No. 22-131

IN THE

Supreme Court of the United States

STARKIST CO.;
DONGWON INDUSTRIES CO., LTD.,

Petitioners,

v.

OLEAN WHOLESALE GROCERY
COOPERATIVE INC., ET AL.,

Respondents.

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

Brief of the Computer & Communications Industry Association as *Amicus Curiae* In Support of Petitioner

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INTEREST OF THE *AMICUS CURIAE* [1]

The Computer & Communications Industry Association ("CCIA") is an international, non-stock, nonprofit association representing a broad cross-section of computer, communications, and Internet industry firms that collectively employ nearly a million workers and generate annual revenues in excess of $540 billion. CCIA's members are proven innovators that provide valuable technology, services, products, and content, reaching nearly every facet of society.[2]

CCIA submits this amicus brief to address the urgent need for this Court to review the Ninth Circuit's en banc decision in this case and its far-reaching consequences for companies with innovative business models that scale quickly and have a global reach. Such companies are susceptible to massive class actions with debilitating exposure in the billions of dollars and are disproportionally prejudiced when a large swath of a certified class is uninjured.

When an innovative product or service touches on virtually every aspect of society and a class action is certified as to that product or service, the risks are already so high that trial is often not a realistic option—regardless of the

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[1] Pursuant to Supreme Court Rule 37.6, this brief was prepared in its entirety by *amicus curiae* and its counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amicus curiae* and its counsel. This brief is filed with the consent of all parties; notice was provided at least 10 days prior to the due date of this brief.

[2] CCIA's members are listed at: www.ccianet.org/about/members.

merits. If lower courts take a lax approach to Rule 23(b)(3) of the Federal Rules of Civil Procedure and Article III standing, as the Ninth Circuit did here, *in terrorem* class-action settlements inflated by the inclusion of uninjured members will plague class-action litigation and undermine due process.

Simply put, the Ninth Circuit's decision in this case lacks the requisite legal boundaries and unfairly punishes companies that innovate and scale quickly to provide transformative services and products to millions of Americans.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's en banc majority decision undercuts critical Rule 23, Article III, and due process protections, paving the way for massive class actions engorged with uninjured class members. According to the Ninth Circuit's en banc majority, the district court in this case was not required "to resolve a dispute between the parties as to whether 28 percent of the class did not suffer antitrust impact" before certifying a class action. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 680 (9th Cir. 2022). Rather, it held that the issue was "for the jury, not the court." *Id.* at 682.

That outlier decision conflicts with this Court's precedents and creates a circuit split that cries out for this Court's review. In sharp contrast to the Ninth Circuit's decision, the unanimous decisions of both the First Circuit and D.C. Circuit have held, respectively, that proposed class actions in which 10% and 12.7% of the class was uninjured did not satisfy Rule 23(b)(3). *In re Asacol Antitrust Litig.*, 907 F.3d 42, 45, 57-58 (1st Cir. 2018); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 623-24 (D.C. Cir. 2019). And other circuit courts—including the initial Ninth Circuit panel decision in this case—have reached

similar conclusions under Rule 23(b)(3) and Article III, rejecting class actions with more than a *de minimis* number of uninjured members. *See infra* §§ I.A-B.

By glossing over Rule 23(b)(3)'s mandate and deferring the uninjured-class-member determination to a jury, the Ninth Circuit's en banc majority undermines this Court's directive to ensure that plaintiffs "affirmatively demonstrate" to the court that they satisfy Rule 23's requirements *before* any class is certified. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). This requirement applies equally even if that analysis "necessarily overlaps" with the "merits," *id.*, or is "'enmeshed in the factual and legal issues comprising plaintiff's cause of action,'" *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Dukes*, 564 U.S. at 351).

And "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Id.* That risk and the pressure to settle—regardless of the merits—are only amplified as innovative technologies and products scale quickly and reach every corner of society. *See infra* § II. Using "averaging assumptions" to try to make class-wide determinations will inevitably pull in larger and larger swaths of uninjured class members as innovative technologies continue to proliferate and class actions become more massive, exerting powerful settlement pressure regularly in the billions of dollars. *See infra* § II.

Deferring the uninjured class-member question until trial carries a high risk that defendants are stripped of important due process rights, particularly when there is usually no administratively feasible way to weed out at trial what can easily be hundreds or thousands of uninjured class members.

See Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 464, 451 (2016); *Asacol*, 907 F.3d at 58; *Rail Freight*, 934 F.3d at 627.

As this Court has recognized, "the question whether uninjured class members may recover is one of great importance," *Tyson Foods*, 577 U.S. at 461, and it "has received considerable attention" from the federal circuit courts, *Krakauer v. Dish Network, LLC*, 925 F.3d 643, 652 (4th Cir. 2019). This important issue is now squarely before this Court and at the center of a circuit split that urgently needs resolution. The petition for certiorari should be granted.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW BECAUSE THE NINTH CIRCUIT'S OUTLIER DECISION IMPROPERLY OPENS THE DOOR TO INFLATED CLASSES WITH UNINJURED MEMBERS—UP TO 28% IN THIS CASE.

A. The Ninth Circuit's Decision Creates a Circuit Split and Conflicts with Supreme Court Precedent Under FRCP 23.

Diverging from other circuits, the Ninth Circuit's en banc majority in this case rejected the view "that Rule 23 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. The majority then went further, concluding that the district court did not err "by failing to resolve a dispute between the parties as to whether *28 percent* of the class did not suffer antitrust impact." *Id.* at 680 (emphasis added). As the en banc dissent recognized, the majority's approach "creates a circuit split" on this important issue. *Id.* at 691-92 (Lee, J., dissenting).

On the other side of the circuit split is the First Circuit's unanimous decision in *Asacol*, which held that a proposed

class in which "approximately *ten percent* of the class had not suffered any injury attributable to defendants' allegedly anticompetitive behavior" did not satisfy Rule 23(b)(3) because "[t]he need to identify those individuals will predominate and render an adjudication unmanageable." 907 F.3d at 45 (emphasis added); *see id.* at 61 (Barron, J., concurring) ("I join our opinion in full"). As Judge Kayatta explained, "this is not a case in which a very small absolute number of class members might be picked off in a manageable, individualized process at or before trial." *Id.* at 53. Rather, there were "apparently thousands who in fact suffered no injury," and the plaintiffs failed to "offer a reasonable and workable plan" to deal with the uninjured class members at trial "in a manner that is protective of the defendant's constitutional rights and does not cause individual inquiries to overwhelm common issues." *Id.*

Decided in 2018, *Asacol* quickly became the leading case on this issue, followed by district courts across the country, including within the Ninth Circuit. *See, e.g.*, *In re Pre-Filled Propane Tank Antitrust Litig.*, No. 14-MD-02567, 2021 WL 5632089, at *4-5, *9-10 (W.D. Mo. Nov. 9, 2021); *Bowen v. Target Corp.*, No. 16-CV-2587, 2021 WL 4860690, at *10 (C.D. Cal. June 24, 2021); *In re Aluminum Warehousing Antitrust Litig.*, 336 F.R.D. 5, 45-51 (S.D.N.Y. 2020); *In re Thalomid & Revlimid Antitrust Litig.*, No. 14-CV-6997, 2018 WL 6573118, at *13 (D.N.J. Oct. 30, 2018).[3]

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[3] Numerous other cases follow or cite *Asacol*, demonstrating the frequency and importance of this issue in not only antitrust cases but class-action litigation more generally. *See In re Marriott Int'l, Inc., Customer Data Security Breach Litig.*, 341 F.R.D. 128, 141 (D. Md. 2022); *Loduca v. Wellpet LLC*, No. 21-CV-954, 2022 WL 2304308, at *4

Indeed, in 2019, the D.C. Circuit's unanimous decision in *Rail Freight* repeatedly cited *Asacol* in holding that a proposed class failed to satisfy Rule 23(b)(3) where 12.7% of the members were uninjured. 934 F.3d at 623-24; *see also id.* at 625 (suggesting "5% to 6% constitutes the outer limits of a *de minimis* number"). And the Ninth Circuit's initial panel decision in this case relied on *Asacol* and *Rail Freight* in holding that the district court's class certification order should be vacated. 993 F.3d 774, 791-94 (9th Cir. 2021), *vacated*, 31 F.4th 651 (9th Cir. 2022).

Yet the Ninth Circuit's en banc majority all but summarily dismissed the circuit decisions in *Asacol* and *Rail Freight*, relegating them to a footnote. *See Olean*, 31 F.4th at 669 n.13. Buried ten lines into that footnote, the en banc majority asserts, *ipse dixit*, that this approach is "consistent with" *Asacol* and *Rail Freight* because those decisions do not

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(E.D. Pa. June 27, 2022); *In re Apple iPhone Antitrust Litig.*, No. 11-CV-6714, 2022 WL 1284104, at *16 (N.D. Cal. Mar. 29, 2022); *Hoggard v. Nationstar Mortg. LLC*, No. 17-CV-99, 2021 WL 7162301, at *11 (D.D.C. Dec. 30, 2021); *Conley v. Roseland Residential Tr.*, 442 F. Supp. 3d 443, 450 (D. Mass. 2020); *In re Niaspan Antitrust Litig.*, 464 F. Supp. 3d 678, 715-16 (E.D. Pa. 2020); *C.G.B. v. Wolf*, 464 F. Supp. 3d 174, 204 (D.D.C. 2020); *Sandoe v. Boston Sci. Corp.*, 333 F.R.D. 4, 9 (D. Mass. 2019); *Baker v. Equity Residential Mgmt., LLC*, 390 F. Supp. 3d 246, 261 (D. Mass. 2019); *Brito v. Barr*, 395 F. Supp. 3d 135, 148 (D. Mass. 2019); *In re Intuniv Antitrust Litig.*, No. 1:16-CV-12396, 2019 WL 3947262, at *7-8 (D. Mass. Aug. 21, 2019); *Diverse Partners LP v. Agribank FCB*, No. 16-CV-9526, 2019 WL 4305008, at *5 (S.D.N.Y. Sept. 11, 2019); *Hunter v. Time Warner Cable Inc.*, No. 15-CV-6445, 2019 WL 3812063, at *14 (S.D.N.Y. Aug. 14, 2019); *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 407 F. Supp. 3d 422, 434 (S.D.N.Y. 2019).

adopt "a per se rule." *Id*. This departure from precedent is stark and unexplained.

As Judge Lee's en banc dissent shows, the Ninth Circuit's "majority opinion needlessly creates a split with other circuits that have endorsed a *de minimis* rule." *Id.* at 692 (discussing *Asacol* and *Rail Freight*). Beyond the First Circuit and D.C. Circuit, other circuits—including the Third, Fourth, Seventh, and Eleventh—have similarly recognized the imperative to resolve the issue of uninjured class members at the class-certification stage. *See In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 194 (3d Cir. 2020) (vacating class certification because the district court failed to resolve conflicting expert opinions about whether "up to one-third of the entire class" was uninjured, "even though [that issue] touches on the merits"); *Cordoba v. DirecTV, LLC*, 942 F.3d 1259, 1277 (11th Cir. 2019) (vacating class certification because the district court did not consider "before certification whether the individualized issue of standing will predominate . . . when it appears that a large portion of the class does not have standing"); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (affirming denial of class certification where "[c]ountless members of [the] putative class could not show any damage"); *cf. Krakauer v. Dish Network LLC*, 925 F.3d 643, 658 (4th Cir. 2019) (analyzing *Asacol* but finding "there is simply not a large number of uninjured persons included within the plaintiffs' class").

The Ninth Circuit's en banc decision clashes with *Asacol*, *Rail Freight*, and these other circuit decisions. As this Court has repeatedly emphasized, district courts must faithfully enforce Rule 23, even when a disputed class-certification issue "necessarily overlaps" with the "merits." *Dukes*, 564 U.S. at 352. After all, "Rule 23 does not set forth a mere pleading standard." *Id.* at 350. Rather, a class-action plaintiff "must affirmatively demonstrate his compliance with the Rule." *Id.* And a district court must conduct a

"rigorous analysis," which "will frequently 'entail overlap with the merits of the plaintiff's underlying claim'" and be "'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Comcast*, 569 U.S. at 33-34 (quoting *Dukes*, 564 U.S. at 351)); *see id.* at 34 ("By refusing to entertain arguments against respondents' damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry.").

As the D.C. Circuit aptly explained in *Rail Freight*, district courts cannot "defer questions about the number and nature of any individualized inquiries that might be necessary to establish liability." 934 F.3d at 626. Resolving such questions before a proposed class is certified "is part-and-parcel of the 'hard look' required by *Walmart* and *Comcast*." *Id.*; *see also Med. & Chiropractic Clinic, Inc. v. Oppenheim*, 981 F.3d 983, 992 (11th Cir. 2020) ("Rule 23 makes clear that the district court in which a class action is filed operates as a gatekeeper.").

In short, "the majority opinion conflicts with Rule 23's text, common sense, and precedent from other circuits." *Olean*, 31 F.4th at 686 (Lee, J., dissenting). This Court should grant the petition for certiorari to resolve this conflict.

B. The Ninth Circuit's Decision Raises Serious Article III Concerns.

Whether a class member has been injured is not only a necessary element of liability (antitrust impact in this case) but also implicates Article III standing. *See Krakauer*, 925 F.3d at 652 (observing the uninjured class-member "question can be seen as implicating either the jurisdiction of the court under Article III or the procedural issues embedded within Rule 23's requirements for class certification"); *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 768-69 (5th Cir. 2020) (vacating class certification in connection with the

"antecedent" Rule 23(b)(3) requirement, then questioning "whether the class additionally fails under Article III" because "[c]ountless unnamed class members lack standing").

We know that one of the most fundamental requirements for seeking redress in federal court is the "'irreducible constitutional minimum' of standing." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "[U]nder Article III, a federal court may resolve only 'a real controversy with real impact on real persons.'" *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (quoting *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2103 (2019) (Gorsuch, J., concurring)). "Importantly, this Court has rejected the proposition that 'a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.'" *Id.* at 2205 (quoting *Spokeo*, 578 U.S. at 341). "As the Court emphasized in *Spokeo*, 'Article III standing requires a concrete injury even in the context of a statutory violation.'" *Id.*

Putative class actions cannot evade these bedrock principles: "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *TransUnion*, 141 S. Ct. at 2208 (citing *Tyson Foods*, 577 U.S. at 466 (Roberts, C.J., concurring)); *see Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints."); *Davis v. FEC*, 554 U.S. 724, 734 (2008) ("'[S]tanding is not dispensed in gross.'" (citation omitted)).

As many circuits have recognized: "*In order for a class to be certified*, each member must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision." *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013)

(emphasis added); *accord Cordoba*, 942 F.3d at 1277 ("[T]here is a meaningful difference between a class with a few members who might not have suffered an injury traceable to the defendants and a class with potentially many more, even a majority, who do not have Article III standing."); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006) ("[N]o class may be certified that contains members lacking Article III standing."); *In re Deepwater Horizon*, 732 F.3d 326, 341-42 (5th Cir. 2013) ("By including claimants in the class definition that lack colorable claims, a court . . . ignores the standing requirement of Article III and creates a substantive right where none existed before.").

In fact, the Ninth Circuit itself had recognized that "no class may be certified that contains members lacking Article III standing." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) (quoting *Denney*, 443 F.3d at 264). Yet the Ninth Circuit's en banc majority in this case departs from that rule and the above circuit authority, expressly "overrul[ing] that statement in *Mazza*." *Olean*, 31 F.4th at 682 n.32. In doing so, the Ninth Circuit's en banc majority then brushed aside Article III constraints in this case, reasoning that because antitrust impact "is sufficient to show an injury-in-fact traceable to the defendants and redressable by a favorable ruling, the Tuna Purchasers have adequately *demonstrated* Article III standing at the class certification stage *for all class members*, whether or not that was required." *Olean*, 31 F.4th at 682 (emphasis added).

But neither antitrust impact nor Article III standing have been "demonstrated" in this case "for all class members" when there remains an open and "serious" question about whether 28% of class members are uninjured. *Id.*; *see id.* at 688 (Lee, J., dissenting); *In re Packaged Seafood Prods. Antitrust Litig.*, 332 F.R.D. 208, 324, 328 (S.D. Cal. 2019). After all, the Ninth Circuit's en banc majority held that "it is for the jury, not the court," to resolve this dispute. *Olean*, 31

F.4th at 682.

The Ninth Circuit's divergent and dismissive approach to Article III standing only reinforces the need for this Court's review.[4]

C. The Ninth Circuit's Decision Raises Serious Due Process Concerns About Manageability and Administrative Feasibility in Evaluating Individualized Differences Among Class Members.

To determine whether a class action will be manageable at trial, "the district court must at the time of certification offer a reasonable and workable plan for how that opportunity will be provided in a manner that is protective of the defendant's constitutional rights and does not cause individual inquiries to overwhelm common issues." *Asacol*, 907 F.3d at 58. Otherwise, class certification risks running afoul of critical Seventh Amendment and due process rights. *Id.* at 53.

Unlike a case in which a "mechanical" calculation can adequately allocate damages, the district court in this case "will need to conduct individualized mini-trials to determine whether each class member suffered an injury, and if so,

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[4] Though courts agree that Rule 23(b)(3) and Article III both impose important limitations on class actions, clarification from this Court is also needed as to the correct mode of analysis and the interplay between these requirements. *See, e.g.*, *Krakauer*, 925 F.3d at 652 ("At times, the discussion of these two issues has run together."); *Asacol*, 907 F.3d at 56 ("[W]e acknowledge the divergence evident in the manner in which our sister circuits have addressed the treatment of uninjured putative class members." (collecting cases)).

what the damages are for each member." *Olean*, 31 F.4th at 691 (Lee, J., dissenting). That approach is problematic because there can easily be hundreds, if not thousands, of potentially uninjured class members when the uninjured class-member issue is left for trial. *See Tyson Foods*, 577 U.S. at 463-64 (Roberts, C.J., concurring) ("[I]t is undisputed that hundreds of class members suffered no injury in this case. The question is: which ones?" (internal citation omitted)); *Rail Freight*, 934 F.3d at 627 ("In *Asacol*, the First Circuit noted the absence of even a single case 'allowing, under Rule 23, a trial in which thousands of class members testify.' That Court declined to create 'the first such case.' So do we." (internal citations omitted)).

Exacerbating the problem with the Ninth Circuit's approach, courts often have (mistakenly) adopted a position on discovery that does not permit discovery of absent class members. *See* 3 Newberg and Rubenstein on Class Actions § 9:11 (6th ed. 2022). As a result, the uninjured routinely lurk in the class without exposure. And thus a defendant's ability to adequately raise individual challenges at trial is severely limited and plaintiffs would likely lack the necessary proof. *See Asacol*, 907 F.3d at 53 (concluding plaintiffs' inability to "rely on unrebutted testimony in affidavits to prove injury-in-fact is fatal to plaintiffs' motion to certify this case" and "affidavits would be inadmissible hearsay at trial, leaving a fatal gap in the evidence").

Indeed, at the center of the dispute over uninjured class members in this case is plaintiffs' reliance on "averaging assumptions" to calculate alleged overcharges on a class-wide basis. *Id.* at 677. The "serious" and unresolved concern acknowledged by the district court in this case is whether overcharge assumptions "'paper over' individualized differences among class members" related to "individualized negotiations and different bargaining power among the purchasers[.]" *Id.* at 675, 677.

It is widely recognized that relying on "averages can lead to serious analytical problems" and can "hide substantial variation across individual cases, which may be key to determining whether there is common impact." ABA Section of Antitrust Law, *Econometrics: Legal, Practical, and Technical Issues* 220 (1st ed. 2005); *see, e.g.*, *Blades v. Monsanto Co.*, 400 F.3d 562, 573-74 (8th Cir. 2005) (affirming denial of class certification and rejecting the use of averages). And averaging assumptions are also likely to present significant, if not insurmountable, challenges when courts try to allocate damages between uninjured and injured class members at trial. *See, e.g.*, *Tyson Foods*, 577 U.S. at 464 (Roberts, C.J., concurring) ("I am not convinced that the District Court will be able to devise a means of distributing the aggregate award only to injured class members.").

In rejecting the Ninth Circuit's "Trial by Formula" approach in *Dukes*, this Court made clear that "the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,'" and thus defendants must "have the right to raise any individual affirmative defenses it may have" at trial. 564 U.S. at 367 (quoting 28 U.S.C. § 2072(b)). In other words, a "class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to *individual* claims." *Id.* (emphasis added); *see Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1303 (2010) (recognizing a due-process violation when "individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others through the procedural device of the class action").

As in *Asacol*, this case involves "more than a statutory defense; rather, we have a challenge to a plaintiff's ability to prove an element of liability" and Article III standing. 907 F.3d at 53. "The fact that plaintiffs seek class certification provides no occasion for jettisoning the rules of evidence and procedure, the Seventh Amendment, or the dictate of the

Rules Enabling Act, 28 U.S.C. § 2072(b)." *Id.* (citing *Tyson Foods*, 577 U.S. at 458 (explaining a class action does not give "plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action")).

"Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected." *In re Bridgestone/Firestone Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (7th Cir. 2002) (citing *Amchem*, 521 U.S. at 613). With no "reasonable and workable plan" for dealing with a class where nearly a third may be uninjured, certifying a class was especially improper here.

II. THIS COURT SHOULD GRANT REVIEW TO ADDRESS THIS RECURRING ISSUE OF FUNDAMENTAL IMPORTANCE.

"[T]he question whether uninjured class members may recover is one of great importance," *Tyson Foods*, 577 U.S. at 461, and "has received considerable attention" from the federal circuit courts, *Krakauer*, 925 F.3d at 652; *see also Philip Morris*, 561 U.S. at 1303 ("The extent to which class treatment may constitutionally reduce the normal requirements of due process is an important question.").

On top of the circuit split and the fundamental constitutional considerations at issue, "[c]ertification of the class is often, if not usually, the prelude to a substantial settlement by the defendant because the costs and risks of litigating further are so high." *Amgen, Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 485 (2013) (Scalia, J., dissenting). And "plaintiffs with weak merits claims may readily assume that risk, mindful that class certification often leads to a hefty settlement." *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1713 (2017).

This concern is particularly acute in cases like this where plaintiffs rely on aggregate damages and unresolved questions exist about the extent of uninjured class members. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of devastating loss, defendants will be pressured into settling questionable claims."); *Cordoba*, 942 F.3d at 1276 ("Given the '*in terrorem* character of a class action,' a class defined so as to improperly include uninjured class members increases the potential liability for the defendant and induces more pressure to settle the case, regardless of the merits." (internal citation omitted)).

Moreover, "[w]hen combined with the procedural device of the class action, aggregated statutory damages claims can result in absurd liability exposure in the hundreds of millions—or even billions—of dollars on behalf of a class whose actual damages are often nonexistent." Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 104 (2009); *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." (citations omitted)); *Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003) (discussing due process concerns "from the effects of combining a statutory scheme that imposes minimum statutory damages awards" with "the class action mechanism that aggregates many claims").

Compounding this problem is that the Ninth Circuit's approach enables plaintiffs to circumvent Rule 23(b)(3) "by merely offering a well-written and plausible expert opinion." *Olean*, 31 F.4th at 689 (Lee, J. dissenting). As in this case,

"[m]ultiple regression analysis is commonly used" when assessing "whether all members of a proposed class are affected." *Econometrics* at 220-21, *supra* at 13. Yet "regression analysis will always yield a result," and "whether regression is useful for assessing classwide impact is a different question." ABA Section of Antitrust Law, *Econometrics: Legal, Practical, and Technical Issues* 355-56 (2d ed. 2014).

Indeed, "[b]y their very nature, regressions summarize data" and "can overlook crucial detail," resulting in "misleading information." *Econometrics* at 221, *supra* at 13. If all that plaintiffs must do is offer a regression analysis—irrespective of whether it results in an inflated class—then Rule 23(b)(3) loses its significance. *See West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) (emphasizing courts must resolve expert disputes under Rule 23 because, otherwise, plaintiffs "can obtain class certification just by hiring a competent expert"); *Comcast*, 569 U.S. at 34 ("Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)." (citing *Amchem*, 521 U.S. at 623-24)).

If most class actions never make it to trial, then defendants are left paying potentially massive settlements to classes inflated with uninjured class members. *See Olean*, 31 F.4th at 685-86 (Lee, J., dissenting) (recognizing that by not resolving the "dueling experts' differing opinions" until trial "that day will likely never come to pass because class action cases almost always settle once a court certifies a class.").

"[I]f there is no way to ensure that the jury's damages award goes only to injured class members, that award cannot stand." *Tyson Foods*, 577 U.S. at 466 (Roberts, C.J., concurring). And the same applies to class settlements. *See, e.g.*, *Drazen v. Pinto*, 41 F.4th 1354, 1361 (11th Cir. 2022) ("If every plaintiff within the class definition in the class action in *TransUnion* had to have Article III standing to recover damages after trial, logically so too must be the case

with a court-approved class action settlement."); *In re Deepwater Horizon*, 732 F.3d at 341-42 ("Allowing recovery from the settlement fund by those who have no case and cannot state a claim, the court acts *ultra vires*.").

This Court's directive that lower courts "rigorous[ly]" scrutinize whether plaintiffs have met class-certification requirements, even when a disputed class-certification issue "necessarily overlaps" with the "merits," *Dukes*, 564 U.S. at 351-52, is more critical than ever. Class-action defense spending grew a record-breaking 16% in 2021, crossing the $3 billion threshold for the first time and is expected to rise again in 2022. *See 2022 Class Action Survey*, Carlton Fields at 6-7 (11th ed. 2022), *available at* classactionsurvey.com. This increase in defense spending relates to an estimated 27% increase in class actions in 2022 for large companies—the highest number of both ongoing and total matters in over a decade. *Id.* at 4, 17.

With such a low Rule 23(b)(3) threshold in the Ninth Circuit, plaintiffs will flock to the nation's largest circuit to file massive and inflated class actions knowing that they can "extract settlements." *Olean*, 31 F.4th at 692 (Lee, J., dissenting). And this problem may disproportionally subject innovative digital-services companies that scale quickly and reach nearly every facet of society to enormous exposure. *See* Mark Fenwick et al., *Regulation Tomorrow: What Happens When Technology is Faster than the Law?*, 6 Am. U. Bus. L. Rev. 561, 563, 572 (2017) (cautioning against overregulation that "stifles or distorts technological development" as "disruptive technologies arrive more frequently and at a faster pace").

As detailed above, most circuit courts have weighed in on this recurring and critical issue, making the petition for certiorari here particularly ripe for this Court's review. And the Ninth Circuit's outlier decision and its significant ramifications urgently warrant that review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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