[ing] or modify[ing] any substantive right." 28 U.S.C. § 2072(b); *see also* Fed. R. Civ. P. 82 ("These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts."). Rule 23 serves to aggregate claims, not conjure them into existence. And Article III gaps must be policed at the threshold, not waved aside for post-certification winnowing.

A lax approach to uninjured class members at certification thus runs roughshod over both Rule 23(b)(3) predominance and Article III. Even in the Ninth Circuit, however, the decision below represents one of the most extreme instances of accommodating more-than-de-minimis numbers of the uninjured—here, a class where virtually "*all*" members have no evidence of injury. App.4a ("[E]ither all class members were injured or they were not," and "that is entirely consistent with this court's reasoning in *Olean*"). In affirming certification, the Ninth Circuit made no mention of Article III. And in a bare reference to "injury-in-fact," it reasoned not that plaintiffs *had shown* injury-in-fact, nor that their proposed "price premium" damages model *would show* injury-in-fact, but only that the proposed model *might show* injury-in-fact as one of two possible outcomes. *Id*. That is, "Dr. Ingersoll's proposed conjoint analysis" might determine that a price premium attributable to the

alleged misrepresentation was *either* "presen[t] or absen[t]," and that question was not-yet-answerable because the model was not-yet-executed. App.4a-5a.

In effect, the Ninth Circuit turned Rule 23(b)(3) and Article III gatekeeping on its head, defying the prerequisite that plaintiffs "actually *prove*" predominance prior to certification. *Halliburton*, 573 U.S. at 275-76. If there is *no* injury across the class, it matters not that the non-injury is common—that class should not move past go. And "injury-*in-fact*" is meaningless if merely outlining an expert's proposed, not-yet-executed analysis that might show injury (or not) clears that bar. *See, e.g., TransUnion*, 594 U.S. at 424 (injury-in-fact must be "real, and not abstract"). To contemplate that virtually *all* class members can simply be "winnowed" out down the line would take a certify-first, winnow-later approach to new extremes.

2. The Ninth Circuit's hyper-permissive approach to uninjured class members is only compounded by the inapt "presumption of reliance" applied in California consumer protection law. As Judge Forrest recognized in her dissent, this line of cases—often entailing, as here, claims under California's Consumers Legal Remedies Act (CLRA)—has drifted farther and farther afield from policing of legally cognizable injury-in-fact.[2] App.10a-12a.

The CLRA prohibits "deceptive acts or practices," Cal. Civ. Code § 1770(a), whereby plaintiffs "show not

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[2] While Judge Forrest would have only reversed certification of the California class, the same injury defects bedevil the New York class. Like the CLRA, New York's General Business Law requires injury to be caused by the alleged misrepresentation. *See Solomon v. Bell Atl. Corp.*, 9 A.D.3d 49, 52-53 (1st Dep't 2004).

only that a defendant's conduct was deceptive but that the deception caused them harm." *Mass. Mut. Life Ins. Co. v. Superior Court,* 97 Cal.App.4th 1282, 1292 (2002). "'Causation … may be established by *materiality*'" of the misrepresentation, and in turn, materiality may be established based on whether an objective, "reasonable consumer" would view it as important in the purchase decision. *Noohi v. Johnson & Johnson Consumer Inc.*, 146 F.4th 854, 868 (9th Cir. 2025). Thus, "California law does not require an individualized inquiry into each CLRA-class member's reliance." App.7a. Rather, upon a finding that "a material misrepresentation was made," plaintiffs are afforded a class-wide "presumption of reliance." *Lytle v. Nutramax Lab'ys, Inc.*, 114 F.4th 1011, 1019, 1022 (9th Cir. 2024).

That presumption is purportedly rebuttable upon a showing that "materiality or reliance … would vary from consumer to consumer." *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 129 (2009). At the same time, California law cautions that "establish[ing] a lack of causation as to a handful of class members does not necessarily render the issue of causation an individual, rather than a common, one." *Id.* And as this case illustrates, the presumption has proven all but dispositive: The decision below opined that "named Plaintiffs' deposition testimony, Bayer's internal documents, and Dr. Matthews's survey" entitled them to the presumption of reliance. App.7a. But as Judge Forrest pointed out in dissent, "neither the *named plaintiffs'* depositions nor *Bayer's* internal documents can demonstrate classwide reliance" as to absent class members, App.12a (emphases added), and Dr. Matthews "testified 58 times that she had *no*

evidence that *any* consumer was deceived by the product label," Pet.9-10 (emphasis added). The majority nonetheless insisted that these points did not "defeat" certification, ignoring Article III's strictures. It explained that "at this [certification] stage," the key is whether reliance is "susceptible to common proof," App.7a—and here, caselaw presumes it is. *See Lytle*, 114 F.4th at 1034 (deceptive-marketing claims are "generally susceptible to common proof"). This was, however, mere tautology, deeming the presumption of class-wide reliance undefeated because, in effect, class-wide reliance is presumed.

That state-law presumption of reliance itself stands on unsound footing and cannot be simply imported into the federal Article III analysis. California courts extended the concept to CLRA cases in *Massachusetts Mutual Life Insurance Co. v. Superior Ct.*, 97 Cal. App. 4th 1282 (2002). *Massachusetts Mutual* drew from a presumption applied in fraud cases from *Vasquez v. Superior Ct.*, 4 Cal. 3d 800 (1971). And *Vasquez*, in turn, analogized to the presumption of reliance applied in federal securities fraud cases. *See id.* at 814-15 (noting "class action cases in which stockholders have alleged fraud" but are "not … required to establish reliance by each stockholder"). But what might make sense in the securities market has little utility in the market for consumer goods.

For federal securities fraud, this Court's presumption of reliance from *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), "is premised on the theory that investors rely on the market price of a company's security, which in an efficient market incorporates all of the company's public misrepresentations."

Goldman Sachs Grp. v. Arkansas Tchr. Ret. Sys., 594 U.S. 113, 117 (2021). The doctrine assumes that a stock's price reflects all material information, such that investors who bought stock have constructively relied on the misrepresentation.

Whatever one thinks of the questionable *Basic* presumption, markets for consumer goods are markedly different. Consumers have a panoply of personal and emotional motivations for purchasing goods untethered to prices. Product prices, moreover, do not tick fluidly up and down based on marketing. *See, e.g.* 1 McLaughlin on Class Actions § 5:55 (22nd ed. 2025) ("Most courts have not permitted plaintiffs in consumer cases to overcome the predominance shortcoming … through use of the securities law 'fraud on the market' presumption of reliance"); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 224 (2d Cir. 2008) (decertifying a class alleging RICO violations based on product mislabeling in part because the *Basic* presumption applies in the efficient securities market but not in the inefficient market for consumer goods). In fact, plaintiffs' own survey expert found *no* statistical impact from removing the word "Natural" from the label. And named plaintiffs manifestly lack compelling evidence that all class members would have relied on the label in making their purchases. Pet.9. Yet California law dictates a *Basic*-style presumption even here, where the underlying assumptions do not translate.

Applying the presumption of reliance in this context has led to the proliferation of "price premium" theories of injury. Price-premium damages models—from a cadre of familiar experts—purport to use conjoint analysis to measure the "overpayment

attributable to the challenged [label]" as common proof. *Noohi*, 146 F.4th at 865; *see also* App.4a ("Dr. Ingersoll's proposed conjoint analysis demonstrated … the price premium attributable to the label claims'"); *Falcone v. Nestle USA, Inc.*, No. 24-7707, 2026 WL 74510, at *2 n.2 (9th Cir. Jan. 9, 2026) ("The district court may want to consider Dr. William Robert Ingersoll's proposal for a price premium (conjoint) damages model as a more appropriate way to measure Falcone's damages."); *Lytle*, 114 F.4th at 1036 (plaintiffs' theory of causation was "that they paid more than they otherwise would have as a result of the misleading statements").[3]

"[P]rice premium[s]" have thus ascended into the Ninth Circuit's "standard measure of damages under the CLRA," *Noohi*, 146 F.4th at 865. Yet a price-premium expert is no substitute for proving Article III injury-in-fact. As Judge Forrest observed, price

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[3] *See also Milan v. Clif Bar & Co.*, 340 F.R.D. 591, 601 (N.D. Cal. 2021) ("Gaskin's proposed conjoint analysis" can "estimate price premia"); *Bailey v. Rite Aid Corp.*, 338 F.R.D. 390, 408 (N.D. Cal. 2021) ("Gaskin … has designed but not yet executed a choice-based conjoint analysis that … measur[es] this price premium"); *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1104 (N.D. Cal. 2018) ("Gaskin['s] … conjoint analysis will yield estimates of the 'market price premia'"); *In re Arris Cable Modem Consumer Litig.*, 327 F.R.D. 334, 368 (N.D. Cal. 2018) ("Gaskin states that … conjoint analysis will yield …. 'price premium attributable to' the alleged misstatements"); *Fitzhenry-Russell v. Dr. Pepper Snapple Grp.*, 326 F.R.D. 592, 615 (N.D. Cal. 2018) ("price premium measures … how much the 'Made From Real Ginger' claim is worth" and "is able to calculate damages on a class-wide basis"); *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 989 (C.D. Cal. 2015) ("if plaintiffs … propose a methodology to calculate the price premium attributable to use of the '100% Natural' label … they will be able demonstrate causation on a classwide basis").

premiums are no answer to how "only those class members who *relied* on the misrepresentation have suffered a *legally cognizable injury*." App.11a (Forrest, J., dissenting) (emphasis added). They do not amount to "evidence" that "*injury* is common to all." App.4a, 7a-8a. As a state-law matter, California is free to fashion a "reasonable consumer" standard for materiality and even a "presumption of reliance" to make product-labeling claims more amenable to class treatment in California state courts. But those state-law rules cannot control the federal Article III standing analysis. California's rules ultimately cannot sidestep the federal minimum showing that Article III requires to establish injury-in-fact at the get-go of any individual suit in federal court: that of the plaintiff's actual reliance on the representation. California cannot establish as a matter of law a federally sufficient Article III injury that does not exist. Nor can California dictate to federal courts what *evidence* (like materiality) suffices to prove such an injury-in-fact for each putative class member.

The decision below reflects the perfect storm: It combines the Ninth Circuit's permissive accommodation of uninjured class members at certification, with its rote acceptance of price-premiums as class-wide injury, with its embrace of a "merely proposed," unexecuted price-premium model that might well show that "all class members … were *not*" injured. App.4a-5a (emphasis added). The unfortunate result are certified classes of "thousands" of multivitamin consumers, App.23a, seeking tens of millions of dollars in damages, Pet.8, in which virtually *all* class members lack evidence of injury and may lack standing. Precisely because this confluence

of errors has rendered California consumer-protection cases (in the Ninth Circuit's eyes) "generally 'ideal for class certification,'" *Noohi*, 146 F.4th at 868, this line of cases is a particularly good one for this Court to resolve the question presented.

II. The Ninth Circuit's Approach "Raise[s] the Costs of Doing Business" and Ultimately Harms Consumers.

1. The practical harms of this errant approach are stark. Classes "overinflated with *uninjured* members" threaten businesses with "massive liability" and will "substantially raise the costs of doing business." *LabCorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting) (emphasis added). Nowhere is this more clearly on display than in the Ninth Circuit.

Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC, 31 F.4th at 686, *cert. denied*, 143 S. Ct. 424 (2022)—the Ninth Circuit's landmark case deeming more-than-de-minimis uninjured members no bar to certification—entailed a class of tuna consumers alleging price-fixing. The class consisted of "thousands" of proposed members, *In re Packaged Seafood Prods. Antitrust Litig.*, 332 F.R.D. 308, 329 (S.D. Cal. 2019), and was certified despite testimony that "*almost a third* of the class members may not have suffered injury." *Id.* at 685-86 (emphasis added). By the Ninth Circuit's view, a remarkable "one out of three members" could simply be "winnow[ed] out … later at trial," rather than grappled with at the certification stage. *Id.* at 686.

Davis v. Laboratory Corp. of America Holdings, No. 22-55873, 2024 WL 489288 (9th Cir. Feb. 8, 2024), *cert. granted but dismissed as improvidently granted*, 605

U.S. 327 (2025), entailed a class of "hundreds-of-thousands of people" challenging self-service kiosks that were allegedly inaccessible to the legally blind, seeking "*half a billion dollars* a year." LabCorp Pet.*3. Many members may have visited treatment centers that had kiosks, but "would not use kiosks anyway because they dislike kiosks or prefer to speak with a front-desk employee," 605 U.S. at 329 (Kavanaugh, J., dissenting). Yet the Ninth Circuit brushed this aside, noting that circuit precedent permits "'certification of a class that potentially includes more than a de minimus [sic] number of uninjured class members.'" 2024 WL 489288, at *2 n.1 (quoting *Olean*, 31 F.4th at 669). In its view, the injury of even one named plaintiff sufficed to "convey Article III standing" for the class of hundreds-of-thousands of others. *Id.* at *1.

Lytle v. Nutramax Laboratories, Inc., 114 F.4th 1011 (9th Cir. 2024), *cert. denied*, 145 S. Ct. 1308 (2025), followed suit in another CLRA action involving a class of purchasers of dog products marketed as promoting healthy joints. The class sought to prove their price-premium theory through an "unexecuted" damages model. *Id.* at 1024, 1026 n.4. The Ninth Circuit reasoned that certification was consistent with the possibility that "an ascertainable portion" of the class "suffered no injury" because they were "not exposed to a statement with any attributable overcharge." *Id.* at 1026-27 (citing *Olean*, 31 F.4th at 669). It reasoned that there was a "possibility" that the expert's unexecuted damages model would reveal "no damages," but that the predominance requirement would nonetheless be satisfied because the *lack* of a price premium would "be common to the class." *Id.* at 1026. Defendant's concerns about permitting a class

"where it is uncertain that a damages model will show any injury at all" were deemed "largely irrelevant." *Id.* at 1029. The Ninth Circuit merely repeated the tautology that "CLRA claims are ideal for class certification" because courts need not investigate individual consumers' reliance. *Id.* at 1037. Fast-forwarding to the present day, an $11.5 million class settlement awaits final approval. *See* Lytle Dist. Ct. Order at 7, *Lytle v. Nutramax Lab'ys Inc.*, No. 19-0835 (C.D. Cal. Feb. 2, 2026), Dkt. No. 218.

Painters & Allied Trades District Council 82 Health Care Fund v. Takeda Pharmaceutical Co. Ltd., No. 23-55742, 2025 WL 1683472, at *4 (9th Cir. June 16, 2025), *cert. denied,* 146 S. Ct. 1817 (2026), meanwhile, blessed the certification of a multibillion-dollar civil RICO class action premised on "millions of prescribing decisions by thousands of individual physicians," *Id.* at *10 (Miller, J., dissenting). Plaintiffs' expert, however, estimated that just "56 percent of Actos prescriptions were fraudulently induced" by the allegedly concealed risks and "that 44 percent were not." *Id.* at *8 (Miller, J., dissenting). Nearly *half the class*, then, "would have paid for Actos prescriptions even had the risk been disclosed." *Id.* But the Ninth Circuit tabled this issue, holding that "[a]ny challenge of removing uninjured class members … does not defeat predominance." *Id.* at *4 (citing *Olean*, 31 F.4th at 668).

Noohi v. Johnson & Johnson Consumer Inc., 146 F.4th 854 (9th Cir. 2025), *cert. denied*, 146 S. Ct. 2587 (2026), similarly affirmed certification in a CLRA class action, this time of a consumer class taking issue with a representation that certain products were "oil-free." The Ninth Circuit found no error in accepting the

class's proposed, unexecuted damages model as "sufficient for purposes of class certification." *Id.* at 861. It reasoned that "class wide damages calculations under the … CLRA are particularly forgiving" and that other courts addressing CLRA claims have held that members "need not … share a uniform understanding of the contested term." *Id.* at 866, 870. The district court had acknowledged that the model "may show that *no class members* were actually harmed by the allegedly deceptive packaging language" yet proceeded to certify. *Noohi v. Johnson & Johnson Consumer, Inc.*, No. CV 20-03575, 2022 WL 22278783, at *6 (C.D. Cal. Nov. 30, 2022) (emphasis added). Citing circuit precedent, it reasoned that Rule 23 "permit[s] the certification of a class that potentially includes more than a *de minimis* number of uninjured class members." *Id.* (quoting *Olean*, 31 F.4th at 669).

Falcone v. Nestle USA, Inc., 2026 WL 74510 (9th Cir. Jan. 9, 2026), *cert. pending*, affirmed certification of a class of Nestlé chocolate consumers challenging labeling that described the products as "sustainably" or "responsibly" sourced. *Id.* at *1. Yet the notion that "alleged misrepresentations regarding sustainability would render the purchased Nestle chocolate products to become *entirely valueless* to … *every purchaser*" is "highly implausible" on its face. *Id.* at *3 (Clifton, J., dissenting). Many consumers would not "be entitled to a full refund." *Id.* Yet the named plaintiff's testimony was deemed "sufficient to confer Article III standing" on the class, and circuit precedent was again marshaled for the proposition that the "possibility that some class members suffered no injury" does not defeat class certification. *Id.* at *1 & n.1 (citing *Olean*,

31 F.4th at 669, 680-81). Any concerns about the damages theory could be deferred until after certification. *Id.* at *1 n.1, *2 & n.2.

At bottom, what began with the Ninth Circuit's resistance to *capping* the uninjured at a de minimis number has hardened into an affirmative endorsement of *including* more-than-de-minimis numbers of the uninjured in certified classes—even, as here, a class of potentially *all* uninjured members. All this only further augments the Ninth Circuit's admitted "lean[] toward approving class certifications and class settlements," *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 582 (9th Cir. 2019) (Ikuta, J., dissenting), putting a further thumb on the scale of certification.

2. In any event, the "widespread" and "serious real-world consequences" of treating glaring injury gaps as no obstacle to certification are far from circuit-specific. *LabCorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting).

More businesses than ever face putative class-action lawsuits. "[A]round 10,000 class action lawsuits are filed annually." *Class Actions 2021* at 91, (Jonathan D. Polkes & David J. Lender, eds. 2021). 74.7% of companies—three of four—have reported managing class actions, a steep increase from 54.4% in 2018. *See* 2026 Carlton Fields Class Action Survey at 8, https://www.carltonfields.com/insights/class-action-survey.

Meanwhile, spending on class-action defense has grown from about $2 billion in 2011 to $4.53 billion in 2025, with $4.8 billion projected for 2026. *See id.* at 6–7. Such defense typically takes years, imposing protracted burdens on businesses irrespective of the

merits. *See* Adam Mills & Laura Hopkins, *Lex Machina Class Action Litigation Report* 18 (April 2026) ("the median time to class certification was over two years, and the median time to class action settlement was over two and a half years"); Cornerstone Research, 2025 *Review & Analysis of Securities Class Action Settlements* 13 ("median duration from case filing to settlement hearing was 3.5 years").

Class-certification rulings, moreover, often prove outcome-dispositive. "[C]lass certification sets the litigation on a path toward resolution by way of settlement." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009). The catastrophic liability threatened by class actions, coupled with the heavy costs of defending against them, "coerce[] businesses into costly settlements." *LabCorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting). As this Court has recognized, class actions can "place pressure on the defendant to settle even unmeritorious claims." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 524 (2018); *see also* Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973) (describing, as "blackmail settlements," those induced by a small chance of a very large judgment in a class action). But even settlements have become more difficult and expensive to come by, as plaintiffs' counsel have been emboldened in their litigation strategy. *See* 2026 Carlton Fields Class Action Survey at 24 (noting recent drop in settlements). Thus, where courts are routinely certifying classes that sweep in uninjured members in expectation of later-stage winnowing, that stage will in all likelihood never come to pass.

With businesses compelled to treat all these costs as an inevitable part of the "costs of doing business," those costs redound "to consumers in the form of higher prices; to retirement account holders in the form of lower returns; and to workers in the form of lower salaries and lesser benefits." *LabCorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting). The decision below paints the class-action vehicle as helping vindicate consumers' claims that would otherwise go unaddressed. *Cf.* App.35a (noting "small amount in controversy for each individual consumer"). But incorrectly-certified classes—including those where not a single consumer can demonstrate harm—only ensure that consumers "share the cost of litigation in the grocery store's checkout counter, at the dealership, and in their health and auto insurance rates, through less consumer choice, and damage to the economy." Victor E. Schwartz & Cary Silverman, *The Rise of "Empty Suit" Litigation: Where Should Tort Law Draw the Line?,* 80 Brook. L. Rev. 599, 675 (2015). All stakeholders would benefit from the Court's intervention on this important issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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