

No. 26-376

IN THE
Supreme Court of the United States

BAYER HEALTHCARE LLC,

Petitioner,

v.

DONIECE DRAKE AND DEBORAH BOWLING,

Respondents.

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

**BRIEF FOR THE CONSUMER HEALTHCARE
PRODUCTS ASSOCIATION AS
AMICUS CURIAE SUPPORTING PETITIONER**

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October 19, 2026

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY	2
ARGUMENT	3
I. THE COURT SHOULD GRANT CERTIORARI AND HOLD THAT A CLASS CANNOT BE CERTIFIED WHEN VIRTUALLY ALL PUTATIVE MEMBERS HAVE NO PROOF OF INJURY	3
A. Rule 23 and Article III Require Plaintiffs to Provide Common Proof of Actual Injury	4
B. The Ninth Circuit Splits From Class Certification Standards and From Other Courts of Appeals	5
II. CERTIORARI IS WARRANTED TO AVOID MASSIVE HARM TO CHPA MEMBERS, THE ECONOMY, AND THE PUBLIC	7
A. Consumer Product Labeling Cases Are Ripe For Overbroad Classes	7
B. Certifying Classes Based on Promises Creates Perverse Incentives and Disproportionate Settlement Pressure	11
CONCLUSION	13

TABLE OF AUTHORITIES

CASES	Page
<i>Aetna Life Ins. v. Lavoie</i> , 475 U.S. 813 (1986)	7
<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997)	4
<i>Amgen Inc. v. Conn. Ret. Plans & Tr. Funds</i> , 568 U.S. 455 (2013)	3, 11
<i>AT&T Mobility LLC v. Concepcion</i> , 563 U.S. 333 (2011)	11
<i>Comcast Corp. v. Behrend</i> , 569 U.S. 27 (2013)	2, 5, 12
<i>In re ConAgra Foods, Inc.</i> , 302 F.R.D. 537 (C.D. Cal. 2014)	10
<i>Cordoba v. DIRECTV, LLC</i> , 942 F.3d 1259 (11th Cir. 2019)	4
<i>Dapeer v. Neutrogena Corp.</i> , No. 14-22113-Civ, 2015 WL 10521637 (S.D. Fla. Dec. 1, 2015)	10
<i>Falcone v. Nestle USA, Inc.</i> , No. 24-7707, 2026 WL 74510 (9th Cir. Jan. 9, 2026)	2, 9
<i>Flecha v. Medcredit, Inc.</i> , 946 F.3d 762 (5th Cir. 2020)	3
<i>In re Folgers Coffee Mktg.</i> , 159 F.4th 1151 (8th Cir. 2025)	6
<i>Lab’y Corp. of Am. Holdings v. Davis</i> , 605 U.S. 327 (2025)	3, 11, 12
<i>Lujan v. Defs. of Wildlife</i> , 504 U.S. 555 (1992)	5
<i>Mr. Dee’s Inc. v. Inmar, Inc.</i> , 127 F.4th 925 (4th Cir. 2025)	6
<i>Newman v. Bayer Corp.</i> , No. 22 CV 7087, 2026 WL 1243391 (S.D.N.Y. May 6, 2026)	10

TABLE OF AUTHORITIES—continued

	Page
<i>Noohi v. Johnson & Johnson Consumer Inc.</i> , 146 F.4th 854 (9th Cir. 2025)	6, 7
<i>Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC</i> , 31 F.4th 651 (9th 2022)	8, 12
<i>In re Rail Freight Fuel Surcharge Antitrust Litig.</i> , 934 F.3d 619 (D.C. Cir. 2019)	6
<i>Stoneridge Inv. Partners, LLC v. Sci.- Atlanta, Inc.</i> , 552 U.S. 148 (2008)	11
<i>In re Subway Footlong Sandwich Mktg. & Sales Pracs. Litig.</i> , 869 F.3d 551 (7th Cir. 2017)	8
<i>TransUnion LLC v. Ramirez</i> , 594 U.S. 413 (2021)	2, 4
<i>Tyson Foods, Inc. v. Bouaphakeo</i> , 577 U.S. 442 (2016)	4
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 564 U.S. 338 (2011)	2, 4, 5, 12

RULES

Fed. R. Civ. P. 23(b)(3)	4
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SCHOLARLY AUTHORITIES

Jeffrey A. Holmstrand, <i>In Search of Mass Tort Plaintiffs: Advertising and Its Impact on the Targeted Populations, Potential Jury Pools, and Our Clients</i> , 89 Def. Couns. J. 1 (2022)	8
John K. Rabiej, <i>The Making Of Class Action Rule 23 — What Were We Thinking?</i> , 24 Miss. C. L. Rev. 323 (2005)	13

TABLE OF AUTHORITIES—continued

	Page
OTHER AUTHORITIES	
Adeola Adele, Dukes v. Wal-Mart: <i>Implications for Employment Practices Liability Insurance</i> (July 2011)	8
Carlton Fields, <i>2026 Carlton Fields Class Action Survey</i> (2026)	8
Cary Silverman, Shook, Hardy & Bacon L.L.P., U.S. Chamber Inst. for Legal Reform, <i>Bad for Your Health: Lawsuit Advertising Implications and Solutions</i> (Oct. 2017)	8
Mayor Brown LLP, U.S. Chamber Inst. For Legal Reform, <i>Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions</i> (Dec. 11, 2013), http://bit.ly/3rrHd29	8
Ashurst Perkins Coie, <i>Food & Consumer Packaged Goods Litigation Year in Review 2025</i> (March 16, 2026), https://bit.ly/4yFwIdy	8

INTEREST OF *AMICUS CURIAE*¹

The Consumer Healthcare Products Association (CHPA) is a 145-year-old, member-based national trade association that represents the leading manufacturers and marketers of over-the-counter medicines and dietary supplements. CHPA members' products provide millions of Americans with safe, effective, and affordable therapies to treat and prevent many common ailments and diseases. CHPA supports and engages in science, education, and advocacy related to these therapies. CHPA also monitors legal issues that affect its members and the industry and provides its perspective in cases that raise such issues.

This is one of those cases. CHPA's members are routinely targeted as defendants in class action lawsuits based on supposed misrepresentations on product labels and ingredient lists. Also routinely, plaintiffs and their attorneys ask courts to certify classes consisting of *every* consumer to have purchased a product even though, in reality, *zero* consumers, or exceedingly few of them, were even arguably injured. These cases often turn on proposed consumer-perception surveys, conjoint analyses, or price-premium models—not common, reliable *evidence* of class-wide injury. CHPA submits this brief to explain that this all-too-common approach to class certification will continue to have serious consequences for its members and for the public if this Court does not correct it.

¹ No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation of this brief; and no person except *amicus*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2, counsel of record for all parties were timely notified of CHPA's intent to file this brief.

INTRODUCTION AND SUMMARY

“Class certification is to be based on evidence, not a promise that flaws will somehow be fixed later.” *Falcone v. Nestle USA, Inc.*, No. 24-7707, 2026 WL 74510, at *4 (9th Cir. Jan. 9, 2026) (Clifton, J., dissenting). The Ninth Circuit’s approach to class certification has become so warped that it took a recent *dissent* to state that irrefutable proposition. The problem is especially acute when it comes to injury: not only are classes being certified with uninjured members, but many courts are doing so without even requiring plaintiffs to show that their proposed methods of common proof actually work. This case is paradigmatic. Plaintiffs obtained class certification based on a theory and an expert’s promise that a model he has not executed may eventually establish that class members—how many is anyone’s guess—were injured. Plaintiffs provided no evidence that any consumer was actually misled or otherwise injured by a product label.

The Ninth Circuit’s decision to allow certification of such a class is incompatible with Rule 23, Article III, and this Court’s precedent. Under Rule 23, all class members must have “suffered the same injury,” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011), which is definitionally impossible when many class members suffer no injury at all. Under Article III, “[e]very class member must have ... standing in order to recover individual damages.” *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021). In all cases, moreover, plaintiffs must “affirmatively demonstrate” that class certification is warranted, *Wal-Mart*, 564 U.S. at 350, and support that showing with “evidentiary proof,” *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). It should go without saying that the possibility of future evidence is not evidence and does not “affirmatively demonstrate” anything.

If this Court does not correct the course the Ninth Circuit and others are on, the class action mechanism will “generate serious real-world consequences” for defendants like CHPA members. *Lab’y Corp. of Am. Holdings v. Davis*, 605 U.S. 327, 333 (2025) (Kavanaugh, J., dissenting) (per curiam) (*Labcorp*). Certifying a class is a “transformative” moment in a case: it can “change the number of plaintiffs from one to one million” and “dramatically change” the stakes. *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 770 (5th Cir. 2020) (Oldham, J., concurring). The chances of settlement skyrocket as companies seek to avoid the risk of “potentially ruinous liability.” *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 474 (2013). “Classes that are overinflated with *uninjured* members,” in particular, “raise the stakes for business that are the targets of class actions.” *Labcorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting). A meaningful limit on the number of uninjured members in a class—and a requirement that plaintiffs provide evidence of injury—are a critical backstop against this result. It is burdensome enough to litigate class actions through the certification stage; that burden should not be increased even further when there is no evidence that any consumer was actually misled or injured. The Court should grant certiorari and reverse.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI AND HOLD THAT A CLASS CANNOT BE CERTIFIED WHEN VIRTUALLY ALL PUTATIVE MEMBERS HAVE NO PROOF OF INJURY.

This case readily satisfies all of the criteria for certiorari: the circuits are divided, the Ninth Circuit’s approach is wrong, and the issue is exceptionally

important. Indeed, this Court has twice granted certiorari to decide the question presented and has explicitly recognized it as a question “of great importance.” *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 461 (2016). That is all the more true a decade later, and the Court should answer it now.

A. Rule 23 and Article III Require Plaintiffs To Provide Common Proof of Actual Injury.

The class certification standards require that courts carefully police the boundaries of putative classes. Rule 23 has been called an “adventuresome innovation” that massively expanded the scope of class action suits for money damages. *Wal-Mart*, 564 U.S. at 362; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614–15 (1997). To counterbalance this plaintiff-friendly expansion, however, the Rule also contains “greater procedural protections” for defendants. *Wal-Mart*, 564 U.S. at 362. Perhaps the most important is the requirement that “common” questions “predominate” over “individual” ones. Fed. R. Civ. P. 23(b)(3). That prerequisite ensures that a class is “sufficiently cohesive to warrant adjudication by representation.” *Amchem*, 521 U.S. at 623.

Actual injury is an essential part of these certification and predominance inquiries. Under Rule 23, predominance requires that class members “suffer the same injury.” *Wal-Mart*, 564 U.S. at 348. Under Article III, too, only plaintiffs that can ultimately prove injury are entitled to relief. *TransUnion*, 594 U.S. at 431. And the greater the number of uninjured plaintiffs, the more of these individualized inquiries will be necessary—“each plaintiff will likely have to provide some individualized proof that they have standing,” creating a key “individualized issue.” *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1274–75 (11th Cir. 2019). The

constitutional burden to demonstrate standing persists at each “successive stage[] of the litigation,” before and after class certification. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

These requirements ask a lot of plaintiffs and of courts before a class can be certified. “Rule 23 does not set forth a mere pleading standard,” and every plaintiff must “affirmatively demonstrate” that its proposed class satisfies the prerequisites for one. *Wal-Mart*, 564 U.S. at 350. To that end, predominance requires plaintiffs to present “evidentiary proof,” not simply a “method of measurement” that “*can be* applied class-wide.” *Comcast*, 569 U.S. at 33, 37 (emphasis added). And courts considering a plaintiff’s evidence have to roll up their sleeves too: they must engage in a “rigorous analysis” on class certification. *Wal-Mart*, 564 U.S. at 351.

Under these principles, plaintiffs must come forward with real evidence and real proof before courts can certify a class of people alleging that they have all suffered the same injury. What courts cannot do is allow plaintiffs to postpone the very evidentiary showing that justifies treating thousands of individual cases as a single lawsuit.

B. The Ninth Circuit Splits From Class Certification Standards And From Other Courts of Appeals.

Petitioner details the intractable divide among the lower courts over whether a putative class with uninjured members can be certified—and, if so, over how many uninjured class members is too many. Pet. 15–20. Many of those decisions also highlight the concomitant need to evaluate plaintiffs’ actual evidence of injury at the certification stage. In both respects, the Ninth Circuit is an outlier, and this case shows why.

On one side, several courts recognize that asking a common question is not the same thing as proving a common answer through common evidence. The D.C. Circuit, for example, allows only a *de minimis* number of uninjured class members *and* requires common evidence: a model that “leaves the plaintiffs with no common proof of ... essential elements of liability for ... 12.7 percent” of a proposed class does not satisfy Rule 23. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 624–26 (D.C. Cir. 2019); see also *id.* (“we do expect the common evidence to show all class members suffered *some* injury”). In the Fourth Circuit, an analogous evidentiary failure doomed certification when “plaintiffs’ only expert witness failed to show harm for nearly one-third of the class.” *Mr. Dee’s Inc. v. Inmar, Inc.*, 127 F.4th 925, 933 (4th Cir. 2025).

The Eighth Circuit enforces similar limits. There, a commonly-viewed product label cannot create predominance when “many class members weren’t deceived, and figuring out who was and who wasn’t will require consumer-by-consumer inquiries into each class member’s individual tastes, interpretations, and circumstances, undermining the efficiencies class actions are intended to provide.” *In re Folgers Coffee Mktg.*, 159 F.4th 1151, 1156 (8th Cir. 2025). Rule 23 does not “allow those who suffered no ascertainable loss from [a label’s] representations to piggyback on the injuries of others to pursue a remedy.” *Id.* at 1157.

On the other side, by contrast, class certification works differently in the Ninth Circuit, where plaintiffs need no common evidence at all. Instead, a plaintiff can certify a class merely by promising that an expert “propose[s] to measure” injury, whether or not “the proposed calculation of the price premium will [even] prove accurate.” *Noohi v. Johnson & Johnson Consumer Inc.*, 146 F.4th 854, 865–67 (9th Cir. 2025). So

long as someone “*could* reliably measure damages on a classwide basis,” there is no need for actual common proof before certification. *Id.* (emphasis added).

The class certification decisions here show just how problematic the Ninth Circuit’s standard is in practice. Plaintiffs presented only a “theory ... that all class members were exposed to” a product label and a “not-yet-executed” conjoint model. Pet. App. 4a–5a. Their *theory* was that “all class members were injured or they were not,” *id.*, but they presented zero *evidence*. Bayer, moreover, presented “undisputed evidence that a substantial portion of class members was not misled” or injured. *Id.* at 10a (Forrest, J., dissenting). And there was no economically coherent basis or evidence to conclude that everyone was injured just because some people may have been. That evidentiary hole would have been a dispositive bar to class certification in other circuits, but it was a non-event in the Ninth. The Court should grant certiorari and reverse.

II. CERTIORARI IS WARRANTED TO AVOID MASSIVE HARM TO CHPA MEMBERS, THE ECONOMY, AND THE PUBLIC.

Careful adherence to the constitutional and procedural boundaries on class certification is critically important to CHPA and its members—and to stemming the decades-long “proliferation of class actions involving broadly defined classes.” *Aetna Life Ins. v. Lavoie*, 475 U.S. 813, 826 (1986).

A. Consumer Product Labeling Cases Are Ripe For Overbroad Classes.

OTC drugs and dietary supplements—what CHPA’s members make and sell—are frequent targets for sweeping class action complaints against their labeling or advertising. Last year, “class-action filings against the consumer packaged goods (CPG) industry

continued apace, with more than 200 lawsuits filed.” Ashurst Perkins Coie, *Food & Consumer Packaged Goods Litigation Year in Review 2025* 3 (March 16, 2026), <https://bit.ly/4yFwIdy>.

More broadly, class actions have exploded in recent years, to where “around 10,000” are filed annually. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 686 (9th 2022) (en banc) (Lee, J., dissenting). The costs of these suits have exploded too. Just defending class actions topped \$4.5 billion in 2025 and is projected to increase again this year. Carlton Fields, *2026 Carlton Fields Class Action Survey* 7 (2026), bit.ly/4yqm0aB. Defending a single class action can cost a business up to \$100 million. See, e.g., Adeola Adele, *Dukes v. Wal-Mart: Implications for Employment Practices Liability Insurance* 1 (July 2011). And the cases rarely benefit putative class members, while plaintiffs’ attorneys profit. Mayer Brown LLP, U.S. Chamber Inst. for Legal Reform, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* 1, 5 (Dec. 11, 2013), <http://bit.ly/3rrHd29>. Remarkably, enterprising lawyers and financing third parties spend approximately \$1 billion on television advertising each year looking for plaintiffs to use to bring class actions.²

The result is that many class action lawsuits are based on allegations that have no relationship to harm caused to anybody, much less to an entire class. See, e.g., *In re Subway Footlong Sandwich Mktg. & Sales Pracs. Litig.*, 869 F.3d 551, 553, 557 (7th Cir. 2017)

² See Cary Silverman, Shook, Hardy & Bacon L.L.P., U.S. Chamber Inst. for Legal Reform, *Bad for Your Health: Lawsuit Advertising Implications and Solutions* 6 (Oct. 2017); see also Jeffrey A. Holmstrand, *In Search of Mass Tort Plaintiffs: Advertising and Its Impact on the Targeted Populations, Potential Jury Pools, and Our Clients*, 89 Def. Couns. J. 1 (2022).

(reversing class certification when lawsuit alleging Subway “Footlong” sandwiches were not always precisely 12 inches was “no better than a racket” and should have been “dismissed out of hand” because it provided only “worthless benefits” to the class while “enrich[ing] only class counsel”).

Closer to home for CHPA, class action plaintiffs and their attorneys regularly seek to bring claims based on product labels that are disconnected from any harm. In *Falcone*, for instance, the Ninth Circuit affirmed the certification of a class of everyone who bought Nestle chocolate, on the theory that every one of those class members may have thought that the products “were produced free of child labor and deforestation.” 2026 WL 74510, at *1. Worse, the court held that plaintiffs did not even need to “provide a class-wide method for calculating damages at the class certification stage”—“a logical connection between their damages model and their theory of liability” would do. *Id.* at *2. As the dissent correctly observed, however, “[c]lass certification is to be based on evidence, not a promise that flaws will somehow be fixed later.” *Id.* at *4 (Clifton, J., dissenting).

Unsurprisingly, the Ninth Circuit has become the destination of choice for consumer-product plaintiffs. They can take advantage of the special, plaintiff-friendly standards at class certification without worrying about whether putative class members were or were not injured. And they often include a New York subclass to take advantage of that State’s statutory penalty scheme—even though such penalties would not be available in New York state court. This case is emblematic of both strategies. Pet. App. 1a–10a.

On the East Coast, a district court in another product labeling case recently certified a class seeking more than \$100 million without requiring any common

evidence that all or nearly all class members were injured. *Newman v. Bayer Corp.*, No. 22 CV 7087, 2026 WL 1243391, at *3 (S.D.N.Y. May 6, 2026). Citing the Ninth Circuit’s decision in this case, the court brushed aside the fact that plaintiff’s *own expert* determined that 72.9% of consumers were not deceived. *Id.* All that mattered for class certification purposes was that plaintiff had a *theory* that—somehow—“all consumers would have the same injury,” whether or not deceived. *Id.* at *5.

Other examples abound. See, e.g., *Dapeer v. Neutrogena Corp.*, No. 14-22113-Civ, 2015 WL 10521637, at *12 (S.D. Fla. Dec. 1, 2015) (recommending denial of class certification where plaintiff brought putative class action alleging labeling sunscreen SPF 70 was misleading because any greater SPF than 50 offers no increased sun protection, as there was no evidence of harm to the named class representative); *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 576–79 (C.D. Cal. 2014) (denying class certification where plaintiffs brought putative class action alleging a cooking oils brand was deceptively marketed as “100% Natural” when it was made from GMOs, in part because plaintiffs had no evidence showing “consumers believe the label means the product contains no genetically modified organisms or GMO ingredients”).

Many cases like these should never even be filed, but certifying classes on such flimsy grounds all but guarantees that their coercive effects will persist, imposing billions of dollars of costs on the consumer-products industry and, in turn, the consumers.

**B. Certifying Classes Based on Promises
Creates Perverse Incentives and Dispro-
portionate Settlement Pressure.**

The Court should also grant certiorari because the Ninth Circuit’s no-evidence approach to class certification risks profound consequences for defendants like CHPA’s members, and therefore consumers.

Class certification is a flash point in class action litigation. Once certification is granted, “extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies.” *Ston-eridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 163 (2008). Indeed, 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.*, 568 U.S. at 485 (Scalia, J., dissenting); see also, *e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (acknowledging “the risk of ‘in terrorem’ settlements that class actions entail”). As the government recently told this Court, “[a]s class actions become more sprawling and the potential liability larger, the decision on class certification often becomes dispositive: a denial can sound the death knell of the litigation, while a grant can create substantial pressure to settle.” Brief for United States as *Amicus Curiae* at 2, *Labcorp*, 605 U.S. 327 (2025) (No. 24-304).

By extension, then, “[c]lasses that are overinflated with *uninjured* members raise the stakes for business that are the targets of class actions.” *Labcorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting). Over-subscribed classes “can coerce businesses into costly settlements that they sometimes must reluctantly swallow rather than betting the company on the uncertainties of trial.” *Id.* And such “coerced settlements substantially

raise the costs of doing business,” where “overbroad and incorrectly certified classes can ultimately harm consumers, retirees, and workers, among others.” *Id.*

Certifying classes based on a promise to produce evidence, rather than actual common evidence, also creates absurd incentives for plaintiffs while punishing defendants. From plaintiffs’ perspective, it is difficult to see why a class representative would ever do anything more than hire a qualified expert to sketch out a model that *could* supposedly show class-wide injury if it were someday executed. If the theoretical possibility of injury is enough for certification, why take the risk of seeing what the model actually spits out? From the defendants’ perspective, moreover, opposing class certification is necessarily harder when the plaintiff’s case rests on an unexecuted model rather than actual common evidence. There is less to challenge, less to attack, less to criticize, and less to subject to dueling expert testimony. The resulting inquiry is the antithesis of the “evidentiary proof” and “rigorous analysis” that class certification is supposed to demand. *Comcast*, 569 U.S. at 33; *Wal-Mart*, 564 U.S. at 351. Class certification becomes virtually automatic.

It is essential that courts carefully ensure that class actions are pursued only on behalf of classes that are correctly calibrated to the number of individuals harmed. The decision below upsets that balance and “invite[s] plaintiffs to concoct oversized classes stuffed with uninjured class members,” which enables them 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). Rule 23(b)(3) was not intended to act this way. It was carefully crafted with “delimiting criteria” that would avoid giving “district judges power without

bounds.” John K. Rabiej, *The Making Of Class Action Rule 23 — What Were We Thinking?*, 24 Miss. C. L. Rev. 323, 345 n.98 (2005).

The Court should grant certiorari and make clear that courts may not certify classes that are “overinflated with *uninjured* members,” particularly when plaintiffs’ alleged “proof” is nothing more than a theory and a promise to try to establish class-wide injury later.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari and reverse the Ninth Circuit’s decision affirming class certification.

Respectfully submitted,

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