No. 25-625

In the

Supreme Court of the United States

TAKEDA PHARMACEUTICAL COMPANY, LTD., et al.,

Petitioners,

v.

PAINTERS & ALLIED TRADES DISTRICT COUNCIL 82 HEALTH CARE FUND, et al.,

Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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December 15, 2025

QUESTIONS PRESENTED

1. Whether a federal court may certify a class action under Federal Rule of Civil Procedure 23(b)(3) when some members of the proposed class lack any Article III injury.

2. Whether a federal court may certify a class action under Federal Rule of Civil Procedure 23(b)(3) when a class relies on representative evidence to try to prove an individualized reliance issue that is a necessary element of each plaintiff's claim.

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as an amicus curiae to oppose federal-court adjudication of claims by those who lack Article III standing. *See*, *e.g.*, *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021); *Spokeo v. Robins*, 578 U.S. 330 (2016). WLF also participates in important class actions to combat abuses of Rule 23 and the class mechanism. *See, e.g., Comcast Corp. v. Behrend*, 569 U.S. 27 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

INTRODUCTION

A crowd of RICO plaintiffs clamoring to average their injuries into one suit calls to mind the statistician's joke about a man with his head in an oven and his feet in a freezer who insists that, overall, he's quite comfortable. Given the highly individualized nature of the proof required, fraud claims like those asserted under civil RICO are typically "unsuited for treatment as a class action." Fed. R. Civ. Pro. 23, advisory comm. note to 1966 amendments.

True, there are many well-known examples of the "wisdom of the crowd" effect. Ask people at the

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* No party's counsel authored any part of this brief. No one, other than Washington Legal Foundation and its counsel, helped pay for the brief's preparation or submission. Filed more than ten days before the deadline, this brief puts all parties on timely notice of WLF's intent to file.

county fair to guess the weight of a cow, for instance, and the average of their guesses will often be astonishingly close to the cow's true weight. The technique works by negating underlying idiosyncrasies. Many people will overestimate the cow's weight. Many others will undershoot it. Averaging the various wrong answers tends to produce a single number that approximates the right answer.

As with the weight of cows, so too with civil-RICO injuries in federal litigation? Of course not. If Jack defrauds Alice of $100 but defrauds Bob of nothing, no reasonable person will say that Alice and Bob have each lost $50. If, citing the $100 swiped from Alice, Bob sues Jack for $50, he'd be laughed out of court. And nothing changes if a clever lawyer tries to get the $50 for Bob by stamping "CLASS ACTION" atop the complaint. In a lawsuit—certainly one in federal court—*each* plaintiff must have suffered a concrete injury to recover damages. Under Article III, class actions cannot proceed by the wisdom of the crowd. Plaintiffs without an injury have no suit; and slipping them into a class cannot magically create one for them.

Like Tolstoy's quip about unhappy families, every defrauded RICO plaintiff is injured in its own way. So while averaging estimates of a cow's weight at the fair can remove unwanted noise, averaging the harms suffered by RICO class members obscures crucial distinctions, abridges defendants' substantive rights, and enlists federal courts into issuing advisory opinions. Above all, it violates the Constitution.

This case proves the point. The named plaintiffs here sought to press RICO claims on behalf of a class of third-party payors (TPPs) for the anti-diabetes drug Actos. To do so, they had to prove that the proposed class satisfies Rule 23(b)(3)'s "predominance" requirement. Rather than hold them to that rigorous standard, the District Court accepted an expert's statistical regression model as being "capable" of establishing predominance on a class-wide basis. Affirming class certification, the Ninth Circuit allowed that expert to essentially manufacture predominance by simply assuming away the very distinctions that make it impossible to meld the various payors into a uniform class.

In doing so, the Ninth Circuit's decision blesses class certification even though averaging a class's injuries improperly obscures the fact that many class members suffered no injury. By allowing uninjured individuals to invoke federal-court jurisdiction based solely on a defendant's alleged violations of federal law, that holding impermissibly enlarges the legislative and judicial powers—at the expense of the executive power. It also greatly expands the federal courts' reach well beyond those "cases" and "controversies" over which they have subject-matter jurisdiction. This Court should grant the petition to ensure that the federal courts do not become a haven for plaintiffs' attorneys seeking to certify classes with uninjured members.

SUMMARY OF ARGUMENT

Just four years ago in *TransUnion*, this Court rebuked the Ninth Circuit for allowing a district court to enter judgment for uninjured plaintiffs. There, the district court lacked jurisdiction to enter the judgment because class members who suffered no injury lacked Article III standing to sue in federal court. Most courts of appeals have faithfully applied that decision and hold that district courts cannot certify classes with uninjured members. Not so in the Ninth Circuit. Yet "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 365 (1982) (per curiam).

The Framers limited the Judiciary's ambit to deciding cases and controversies so that it could not encroach on the other branches' powers. The Ninth Circuit's holding is sharply at odds with this Court's historical understanding that neither Congress nor the Judiciary may dilute the case-or-controversy requirement. This Court has consistently rejected assertions that federal courts may entertain citizen suits to vindicate a generalized interest in the proper administration of the laws, even when Congress has explicitly authorized such suits by statute. The Court should grant the writ to restore the Executive's proper relationship with the Judicial and Legislative Branches.

I.A. Article III's injury-in-fact requirement is grounded in separation-of-powers concerns. Historically, Anglo-American courts were limited to

deciding only cases or controversies between adverse parties. The courts may say what the law is only by resolving discrete and tractable disputes. Congress, on the other hand, makes the laws, while the President enforces them. Requiring all plaintiffs to prove standing thus helps ensure that federal courts do not interfere with the other branches' constitutional prerogatives.

B. Under the Take Care Clause, the Framers made clear that the President's most important duty was to ensure that the laws be faithfully executed. The cornerstone of the President's enforcement authority is the exercise of discretion—the power to control the initiation, prosecution, and termination of actions to enforce federal law. Only the President or his officers may direct federal legal action against a person without alleging that he suffered a personal injury by the defendant's misconduct. When, as here, a class member suffers no injury-in-fact, certifying a class with uninjured members deprives the President of the prosecutorial discretion that lies at the heart of the President's power to execute the laws.

Congress cannot delegate the President's prosecutorial discretion to private parties unless the President retains enough control over that party to ensure that the President can perform his Article II duties. Because civil RICO does not give the President control over private lawsuits, the Ninth Circuit's holding impermissibly transfers a core Article II function to private plaintiffs. By authorizing federal courts to require compliance with federal law at the behest of uninjured individuals, the decision below harms the Constitution's careful separation of powers and should be reviewed.

II. It is immaterial whether *some* class members have Article III standing. A class action is merely "an exception to the usual rule that litigation is conducted by and on behalf of individual named parties only." *Wal-Mart*, 564 U.S. at 348 (cleaned up). For a federal court to certify a class, every member of the class must have Article III standing. Otherwise, averaging a class's injuries will often hide that many class members have no injury. The exercise of jurisdiction in such cases defies this Court's well-settled precedent. Class certification here stands on a baseless fallacy. This Court should grant review and vindicate both the Constitution and the rule of law.

REASONS FOR GRANTING THE WRIT

I. PERMITTING FEDERAL COURTS TO ADJUDICATE CLAIMS BY UNINJURED CLASS MEMBERS VIOLATES THE SEPARATION OF POWERS.

Any time one branch of government encroaches on the constitutional prerogatives of another, even without enlarging its own power, it violates the separation of powers. *See Clinton v. Jones*, 520 U.S. 681, 701 (1997). Allowing federal courts to adjudicate claims by uninjured class members, as the Ninth Circuit did here, violates the separation of powers by enlarging judicial and legislative power at the expense of executive power. Likewise, authorizing federal courts to enforce federal law at the behest of private citizens who have suffered no injury also permits Congress to interfere with the President's duties under the Take Care Clause. This Court should intervene.

A. The Decision Below Contravenes Article III.

Article III's injury-in-fact requirement ensures that cases will be resolved "not in the rarified atmosphere of a debating society" but with "a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 472 (1982). The Ninth Circuit's rule, on the other hand, "create[s] the potential for abuse of the judicial process, distort[s] the role of the Judiciary in its relationship to the Executive and the Legislature, and open[s] the Judiciary to an arguable charge of providing 'government by injunction.'" *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974) (citation omitted).

Here the Ninth Circuit affirmed class certification despite the known presence of uninjured class members. Even in their own modeling, the plaintiffs could not show that all TPPs were injured. Having defined the class as those TPPs who "purchased at least five independent prescriptions of Actos," plaintiffs conceded that up to two percent of class members were uninjured. Pet. App. 20. Even if that estimate is accurate, that is thousands of TPPs.

As Judge Miller emphasizes in his dissent, the plaintiffs' expert's analysis hinged on the unsupported assumption of statistical independence among prescriptions, ignoring record evidence that physicians may prefer to prescribe Actos based on experience while TPPs serve varying patient populations with differing sensitivities to bladder-cancer risks. *Id.* at 21. Without statistical

independence, plaintiffs' probability calculation collapses and risks inflating the number of uninjured TPPs beyond de minimis levels. Even so, with no winnowing mechanism to sort uninjured plaintiffs, the trial court certified the class, and the panel majority affirmed. Touting circuit precedent that affirmed certification for a class including at least 5.5% uninjured members, the appeals court embraced the plaintiffs' expert's statistical analysis to conclude that the number of uninjured TPPs was "de minimis." Pet. App. 7.

Yet smuggling in one uninjured plaintiff with every injured nineteen isn't de minimis—it's unconstitutional. An Article III injury "must be likely, as opposed to merely speculative." *United States v. Windsor*, 570 U.S. 744, 757 (2013) (quotation omitted). Here, the District Court's estimate of the number of uninjured class members is, at best, too speculative and rests on too many unproven assumptions. Put differently, certifying a hypothetical class "produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) (citations omitted).

RICO changes nothing. Congress cannot "erase Article III standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) (citing *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)); *see TransUnion*, 594 U.S. at 426. But that is what the Ninth Circuit allows here. It permits uninjured class

members to sue for RICO violations that never harmed them. In other words, it reads RICO, combined with Rule 23, as giving uninjured plaintiffs the right to sue. This it cannot do.

B. The Decision Below Violates Article II's Take Care Clause.

Unless lower courts adhere strictly to Article III's injury-in-fact requirement, private plaintiffs and the Judiciary will enforce the laws—a role the Constitution exclusively reserves for the Executive. Allowing recovery for uninjured class members thus invades the exclusive province of the President to enforce federal law under the Take Care Clause. *See* U.S. Const. art. II, § 3. "As Madison stated on the floor of the first Congress, 'if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and *controlling* those who execute the laws.'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (quoting 1 Annals of Cong. 463 (1789) (emphasis added)).

The Constitution "does not leave to speculation who is to administer the laws enacted by Congress." *Printz v. United States*, 521 U.S. 898, 922 (1997). It is "the President," both "personally and through officers whom he appoints" who enforces federal law. *Id.* The Take Care Clause thus imposes on the Executive Branch a duty to undertake all necessary means, including suing in federal court to ensure compliance with federal law. *Allen v. Wright*, 468 U.S. 737, 761 (1984).

Because they lack any concrete injury-in-fact, the uninjured class members seek only to vindicate

the public interest triggered by a bare violation of federal law. But "[v]indicating the public interest * * * is the function of Congress and the Chief Executive." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) (emphasis removed). The separation of powers bars Congress from giving private parties the ability to vindicate the public interest because that is the exclusive province of the Executive Branch. "A lawsuit is the ultimate remedy for a breach of the law," and the Constitution entrusts the Executive—not the other branches—"to take Care that the Laws be faithfully executed." *Buckley v. Valeo*, 424 U.S. 1, 138 (1976).

By allowing named plaintiffs to pursue claims on behalf of uninjured class members, the Ninth Circuit's holding effectively transfers the President's enforcement duty under the Take Care Clause to politically unaccountable private parties. Such a move "violates the basic principle that the President cannot delegate ultimate responsibility or the active obligation to supervise that goes with it, because Article II makes a single President responsible for the actions of the Executive Branch." *Free Enter. Fund*, 561 U.S. at 496 (quotation omitted).

Consistent with Article II, a private plaintiff lacks standing to seek the mere "vindication of the rule of law." *Steel Co.*, 523 U.S. at 106. Indeed, this Court's precedents weigh "against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties." *Allen*, 468 U.S. at 761. A contrary view, one allowing any private citizen to sue whenever the law

is violated, diminishes the President's political accountability.

Allowing uninjured plaintiffs to pursue claims disrupts "the balance that the Framers created to protect the executive from legislative power." James Leonard & Joanne C. Brant, *The Half-Open Door: Article II, the Injury-In-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 Rutgers L. Rev. 1, 115 (2001). The Ninth Circuit's decision disrupts this balance by giving named plaintiffs the ability to vindicate the rights of uninjured class members. Again, this job belongs to the President—not the plaintiffs' bar.

The President's ability to control the initiation, prosecution, and termination of actions brought to ensure compliance with federal law is crucial to taking care that the laws are enforced. The keystone of this enforcement authority is the exercise of prosecutorial discretion. Such discretion "creates a troubling potential for abuse, even when it is exercised by a governmental entity that is subject to constitutional and other legal and political constraints." Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781, 790 (2009). That is why "the Constitution prohibits Congress and the Executive Branch from delegating such prosecutorial discretion to private parties, who are subject to no such requirements." *Id.*

Even a statute divesting the President of some measure of prosecutorial discretion must "give the Executive Branch sufficient control * * * to ensure that the President is able to perform his constitutionally assigned duties." *Morrison v. Olson*,

487 U.S. 654, 696 (1988). *Morrison* involved a constitutional challenge to the Ethics in Government Act of 1978, which authorized the appointment of an independent counsel to prosecute high-ranking government officials. *See id.* at 660–61. In upholding the law, the Court emphasized that the challenged statute included "several means of supervising or controlling the prosecutorial powers that may be wielded by an independent counsel," which, in its view, satisfied the Take Care Clause. *Id*.

Under the Ethics in Government Act, the Attorney General could "remove the counsel for 'good cause,'" control the scope of the litigation, and ensure that the prosecution was pursued in the public interest. *Morrison*, 487 U.S. at 696. None of *Morrison*'s statutory safeguards are present here. Plaintiffs are subject to no control or oversight by the Executive Branch. In fact, RICO does not even require private plaintiffs to notify the Attorney General of their suit. Further, unlike the independent counsel at issue in *Morrison*, the motivation for uninjured private plaintiffs is financial gain unrelated to the public good. Without "sufficient control" by the Executive, the Ninth Circuit's understanding of the reach of uninjured-class-member standing violates Article II.

II. THIS COURT SHOULD CLARIFY THAT THE SAME STANDING RULES APPLY TO BOTH ABSENT AND NAMED CLASS MEMBERS.

Standing "is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Rule 23 does not alter that reality. That the named plaintiffs here suffered an Article III injury changes nothing.

Federal courts can "provide relief to claimants, in individual or class actions," but only if those claimants "have suffered, or will imminently suffer, actual harm." *Id.* at 349. "That a suit may be a class action," in other words, "adds nothing to the question of standing" under Article III. *Spokeo*, 578 U.S. at 338 n.6 (quoting *Simon v. E. Kentucky Welfare Rts. Org.*, 426 U.S. 26, 40 n.20 (1976)); *see Warth v. Seldin*, 422 U.S. 490, 502 (1975).

It follows that "unnamed class members" who suffered no injury-in-fact "lack a cognizable injury under Article III." *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 768 (5th Cir. 2020). Because the "constitutional requirement of standing is equally applicable to class actions," "each [class] member must have standing." *Halvorson v. Auto-Owners Ins.,* 718 F.3d 773, 778–79 (8th Cir. 2013) (citations omitted). A class cannot be certified if some of its members lack the ability to sue individually. In other words, "a named plaintiff cannot represent a class of persons who lack the ability to bring suit themselves." *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 620 (8th Cir. 2011) (quotation omitted).

This Court's caselaw confirms that district courts cannot certify a class with *any* uninjured members. After all, standing is a "jurisdictional doctrine." *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 8 (2023) (Thomas, J., concurring). It forbids courts "from exercising power over people who never fell within the sweep of a court's authority." *Speerly v. Gen. Motors*, 143 F.4th 306, (6th Cir. 2025) (Thapar, J, concurring) (citation omitted). Upon certification, they become bound by the judgment, receiving the

same Article III scrutiny as named plaintiffs to avoid nonjusticiable claims.

Judgment is improper if "no reasonable juror" could believe, based on the representative evidence, that each class member was injured. *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 459 (2016). Chief Justice Roberts, joined by Justice Alito, concurred in *Tyson Foods* while expanding on the Article III analysis. "Article III," the Chief Justice wrote, "does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Id.* at 466. And because no federal court can grant relief to them, uninjured parties cannot be included in a class of claimants seeking treble damages.

In *TransUnion*, the full majority embraced Chief Justice Roberts's view and clarified that "[e]very class member must have Article III standing in order to recover individual damages." 594 U.S. at 431. But because the Court resolved *TransUnion* on narrower grounds, it left for another day "whether every class member must demonstrate standing before a court certifies a class." *Id.* at 431 n.4.

This case, which has the advantages of a fully developed record and superb counsel on both sides, offers the Court an ideal vehicle to clarify whether unnamed plaintiffs must satisfy Article III to be joined in the case to judgment. The Court should answer that question and end an entrenched circuit split. Permitting certification of a class with members who suffered no Article III injury raises the same separation-of-powers issues as allowing uninjured plaintiffs to sue individually on their own behalf. In both cases, the President cannot exercise his core

power under the Take Care Clause. In both cases, an Article III court is venturing far beyond its charge to resolving discrete and tractable disputes. This strikes at the heart of our constitutional structure.

If anything, the concerns here are greater than when a single uninjured plaintiff sues in federal court. In those cases, the uninjured plaintiff decides what violations of federal law to vindicate. Here, however, the uninjured class members are not choosing to vindicate a right. Rather, Plaintiffs and their counsel are purportedly vindicating interests on behalf of these uninjured individuals.

But vindicating the interest of others is the President's job. *See Lujan*, 504 U.S. at 576. The Constitution does not allow the courts to transfer that duty to the plaintiffs' bar. This Court should grant review to clarify that all class members must have suffered a concrete injury under Article III.

CONCLUSION

This Court should grant the writ.

Respectfully submitted,
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December 15, 2025