

IN THE
Supreme Court of the United States

NESTLÉ USA, INC.,

Petitioner,

v.

MARIE FALCONE, INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

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

**BRIEF OF ATLANTIC LEGAL FOUNDATION
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm. ALF's mission for the past five decades has been to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, former government officials, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. See atlanticlegal.org.

ALF has an abiding interest in the application of sound principles of law to class actions. The questions presented by this case, especially the extent to which damages classes may include uninjured members, are of exceptional importance to ALF. Several intermediate federal appellate courts, like the

¹ Petitioner's and Respondent's counsel were provided timely notice of this brief in accordance with Supreme Court Rule 37.2. No party's counsel authored this amicus brief in whole or in part. No one other than the *amicus curiae* or its counsel contributed money to prepare or submit this brief.

Ninth Circuit here, allow district courts to certify broad classes with numerous members who have suffered no injury. By doing so, these courts contravene the jurisdictional limits placed on federal courts by the Constitution. ALF has an interest in ensuring that Petitioner Nestlé USA, like all defendants, is subject to class litigation in federal court only when all members of the putative class have standing to proceed in the federal forum and the proceeding complies with stringent class certification requirements.



SUMMARY OF ARGUMENT

“Article III, § 2, of the Constitution restricts the federal ‘judicial Power’ to the resolution of ‘Cases’ and ‘Controversies.’” *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 273 (2008). This constitutional restriction, which is “fundamental to the judiciary’s proper role in our system of government,” *Raines v. Byrd*, 521 U.S. 811, 818 (1997), requires litigants seeking relief in federal courts to demonstrate they have standing to sue, *Wittman v. Personhuballah*, 578 U.S. 539, 543 (2016).

To satisfy this standing requirement, litigants must prove that they have suffered “an ‘injury in fact’” that is “‘fairly traceable’ to the conduct being challenged” and is redressable by a favorable judicial decision. *Id.* (citation omitted).

Class actions are not exempt from this limitation. *See Warth v. Seldin*, 422 U.S. 490, 501

(1975); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215–16 (1974). “Every class member must have Article III standing in order to recover individual damages.” *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021).

Despite this constitutional imperative, some federal courts permit the certification of a damages class action under Federal Rule of Civil Procedure 23(b)(3) without requiring named plaintiffs to demonstrate that absent class members have standing to pursue relief in federal court. *See, e.g., In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283, 307 (3d Cir. 1998). These courts do so even though class certification injects each absent class member into a case as a party and Article III mandates that each party establish his or her own standing.

Other courts forbid the certification of classes that include any uninjured members. Pet. 21. Still others permit class certification only if the number of uninjured members is not excessive. *Id.* at 20–21. These latter courts, however, differ over the extent to which a class may encompass uninjured members before class treatment is no longer appropriate, with some courts (like the Ninth Circuit) adopting especially lax standards that fail to weed out large swaths of uninjured members. *See id.*

This split of authority is further exacerbated by sharp divisions over how to analyze the problems posed by uninjured class members at the class certification stage. Some courts apply Article III standing principles to decide whether classes can be

certified even though they include uninjured members. Pet. 21. Others address the issue through the rubric of Rule 23’s requirements. *See id.* at 20–22.

Lower courts have struggled with this issue “for decades.” *Speerly v. General Motors, LLC*, 143 F.4th 306, 336 (6th Cir. 2025) (en banc) (Thapar, J., concurring). “The interplay of constitutional standing principles and class certification” has led to “a circuit-level conflict,” with courts “wrestl[ing] extensively but inconclusively with the standing and Rule 23 (and related Seventh Amendment, Rules Enabling Act and due process) questions presented when certification of a proposed class risks allowing uninjured class members to participate in a class action.” 1 McLaughlin on Class Actions § 4:28 (22d ed. 2025).

The issue is “one of great importance.” *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 461 (2016). Indeed, the Court recently granted certiorari to resolve this critical recurring question, but ultimately dismissed the writ as improvidently granted, presumably because of vehicle problems unique to that case. *See Lab’y Corp. of Am. Holdings v. Davis*, 605 U.S. 327, 327 (2025) (*LabCorp*).

By contrast, this case presents the Court with an ideal vehicle to settle the question it left unresolved in *LabCorp*. If anything, the need to do so is more urgent than ever.

“[L]eaving this question unanswered imposes real costs.” *Speerly*, 143 F.4th at 347 (Nalbandian, J., concurring). “[T]he consequences of overbroad and incorrectly certified damages class actions” are

“widespread and significant.” *LabCorp.*, 605 U.S. at 333 (Kavanaugh, J., dissenting). Companies today are forced to spend billions of dollars defending against class actions. William J. 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, 314 (2026). This comes at an enormous cost to consumers, employees, and retirees. *LabCorp.*, 605 U.S. at 333 (Kavanaugh, J., dissenting).

This Court’s immediate intervention is necessary to ensure the Constitution’s uniform application to class actions and to alleviate the intolerable consequences that have flowed from the certification of overly broad class actions. This Court should grant certiorari to resolve the ever-worsening conflict among lower courts over whether damages classes may include uninjured members and, if so, to what extent.



ARGUMENT

- I. Article III prohibits the certification of class actions that include any uninjured class members.**
 - A. Article III requires that each class member have standing at the class-certification stage.**

Article III “limits the jurisdiction of federal courts to ‘Cases’ and ‘Controversies.’” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014). This restriction requires plaintiffs to “establish that they have standing to sue” in federal courts. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013). “[T]he ‘irreducible constitutional minimum’ of standing consists of three elements.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citation omitted). “First and foremost, there must be alleged (and ultimately proved) an ‘injury in fact’—a harm suffered by the plaintiff that is ‘concrete’ and ‘actual or imminent,’ not ‘conjectural’ or ‘hypothetical.’” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 103 (1998) (citations omitted). “Second, there must be causation—a fairly traceable connection between the plaintiff’s injury and the complained-of conduct of the defendant.” *Id.* “And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury.” *Id.*

Because the “usual rule” in federal courts permits “litigation [to be] conducted by and on behalf of the individual named parties only,” *Wal-Mart*

Stores, Inc. v. Dukes, 564 U.S. 338, 348 (2011), the focus of the standing requirement is ordinarily easy to identify. The individual plaintiff must show “personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.” *Raines*, 521 U.S. at 818. But Federal Rule of Civil Procedure 23 is an exception to the usual rule, permitting a plaintiff in certain narrowly defined circumstances to represent the interests of absent class members. *See Wal-Mart*, 564 U.S. at 348–49.

“That a suit may be a class action,” however, “adds nothing to the question of standing.” *Spokeo*, 578 U.S. at 338 n.6. Article III applies with full force to class actions, including to absent members represented by named plaintiffs. *TransUnion*, 594 U.S. at 430–31.

Consequently, some circuit courts properly hold that “a class cannot be certified if it contains members who lack standing.” *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010). Named plaintiffs may not represent a class that includes those who “lack the ability to bring a suit themselves” in federal court. *Id.* Any other conclusion would contravene Article III.

Breaking from this straightforward rule, other circuit courts—including some panels of the Ninth Circuit—have held that a damages class action may be certified “if at least one named plaintiff meets the [standing] requirements.” *E.g., Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011) (citation omitted).

This premise contradicts this Court’s precedent. When confronting a lawsuit seeking damages, this Court has analyzed whether *each* plaintiff has standing to sue. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 95, 109–16 (1979) (holding that some, but not all, of the plaintiffs had standing to sue, where they sought damages among other relief).

The cases in which this Court has elected not to consider whether each plaintiff has standing before reaching the merits typically involved requests for generalized equitable relief rather than damages. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 421, 425 n.9, 431 n.19 (1998).

This practical approach is understandable, since a victory by even one of several plaintiffs secures the same relief sought by every plaintiff, regardless of whether each had standing. *But see* Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 Duke L.J. 481, 483–86, 514–47, 552–53 (2017) (criticizing this so-called “one-plaintiff rule” because “it is inconsistent with the Constitution and the larger web of standing doctrine,” and calling upon the Court to “stop using it”).

Regardless of how this Court treats standing in lawsuits seeking generalized equitable relief, a federal court may certify a *damages* class action under Rule 23(b)(3) *only* where *each and every member* has been shown to have standing. Article III does *not* exempt anyone—and certainly not an absent class member—from the obligation to establish the existence of a case or controversy specific to himself

or herself. To the contrary, any “party” invoking a federal court’s jurisdiction must demonstrate the requisite standing—including an injury-in-fact caused by the challenged conduct—to satisfy the case-or-controversy requirement. *Wittman*, 578 U.S. at 543 (emphasis added); accord *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (holding that Article III requires a “party” to “show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant”). In short, an “Article III case or controversy is one where *all parties* have standing.” *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996) (emphasis added).

This necessarily means named plaintiffs must demonstrate that absent class members have standing when seeking to certify a class. “[A] nonnamed class member is [not] a party to the class-action litigation before the class is certified.” *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011) (emphasis omitted). But once a class is certified under Rule 23, the absent members are added as parties to the lawsuit, *Devlin v. Scardelletti*, 536 U.S. 1, 9–10 (2002); accord *United States v. Sanchez-Gomez*, 584 U.S. 381, 387 (2018), thus becoming plaintiffs themselves, see *TransUnion*, 594 U.S. at 437. This is what “gives an Article III court the power to ‘render dispositive judgments’ affecting unnamed class members.” *Flecha v. Medcredit, Inc.*, 946 F.3d 762, 770–71 (5th Cir. 2020) (Oldham, J., concurring) (citation omitted); see *Devlin*, 536 U.S. at 10. And when a court certifies a *damages* class action under Rule 23(b)(3), these newly added parties each seek

individualized money damages *for themselves*. See *Wal-Mart*, 564 U.S. at 362 (explaining that Rule 23(b)(3) authorizes classes seeking “individualized monetary claims,” with each member having an “individualized claim for money”).

Like any other party, each and every member must therefore have standing to seek relief—particularly damages—in federal court. *TransUnion*, 594 U.S. at 431. This is why, following class certification, this Court considers *all* of the class members—including the absent members—to be “plaintiffs” in the federal case. See *id.* at 430–39 (“determin[ing] whether the 8,185 class members have standing to sue” and concluding “6,332 plaintiffs” who were absent members lacked standing).

Standing must exist “[a]t all stages of litigation.” *Uzuegbunam v. Preczewski*, 592 U.S. 279, 282 (2021). Thus, contrary to the approach adopted by the Ninth Circuit and other circuits, courts cannot certify a class action that includes any absent members who lack the requisite injury-in-fact. Doing so unconstitutionally injects into the litigation new plaintiffs over whom the courts lack jurisdiction. “Those who do not possess Art[icle] III standing may not litigate as suitors in the courts of the United States.” *Valley Forge*, 454 U.S. at 475–76. “Every party that comes before a federal court must establish that it has standing to pursue its claims.” *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 473 (5th Cir. 2013) (emphasis added). Each and every class member must be shown to have suffered the requisite injury-in-fact before they can be added as

parties to the lawsuit through the certification of a damages class.

Given the vital role of Article III standing limitations in safeguarding the separation of powers, this conflict among the lower courts over whether Article III applies to unnamed class members at the class certification stage calls for immediate resolution by this Court. “Article III standing is ‘not merely a troublesome hurdle to be overcome if possible so as to reach the “merits” of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787.’” *United States v. Texas*, 599 U.S. 670, 675 (2023) (citation omitted). “Standing doctrine helps safeguard the Judiciary’s proper—and properly limited—role in our constitutional system,” ensuring federal courts do not “usurp the powers of the political branches.” *Id.* at 675–76 (citation omitted).

B. Class certification rules do not permit federal courts to evade Article III’s strictures.

While several intermediate federal appellate courts have permitted the certification of class actions that included uninjured members, they have done so based on flawed rationales that are at odds with Article III.

Some courts suggest that Rule 23’s prerequisites for class certification will protect against the possibility that uninjured members will ultimately recover by the end of the case; others

maintain that later developments (such as a trial on the merits following class-wide discovery) perform the same sifting function. *See, e.g., Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 (9th Cir. 2016) (asserting that the presence of uninjured members “does not necessarily defeat certification of the entire class” because a “district court is well situated to winnow out those non-injured members at the damages phase of the litigation, or to refine the class definition”); *Kleen Prods. LLC v. Int’l Paper Co.*, 831 F.3d 919, 927 (7th Cir. 2016) (insisting that, at class-certification stage, named plaintiffs need not show every member was injured as long as the class does not include “too many” uninjured members and each member must “ultimately” show injury “to recover”); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1197–98, 1201 (10th Cir. 2010) (maintaining that, at class-certification stage, named plaintiffs need not show absent class members suffered an injury caused by the defendant in part because “classwide discovery and further litigation answer th[is] question after certification”); *Prudential*, 148 F.3d at 307 (claiming that whether absent class members are properly in federal court is an issue of “compliance with the provisions of Rule 23, not one of Article III standing”).

None of these rationales permit federal courts to ignore whether absent members satisfy Article III’s standing requirement at the class-certification stage. Indeed, notwithstanding Article III’s strictures, these are nothing more than policy justifications for certifying class actions with uninjured members. But “policy concerns do not suffice on their own to confer Article III standing to sue in federal court.” *FDA v.*

All. for Hippocratic Med., 602 U.S. 367, 386 (2024). At any rate, these policy rationales cannot be squared with Article III for at least two reasons.

1. Rule 23 cannot be used to evade Article III’s unalterable standing requirement. Article III bars Rule 23 from allowing named plaintiffs to litigate on the merits the claims of absent class members who lack the constitutional right to proceed in federal court based on the assumption that later developments may prevent uninjured members from recovering damages. *See Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992) (holding that the Federal Rules of Civil Procedure cannot “expand the judicial authority conferred by Article III”). Class actions are nothing more than a “procedural” mechanism for the “litigation of substantive claims,” *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 332 (1980)—merely a device that does not itself furnish any substantive rights but instead provides “only the procedural means by which the remedy may be pursued,” *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 402 (2010). This procedural device “leaves the parties’ legal rights and duties intact and the rules of decision unchanged.” *Id.* at 408 (plurality opinion).

Consequently, “Rule 23’s requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure ‘shall not abridge, enlarge or modify any substantive right.’” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612–13 (1997) (quoting 28 U.S.C. § 2072(b)). The possibility that the class may lose on the merits after certification because of a failure to prove injury—or that uninjured members

might otherwise be winnowed out through post-certification proceedings—does not permit uninjured parties who lack standing to nonetheless litigate the merits of their claims in federal court merely because they are absent class members. “[F]ederal jurisdiction cannot be based on contingent future events.” *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 593 (2013). Because “merits question[s] cannot be given priority over an Article III question,” there is no basis for “allowing merits questions to be decided before Article III questions.” *Steel Co.*, 523 U.S. at 97 n.2.

This necessarily means that federal courts may certify a class action only to add *injured* members to the lawsuit, and lack jurisdiction to permit *uninjured* members to become parties via class certification. See *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 439–42 (2017) (holding that party seeking monetary relief for itself cannot be added to a case through intervention *unless* the party first establishes it has Article III standing).

2. Rule 23’s prerequisites for class certification—such as the need to show numerosity, typicality, adequacy of representation, commonality, and predominance—are not a substitute for scrutiny of absent members’ standing at the class-certification stage. Article III’s requirements and Rule 23’s criteria “spring from different sources and serve different functions.” 1 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 2:6 (6th ed. 2022).

The constitutional standing requirement serves the purpose of “assur[ing] an actual factual setting in which the litigant asserts a claim of injury

in fact,” so that “a court may decide the case with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court.” *Valley Forge*, 454 U.S. at 472. The requirement also safeguards against the use of the judicial process to vindicate the interests of mere bystanders with no actual injury. *Id.* at 472–73. This requirement aims to identify “those disputes which are appropriately resolved through the judicial process,” thereby ensuring the federal judiciary is not “being used to usurp the powers of the political branches.” *Driehaus*, 573 U.S. at 157 (citation omitted).

The purpose of Rule 23 is different. It aims “to provide a mechanism for the expeditious decision of common questions.” *Cooper v. Fed. Rsrv. Bank of Richmond*, 467 U.S. 867, 881 (1984).

Given these different goals, “[c]are must be taken, when dealing with apparently standing-related concepts in a class action context” because, although “individual standing requirements” and “Rule 23 class prerequisites . . . appear related, in that they both seek to measure whether the proper party is before the court to tender the issues for litigation, they are in fact independent criteria. . . . Often satisfaction of one set of criteria can exist without the other.” *In re Salomon Smith Barney Mut. Fund Fees Litig.*, 441 F.Supp.2d 579, 605 (S.D.N.Y. 2006) (citation omitted).

Huber v. Simon’s Agency, Inc., 84 F.4th 132 (3d Cir. 2023), illustrates how Rule 23’s prerequisites often fail to effectuate Article III’s standing

requirement. There, the defendant argued that the district court erred in certifying a class because the named plaintiff failed to demonstrate each of the absent class members had standing. *Id.* at 151. But the Third Circuit insisted that it was unnecessary for “each member to prove his or her standing” before the class could be certified. *Id.* at 155. In doing so, the Third Circuit acknowledged that some class members might lack standing. *Id.* Yet the court concluded that the question of whether certification was justified under Rule 23(b)(3) should instead focus on whether the proposed class could be certified “notwithstanding the individualized evidence class members must submit to demonstrate standing and recover damages.” *Id.* at 158. The court decided that “if there is a plausible straightforward method to sort” out class members without standing “at the back end of the case, then the class might appropriately proceed as it is currently defined.” *Id.* at 157–58. This was so, in the Third Circuit’s view, because the “presence of individual questions does not *per se* rule out a finding” that Rule 23(b)(3)’s prerequisites for class certification could be satisfied. *Id.* at 156.

Rule 23’s requirements in *Huber* failed to safeguard Article III’s purpose of ensuring federal courts preside over litigation involving only proper parties who were actually injured and not mere bystanders. The Third Circuit allowed a class to be certified, even though it included uninjured members, as long as Rule 23’s criteria were satisfied because “common, aggregation-enabling, issues” were “more prevalent or important than the non-common, aggregation-defeating, individual issues.” *Id.* at 156.

According to the Third Circuit, if each member could establish standing by the remedial phase of the case—well after the parties had litigated the merits—standing problems would not derail class treatment.

Article III forecloses this approach. *See Steel Co.*, 523 U.S. at 97 n.2 (holding that Article III does not permit the determination of merits questions before Article III questions). Allowing courts improperly to “reach a merits question when there is no Article III jurisdiction opens the door to all sorts of ‘generalized grievances,’ that the Constitution leaves for resolution through the political process.” *Id.* (citation omitted).

And in reality, it is highly unlikely uninjured members will be sifted out by an eventual remedial phase. “[A]s a practical matter, that day will likely never come to pass because class action cases almost always settle once a court certifies a class.” *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods, LLC (Olean II)*, 31 F.4th 651, 686 (9th Cir. 2022) (en banc) (Lee, J., dissenting). When courts certify a class with uninjured members, courts allow “plaintiffs to weaponize Rule 23 to impose an in terrorem effect” by “dramatically expand[ing] the potential exposure and artificially jack[ing] up the stakes.” *Id.* at 691. This “often, if not usually,” leads “to a substantial settlement by the defendant because the costs and risks of litigating further are so high.” *Id.* (citation omitted). “Punting this key question [of each member’s standing] until later amounts to handing victory to plaintiffs because th[e] case will likely settle without the court ever deciding” whether it had jurisdiction over every party. *Id.* at 686.

Since “there is a fundamental analytical distinction between” Rule 23’s prerequisites for class certification and “Article III standing,” *In re Aggrenox Antitrust Litig.*, 94 F.Supp.3d 224, 250 (D. Conn. 2015), courts cannot be permitted to replace an examination of whether each member has standing during the class-certification stage with an analysis of whether Rule 23’s prerequisites are satisfied. The Constitution requires that “any person invoking the power of a federal court must demonstrate standing to do so.” *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013). “Rule 23 didn’t—and couldn’t—alter this fundamental limitation on the federal judicial power,” so the “class action form doesn’t exempt unnamed plaintiffs from Article III’s essential requirement that they have a ‘personal stake’ in the case.” *Speerly*, 143 F.3d at 348–49 (Nalbandian, J., concurring). In short, plaintiffs seeking class certification must both satisfy Rule 23’s requirements *and* demonstrate that each absent class member has Article III standing.

“Relaxation of standing requirements is directly related to the expansion of judicial power,” so allowing any deviations from Article III’s stringent limits would “upset the delicate balance of power inherent in our system of government.” *Id.* (citation omitted). By insisting, at the class-certification stage, that “every class member satisfy the same injury requirement that governs individual suits” from the moment each absent member becomes a party, this Court would ensure “Rule 23 operates as a faithful servant of constitutional structure rather than its quiet rival.” Jacob Davenport, *Injury-in-Fact of Nothing: Why Federal Courts Cannot Certify Classes*

With Uninjured Members After Labcorp, 94 U. Cin. L. Rev. 1184, 1217 (2026). In this era of ubiquitous class actions, “courts must be more careful to insist on the formal rules of standing, not less so.” *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011).

* * * *

In sum, Article III prohibits courts from certifying class actions under Rule 23(b)(3) unless and until named plaintiffs present evidence, at the class-certification stage, that each member suffered some concrete harm that is fairly traceable to the defendant’s alleged wrong and redressable by the court.

II. Alternatively, Rule 23(b)(3) prohibits the certification of a damages class action that includes more than a *de minimis* number of uninjured members.

Even assuming for the sake of argument that a damages class action could be certified where the class includes members who suffered no injury, the Constitution, the Rules Enabling Act, and Rule 23(b)(3) prohibit the certification of a class that includes more than a *de minimis* number of uninjured members.

Constitutional due process requires that defendants have an opportunity to present every available defense. *Lindsey v. Normet*, 405 U.S. 56, 66 (1972). Thus, the Rules Enabling Act prohibits certification where class treatment would deprive

defendants of their opportunity to litigate individualized defenses. *Wal-Mart*, 564 U.S. at 367.

This applies to Article III's standing requirement, since defendants have the right to challenge each party's standing. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 65–66 (1987), *superseded by statute on another ground*, Clean Air Act, Pub. L. No. 101–549, 104 Stat. 2399 (1990). Because “standing is not dispensed in gross,” *TransUnion*, 594 U.S. at 431, and instead mandates an inquiry into “individualized harm,” *United States v. Hays*, 515 U.S. 737, 744 (1995), a standing challenge will unavoidably require an individualized inquiry into whether each class member suffered an injury-in-fact.

Even if Article III permitted this inquiry to occur following the litigation of the merits after class certification (it does not), Rule 23(b)(3)'s plain language bars the certification of a damages class action if the anticipated individualized inquiries into standing will require numerous mini-trials.

Under this provision, a damages class action cannot be certified unless “the questions of law or fact common to class members predominate over any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3). This Court interprets such federal rules based on the ordinary meaning of their plain language. See, e.g., *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951).

The word “common” in Rule 23(b)(3) ordinarily means “belonging to or shared . . . by all members of

a group.” *Common*, Merriam-Webster’s Collegiate Dictionary (11th ed. 2007). And the word “predominate” ordinarily means “to hold advantage in numbers or quantity.” *Predominate*, Merriam-Webster’s Collegiate Dictionary (11th ed. 2007).

Consequently, as a panel of the Ninth Circuit correctly explained before the court erroneously reached a different conclusion en banc, “Rule 23(b)(3) requires that questions of law or fact be shared by substantially all the class members, and these common questions must be superior in strength or pervasiveness to individual questions within the class.” *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods, LLC (Olean I)*, 993 F.3d 774, 792 (9th Cir. 2021), *vacated for reh’g en banc*, 5 F.4th 950 (9th Cir. 2021) (mem.); *accord Olean II*, 31 F.4th at 687 (Lee, J., dissenting).

Simply put, “Rule 23 requires that common questions predominate in damages class actions.” *LabCorp.*, 605 U.S. at 328 (Kavanaugh, J., dissenting). Given the plain meaning of these words (not to mention the inherently individualized nature of the standing inquiry mandated by due process and the Rules Enabling Act), “when a damages class includes both injured and uninjured members, common questions do not predominate.” *Id.*

At the very least, this predominance requirement cannot permit the certification of a class with more than a *de minimis* number of uninjured members. *See Olean II*, 31 F.4th at 692 (Lee, J., dissenting); *Olean I*, 993 F.3d at 792–93. Unless the class “include[s] only (or mostly only) people who have

suffered an injury,” “it follows that ‘common’ issues would not ‘predominate,’ as required under the text of Rule 23.” *Olean II*, 31 F.4th at 692 (Lee, J., dissenting); see *In re Rail Freight Fuel Surcharge Antitrust Litig. (Rail Freight I)*, 725 F.3d 244, 252–53 (D.C. Cir. 2013) (holding that, unless there is a “reliable means of proving classwide injury in fact,” the case “turns on individualized proof of injury” and thus “separate trials are in order”).

Some courts nonetheless maintain that Rule 23(b)(3) permits class certification as long as the class does not include “a great many persons who have suffered no injury at the hands of the defendant.” *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012). That is the approach the Ninth Circuit follows. See, e.g., *Olean II*, 31 F.4th at 669 & n.14 (allowing certification where the class does not include “a great number of members who for some reason could not have been harmed” even if this “includes more than a de minimis number of uninjured class members” (citation omitted)); Pet. App. 3a–4a, n.1 (applying *Olean II* here).

This mistaken approach demonstrates the pitfalls of permitting the certification of a class in which the number of uninjured members is more than *de minimis*. The amorphous rules endorsed by courts like the Ninth Circuit tend to result in certified classes with enormous numbers of potentially uninjured members. See, e.g., *In re EpiPen (Epinephrine Injection USP) Mktg. Sales Prac. & Antitrust Litig.*, No. 17-md-2785, 2020 WL 1180550, at *13, *32, *34–37 (D. Kan. Mar. 10, 2020) (certifying damages class consisting of at least hundreds of

thousands of consumers, of whom up to 5% suffered no injury); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 32–33 & n.29 (1st Cir. 2015) (Kayatta, J., dissenting) (criticizing majority opinion for allowing the certification of a class that could include as many as 24,000 uninjured consumers).

These results cannot be squared with Rule 23’s text permitting a damages class action only where “common” issues “predominate” over individualized issues. Where hundreds or thousands of mini-trials are necessary to assess whether particular class members were injured, common issues necessarily do not predominate over individualized issues. *See, e.g., In re Rail Freight Fuel Surcharge Antitrust Litig. (Rail Freight III)*, 934 F.3d 619, 620, 623–24 (D.C. Cir. 2019) (holding that the need to determine which of thousands of class members were injured meant common issues did not predominate); *In re Asacol Antitrust Litig.*, 907 F.3d 42, 46–47, 51–58 (1st Cir. 2018) (reversing certification of a damages class action in which thousands of class members would need to testify about whether they were injured).

Hence, if the Constitution, the Rules Enabling Act, and Rule 23’s text authorize the certification of a class that includes *any* percentage of uninjured members (they do not), the number of such members “must,” at the very least, “be *de minimis*.” *Olean I*, 993 F.3d at 792. Regardless, this division among lower courts over the extent to which Rule 23 permits certification of a class including absent, uninjured members likewise warrants immediate review.

“Class actions are an attractive option for plaintiffs’ lawyers for the same reason that they pose a tremendous hazard to defendants—the consolidation of numerous claims into one action multiplies the potential damages award, often to a figure so large that it exerts irresistible pressure on defendants to agree to substantial settlements for claims that they would be willing to litigate to judgment if the liability risk were less daunting.” 1 McLaughlin on Class Actions § 1:3 (22d ed. 2025).

These “coerced settlements substantially raise the costs of doing business.” *LabCorp.*, 605 U.S. at 333 (Kavanaugh, J., dissenting). Class actions have been “on the rise across nearly every industry and practice area,” with businesses now spending more than \$4 billion per year on class action litigation. Carlton Fields, *2026 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 3, 6 (2026), <https://tinyurl.com/2pymwju9>. “A record percentage of companies are now dealing with class actions”—“the highest level in 15 years”—and spending on class actions accounts for a sizable percentage of corporate litigation budgets. *Id.* at 6, 8.

The consequences of certifying overly broad classes with more than *de minimis* numbers of uninjured members are therefore severe. See *LabCorp.*, 605 U.S. at 333 (Kavanaugh, J., dissenting). “[C]ompanies pass on those costs 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.” *Id.*

The expansive standard championed by courts like the Ninth Circuit for the inclusion of uninjured members in class actions significantly exacerbates those consequences by allowing plaintiffs' lawyers to repeatedly secure the certification of overbroad classes. *See* Michael J. Williams, *Article III Standing and Rule 23(b) Requirements for Class Action Certification in Damages Actions*, 55 *The Brief* 40, 47–48 (Am. Bar Assn. Winter 2026). Unless this Court grants certiorari, the circuits will continue to remain divided over the recurring question of the extent to which classes may encompass uninjured members, and the plaintiffs' bar will continue to exploit the lax standard adopted by the Ninth Circuit and other courts.²

² This Court should likewise grant certiorari in *Bayer HealthCare LLC v. Drake*, No. 26-376, which presents the same issue as this case.



CONCLUSION

This Court should grant Nestlé’s petition and hold, consistent with Article III’s requirements, that federal courts cannot certify class actions with uninjured members. At minimum, this Court should hold that a class cannot be certified under Rule 23(b)(3) if it includes more than a *de minimis* number of uninjured members.

Respectfully submitted,

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