

No. 26-376

IN THE
Supreme Court of the United States

BAYER HEALTHCARE LLC,
Petitioner,
v.

DONIECE DRAKE AND DEBORAH BOWLING,
Respondents.

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

**BRIEF OF WASHINGTON LEGAL FOUNDATION
AS AMICUS CURIAE SUPPORTING PETITIONER**

CORY L. ANDREWS
Counsel of Record
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

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QUESTION PRESENTED

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

TABLE OF CONTENTS

QUESTION PRESENTED	ii
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	1
INTRODUCTION	2
ARGUMENT	6
I. THE DECISION BELOW REWARDS THE STRATEGY OF KEEPING INJURY VAGUE	6
A. The plaintiffs promised proof they never delivered	6
B. The vagueness is the point.....	8
C. This Court’s precedents forbid certifying a class without classwide evidence of injury.....	9
II. THIS CASE PRESENTS THE QUESTION IN ITS STARKEST FORM AND IN A POSTURE THE LAST VEHICLE LACKED	12
III. THE DECISION BELOW SOWS UNCERTAINTY THAT THE ECONOMY CANNOT PRICE	16
CONCLUSION.....	19

TABLE OF AUTHORITIES

	Page(s)
CASES:	
<i>Comcast Corp. v. Behrend</i> , 569 U.S. 27 (2013).....	1, 4, 10
<i>Coopers & Lybrand v. Livesay</i> , 437 U.S. 463 (1978).....	17
<i>In re Asacol Antitrust Litig.</i> , 907 F.3d 42 (1st Cir. 2018)	13
<i>In re Deepwater Horizon</i> , 739 F.3d 790 (5th Cir. 2014).....	13
<i>Lab’y Corp. of Am. Holdings v. Davis</i> , 145 S. Ct. 1133 (2025).....	12
<i>Lab’y Corp. of Am. Holdings v. Davis</i> , 605 U.S. 327 (2025).....	1, 4, 5, 13, 14, 15, 17, 18
<i>Lytle v. Nutramax Lab’s, Inc.</i> , 114 F.4th 1011 (9th Cir. 2024), <i>cert. denied</i> , 145 S. Ct. 1308 (2025).....	14
<i>Microsoft Corp. v. Baker</i> , 582 U.S. 23 (2017).....	17
<i>Newman v. Bayer Corp.</i> , 348 F.R.D. 567 (S.D.N.Y. 2025).....	9
<i>Newman v. Bayer Corp.</i> , No. 22-cv-7087 (VB), 2026 WL 1243391 (S.D.N.Y. May 6, 2026)	9
<i>Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC</i> , 31 F.4th 651 (9th Cir. 2022) (en banc)	14
<i>Overby v. Anheuser-Busch, LLC</i> , 178 F.4th 175 (4th Cir. 2026)	11

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Speerly v. Gen. Motors, LLC</i> , 143 F.4th 306 (6th Cir. 2025) (en banc)	10
<i>Spokeo, Inc. v. Robins</i> , 578 U.S. 330 (2016)	1
<i>Stafford v. Bojangles’ Rests., Inc.</i> , 123 F.4th 671 (4th Cir. 2024)	11
<i>TransUnion LLC v. Ramirez</i> , 594 U.S. 413 (2021)	1, 4, 11, 15
<i>Tyson Foods, Inc. v. Bouaphakeo</i> , 577 U.S. 442 (2016)	4, 10, 11
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 564 U.S. 338 (2011)	1, 4, 6, 9, 10, 11
<i>Washington v. Reynolds Consumer Prods. LLC</i> , No. 24-cv-02327-ALC-RFT, 2026 WL 2210008 (S.D.N.Y. July 30, 2026)	9
STATUTE:	
28 U.S.C. § 2072(b)	11
RULES:	
Fed. R. Civ. P. 23	1, 4, 11, 14, 15, 16, 18
Fed. R. Civ. P. 23(b)(3)	1, 2, 6, 11, 12, 15
Fed. R. Civ. P. 23(f)	15, 17
Fed. R. Civ. P. 23 advisory committee’s note to 1998 amendment	17

TABLE OF AUTHORITIES
(continued)

	Page(s)
 OTHER AUTHORITIES:	
Brian T. Fitzpatrick, <i>An Empirical Study of Class Action Settlements and Their Fee Awards</i> , 7 J. Empirical Legal Stud. 811 (2010).....	17
Philip S. Goldberg & Andrew J. Trask, <i>No-Injury and Piggyback Class Actions: When Product-Defect Class Actions Do Not Benefit Consumers</i> , 19 U. Mass. L. Rev. 181 (2024).....	8
Lex Machina, <i>Class Action Litigation Report 2026</i> (Apr. 2026), https://perma.cc/3HNX-92Q5	14

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, Inc. 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).

WLF's concern here is a practical one. A business can plan against a known risk. It cannot plan against a liability that attaches not to what the firm or its agents did but to how many people a court is willing to gather into a class. That concern led WLF to press the underlying question last year in *Laboratory Corp. of America Holdings v. Davis*, 605 U.S. 327 (2025), where it was the only amicus to support the petition at the certiorari stage. It filed again on the merits to argue that Rule 23(b)(3) permits no damages class that sweeps in members who suffered no Article III injury. Ultimately, the writ was dismissed as improvidently granted on a record that left unresolved which class was before the Court.

* No party's counsel authored any part of this brief. No one, other than WLF and its counsel, helped pay for the brief's preparation or submission. All parties received timely notice of WLF's intent to file this brief.

The question returns here in the form the *Labcorp* vehicle lacked, and on a record where the plaintiffs' own evidence supplies the answer. As this brief shows, a certification standard that never tests injury lets the artificial size of a class, rather than proof of harm, determine what a defendant must pay, at the expense of the certainty on which risk is priced, capital is allocated, and markets are built.

INTRODUCTION

Every damages class action begins with the promise that one proceeding will answer, in a single stroke, a question common to everyone in the class. Rule 23(b)(3) makes that promise enforceable. A court may certify a class only when common questions “predominate,” Fed. R. Civ. P. 23(b)(3), which means only when the class members share the same injury that entitles them to relief. The promise and the proof are supposed to arrive together, before certification.

Here they did not. The plaintiffs promised to prove a classwide injury but produced no evidence of one. Their survey expert, retained to show that the word “Natural” moved consumers, found that removing it from the label had “no statistical impact” on what consumers believed about the product’s ingredients. 4-ER-512. She then testified 79 times across two depositions that she had no evidence that Bayer’s label deceived anyone. 2-ER-79–83; 3-ER-248–56; *see* Pet. 9–12. The plaintiffs’ damages expert proposed a conjoint analysis to measure a price premium, never ran it, and conceded that it was “possible that there could be no price premium.” 3-ER-357. What the plaintiffs offered was not evidence of injury but a plan to look for one

later, paired with their own expert's finding that the word "Natural" on the label changed nothing.

Holding that a "not-yet-executed damages model" supplies classwide evidence of injury, Pet. App. 5a, the Ninth Circuit affirmed certification of both classes. Because the plaintiffs' theory was a price premium, the panel reasoned, "either all class members were injured or they were not." Pet. App. 4a. And it acknowledged that only the unrun model could establish "whether the putative classes in fact paid a premium price for the product." Pet. App. 6a. The panel never mentioned Article III.

Judge Forrest, dissenting as to the California class, saw the defect. Bayer had "undisputed evidence that a substantial proportion of class members was not misled," and "because there is not classwide causation, neither is there classwide injury." Pet. App. 10a. When Bayer pressed the Article III point again on rehearing, she would have granted the petition. Pet. App. 39a.

The decision below rewards the perverse logic of a familiar litigation strategy. A price-premium theory works as a classwide theory only so long as it stays abstract. Specify who was deceived, and the class fractures into those who were and those who were not. Run the conjoint, and the model may show no premium, or a premium for some buyers and not for others. The plaintiffs' bar has learned that the safest way to keep a class whole is to keep the injury vague. The trick is to allege overpayment in the abstract, promise a model rather than a result, and let a "reasonable consumer" stand in for the actual, varied consumers whose money is at stake. Vagueness is not an accident of these cases; it is the point.

The decision below enshrines that strategy into law. Rule 23 was written to demand clarity. It requires a court to find, on evidence and before certifying, that the common question can be answered classwide. A promise to generate that evidence someday is not evidence today. This Court said as much when it rejected “Trial by Formula” in *Wal-Mart*, 564 U.S. at 367; when it insisted in *Comcast* that a damages model “must measure only those damages attributable to” the theory of liability, 569 U.S. at 35; and when it held in *TransUnion* that “[e]very class member must have Article III standing in order to recover individual damages,” 594 U.S. at 431. A class certified without evidence that anyone in it was injured satisfies none of these commands.

Yet those decisions, plainly stated and often repeated, have not taken hold in the trial courts that certify these classes or in the appeals courts that affirm them. Each of this Court’s precedents drew a clear line, and each has been read narrowly, distinguished, or passed over by courts reluctant to let it disturb a certification. A rule announced but not enforced is, to the litigants who live under it, no rule at all, and the plaintiffs’ bar has built a thriving practice on that difference. The rules are already on the books. What is missing is a holding, in a case that cannot be evaded, that they mean what they say. Only this Court can supply it.

Twice this Court has taken up the question presented, and twice it has come away without an answer. *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 460–61 (2016), declined to reach it. This Court agreed again to answer it in *Labcorp*, then dismissed the writ as improvidently granted, over Justice Kavanaugh’s

insistence that “a federal court may not certify a damages class that includes both injured and uninjured members.” 605 U.S. at 328 (Kavanaugh, J., dissenting from dismissal of certiorari). The circuits remain sharply divided over whether a class may include members who lack an Article III injury, and this case sits at the far edge of that split. Here the Ninth Circuit went well beyond tolerating a class with some uninjured members. It affirmed certification of two classes on a record containing *no* evidence that *any* absent member was injured, and in the face of affirmative evidence (supplied by the plaintiffs’ own expert) that the label never deceived consumers. A rule of federal procedure should not mean opposite things in different federal courthouses, least of all at that extreme.

The costs of leaving the question open fall first on the businesses that must plan against it, and then on everyone else. Certainty is the essential catalyst of free enterprise. A firm can price a known risk, reserve against it, and still invest. It cannot do any of that against a liability that materializes not from proof of harm but from the size of a class a court agrees to certify. The numbers here prove the point. Bayer sold less than \$2 million of the product in New York and California combined. 6-ER-1204–09. The plaintiffs seek \$36.2 million in statutory damages for the New York class alone, roughly twenty times the sales at issue, without evidence that a single absent class member was injured. Pet. 8, 27–28. A liability that bears no relation to the conduct that supposedly produced it cannot be priced, reserved against, or insured. It can only be paid. The petition should be granted.

ARGUMENT

I. THE DECISION BELOW REWARDS THE STRATEGY OF KEEPING INJURY VAGUE.

Rule 23(b)(3) asks a hard question and demands a real answer. A court may certify a damages class only if “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). Predominance is no mere pleading standard. It requires the court to find, after a “rigorous analysis,” that the class’s common questions will “generate common answers apt to drive the resolution of the litigation.” *Wal-Mart*, 564 U.S. at 350–51. The inquiry exists to separate a class that can be tried together from one whose common questions dissolve once the proof comes in.

The decision below inverts that inquiry. It treats the absence of proof of injury not as a reason to deny certification but as a reason to grant it. That move is the basis for a recurring abuse that only this Court can end.

A. The plaintiffs promised proof they never delivered.

Start with the record. The plaintiffs’ theory was a price premium: every buyer of Natural Fruit Bites overpaid because the label said “Natural.” Pet. App. 4a. To make that theory classwide, the plaintiffs needed common evidence that every class member paid a premium and that the premium was attributable to the word “Natural.” They offered neither.

Their survey expert, Dr. Matthews, was retained to show that “Natural” moved consumers. Her survey showed the opposite. Comparing consumers who saw the actual label with consumers who saw the same label with “Natural” removed, she found “no statistical impact” on what they believed about the product’s ingredients. 4-ER-512. In deposition she said so 79 times: she had “no evidence that any consumers are confused by the word ‘[N]atural’ on the Bayer label.” 3-ER-285; *see* 2-ER-79–83; 3-ER-248–56. Their damages expert, Dr. Ingersoll, proposed a conjoint analysis that could, in theory, isolate a premium if anyone actually paid one. He spent “two or three hours” on the report that proposed it. 3-ER-354–55. He had “no data because the study hasn’t been designed or conducted.” 3-ER-352. He reached no opinion on whether a premium existed, 3-ER-356, and agreed that it was “possible that there could be no price premium” at all. 3-ER-357. The plaintiffs thus came to certification with affirmative evidence that the label did not deceive consumers and a promise to look for a premium later. That was all.

The problem is just not that the evidence was thin; it actually pointed the other way. And the Ninth Circuit’s answer was that it did not matter. A proposed, unexecuted model was enough, because at some future point it *might* show an injury that the plaintiffs’ own survey said was not there. Pet. App. 5a–6a. The panel did not deny that the model might come back empty. It accepted that “either all class members were injured or they were not” and affirmed on that basis. Pet. App. 4a. Under that rule, a plaintiff need never prove classwide injury at certification. A plaintiff need only promise to do so, and the vaguer the promise, the safer the class.

B. The vagueness is the point.

This inversion is not confined to one label or one product. It reflects a familiar and deliberate litigation strategy. When plaintiffs frame a consumer claim as a classwide overpayment, they gain a class only by keeping the injury unspecified. The reason is arithmetic. The moment plaintiffs must identify which buyers were deceived, or run a model that prices the alleged premium buyer-by-buyer, the class divides into those who cared about “Natural” and those who did not; those who read the label and those who did not; and those who overpaid and those who got exactly what they wanted at a price they were glad to pay. Specificity is fatal to the class, so plaintiffs avoid it at all costs.

Commentators have described the same tactic in product-defect class actions. Class counsel “will often delay detailing how much less class members would have paid,” precisely because “the answer of exact payment may differ from person to person,” and “this strategic ambiguity is intended to make it easier to maintain common issues across the class.” Philip S. Goldberg & Andrew J. Trask, *No-Injury and Piggyback Class Actions: When Product-Defect Class Actions Do Not Benefit Consumers*, 19 U. Mass. L. Rev. 181, 196 (2024).

The unrun conjoint in this case is that ambiguity at work. An expert who runs a model produces a number, and a number can be tested, defeated, or shown to vary. An expert who merely proposes a model produces only a possibility, and a possibility cannot be cross-examined. Bayer did not challenge the reliability of Dr. Ingersoll’s method, Pet. App. 5a n.2, and it did not need to. A method is not a result. By treating a mere

proposal as evidence, the decision below hands plaintiffs an evergreen incentive to promise models they never intend to run until the settlement leverage of certification has done its work.

The resulting mischief has already begun. Within weeks of the decision below, a district court in New York relied on it to hold that a mislabeling class satisfied predominance even though the plaintiff's own survey found that only 27.1 percent of consumers were confused by the label, and to reject an Article III challenge to the absent class members on the ground that anyone who paid a premium was injured, whether or not she was misled. *Newman v. Bayer Corp.*, No. 22-cv-7087 (VB), 2026 WL 1243391, at *1, *4–5 (S.D.N.Y. May 6, 2026) (quoting the decision below, Pet. App. 4a).

In July 2026, a court in the same district certified a class brought by the same counsel, on a conjoint model that the same expert merely “proposes to use,” reasoning that plaintiffs are “not required to prove injury, but rather must demonstrate that class-wide questions predominate.” *Washington v. Reynolds Consumer Prods. LLC*, No. 24-cv-02327-ALC-RFT, 2026 WL 2210008, at *7 (S.D.N.Y. July 30, 2026) (quoting *Newman v. Bayer Corp.*, 348 F.R.D. 567, 584 (S.D.N.Y. 2025)). The playbook is simple, and it travels.

C. This Court’s precedents forbid certifying a class without classwide evidence of injury.

The strategy fails under settled law, along three independent lines. First, a class may not be certified on the promise that proof will materialize later. That is the teaching of *Wal-Mart*, where this Court “disapprove[d]” the “novel project” of a “Trial by

Formula” that would establish liability by extrapolation rather than proof. 564 U.S. at 367. Representative evidence has its place, but its permissibility “turns . . . on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action.” *Tyson Foods*, 577 U.S. at 455. A model no one has run has no degree of reliability at all. A proposed-but-unexecuted model is Trial by Formula moved up a stage: it asks the court to certify now on the strength of a hypothetical, unexecuted computation. As the Sixth Circuit aptly put it, the predominance inquiry “cannot be answered by ‘maybe,’ ‘perhaps,’ and other ‘what ifs’ that leave the hard questions for later.” *Speerly v. Gen. Motors, LLC*, 143 F.4th 306, 324 (6th Cir. 2025) (en banc).

Second, injury must fit the theory of liability, class member by class member. *Comcast* held that a damages model “must measure only those damages attributable to” the plaintiffs’ theory, and that “[i]f the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class.” 569 U.S. at 35. A model that has not been run attempts nothing. What is true of damages is truer of injury itself. *Comcast* also held that “[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class” when the model does not fit the theory. *Id.* at 34. A class that includes members whose injury cannot be tied to the challenged conduct raises the same individualized questions, one step earlier. Here the plaintiffs’ own survey supplied the disqualifying evidence. A premium that some paid and others did not is an individualized injury, not a common one.

Third, and most fundamentally, a court has no power to award relief to the uninjured. “Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.” *TransUnion*, 594 U.S. at 431 (quoting *Tyson Foods*, 577 U.S. at 466 (Roberts, C.J., concurring)). Because “standing is not dispensed in gross,” “[e]very class member must have Article III standing in order to recover individual damages.” *Id.* A class certified without evidence that anyone in it was injured may consist entirely of members with no standing, and Rule 23 cannot be read to grant them a remedy the Constitution withholds. To do so would “enlarge” a substantive right in violation of the Rules Enabling Act. 28 U.S.C. § 2072(b); *Wal-Mart*, 564 U.S. at 367.

The Fourth Circuit recently confronted the same strategy in a different setting and refused to reward it. Vacating certification of a wage-and-hour class, it rejected commonality and predominance analyses “conducted at such high levels of generality precisely because ‘[s]uch vagueness may mask a multitude of disparities.’” *Overby v. Anheuser-Busch, LLC*, 178 F.4th 175, 182 (4th Cir. 2026) (quoting *Stafford v. Bojangles’ Rests., Inc.*, 123 F.4th 671, 680 (4th Cir. 2024)). To answer the supposedly common question, the court explained, “one must circularly assume that all class members in fact” suffered the alleged wrong, *id.* at 183, which is exactly the assumption the Ninth Circuit made here. Pet. App. 4a. Rule 23(b)(3) exists to ensure that “resources are not wasted pursuing litigation that is aggregate only in theory.” 178 F.4th at 182 (quoting *Stafford*, 123 F.4th at 678). A class whose injury rests on an unrun model is, by definition, “aggregate only in theory.”

Here the Ninth Circuit conflated two different things: whether a term is material to a hypothetical reasonable consumer, and whether it injured the actual consumers in the class. The panel credited Dr. Matthews’s survey as evidence of materiality, Pet. App. 7a, without confronting what the plaintiffs’ own evidence showed about injury. Materiality asks what a *reasonable* person might think. Injury asks what happened to *these* consumers.

A label can be material in the abstract and still have injured no one, because some buyers never cared about “Natural” and others valued it but paid no premium for it. Letting a “reasonable consumer” standard substitute for classwide proof of injury papers over the individualized questions that the predominance inquiry exposes. The panel’s dichotomy—either all class members were injured or they were not—assumes precisely what the predominance inquiry was supposed to test. The two inquiries are distinct, and collapsing them converts vagueness from a fatal defect into a silver bullet.

II. THIS CASE PRESENTS THE QUESTION IN ITS STARKEST FORM AND IN A POSTURE THE LAST VEHICLE LACKED.

That the courts of appeals are divided over uninjured class members is beyond dispute. This Court recognized as much when it granted certiorari in *Labcorp* to decide “[w]hether a federal court may certify a class action pursuant to Federal Rule of Civil Procedure 23(b)(3) when some members of the proposed class lack any Article III injury.” *Lab’y Corp. of Am. Holdings v. Davis*, 145 S. Ct. 1133, 1134 (2025). The lower courts have called the division a “problem

that has been the source of much debate among the circuits,” *In re Asacol Antitrust Litig.*, 907 F.3d 42, 46 (1st Cir. 2018), and yielding a “roughly even split of circuit authority,” *In re Deepwater Horizon*, 739 F.3d 790, 800–01 (5th Cir. 2014). The petition sets out that conflict in full, which is reason enough to grant the writ. WLF presses another, narrower point: the decision below occupies the outermost position in the conflict, and it does so on a record free of the obstacles that upended the Court’s last attempt to answer this question.

Start with how far the decision reaches. The question that divided the circuits in *Labcorp*, and that Justice Kavanaugh would have answered, concerned classes containing “both injured and uninjured members.” 605 U.S. at 328 (Kavanaugh, J., dissenting from dismissal of certiorari). Every circuit to address that question has asked how many uninjured members a class may contain. The decision below does not ask “how many”; it never even asks “whether any.” It affirms certification of two classes with *no* evidence that *any* absent member was injured, and with affirmative evidence that the label did not deceive consumers. Pet. App. 4a–6a. A court that will certify a class containing some uninjured members has taken one contested step. A court that will certify a class with zero proof that any absent class member was injured, and that acknowledges that only an unrun model could supply that proof, Pet. App. 6a, has dispensed with the injury requirement altogether. If the milder practice already splits the circuits and warrants this Court’s review (as two grants of certiorari attest), the decision below, which carries the practice to its breaking point, merits review all the more.

The panel relied on *Lytle v. Nutramax Lab's, Inc.*, 114 F.4th 1011 (9th Cir. 2024), *cert. denied*, 145 S. Ct. 1308 (2025), which held that a “reliable though not-yet-executed damages model” can demonstrate that damages are susceptible to common proof, *id.* at 1019, and that proof of a classwide material misrepresentation raises an “inference of reliance . . . as to the class,” *id.* at 1034. *Lytle* at least arose on a record that did not refute its own premise. The decision below extends *Lytle* to a record where the plaintiffs’ own survey rebutted the inference and treats that inference as conclusive anyway. Add the Ninth Circuit’s en banc tolerance of classes that include uninjured members, *see Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 668–69 & n.14 (9th Cir. 2022) (en banc), and the result is a regime in which classwide injury goes untested at the one stage that generates the most pressure to settle.

That the panel thought this result was so plainly compelled by *Lytle* and *Olean* that it did not warrant publication is not a reason to leave it undisturbed; it is evidence of just how settled the practice has become. In more and more cases, the Ninth Circuit’s unpublished docket marks the place where, in the circuit that hears more class action appeals than any other, Rule 23 is administered furthest from its text and from this Court’s construction of it—beyond the reporters, beyond precedential effect, beyond everything except this Court’s writ. *See* Pet. 23–24; Lex Machina, *Class Action Litigation Report 2026*, at 10 (Apr. 2026), <https://perma.cc/3HNX-92Q5>.

Then there is the case’s posture. *Labcorp* was dismissed without an answer, presumably, as Justice

Kavanaugh explained, because of a threshold dispute over which of two certification orders was before the Court. 605 U.S. at 328, 330–31 (Kavanaugh, J., dissenting from dismissal of certiorari). No matter the precise reason for the Court’s dismissal there, the question cannot be answered on a record that obscures it. This record presents none of those defects.

The class definitions have not changed, Bayer pressed its Article III and Rule 23 arguments at every stage, and the case arrives on Rule 23(f) review with no verdict to unwind. Pet. 20–22. What the plaintiffs’ experts found, and did not find, about the actual label is undisputed. So the question the Court twice tried to reach arrives here in its purest form: may a court certify a Rule 23(b)(3) damages class when virtually all of its members lack evidence of an Article III injury?

TransUnion holds that no uninjured member may recover damages. 594 U.S. at 431. The question here is whether that command has any force at certification, the stage at which the case is effectively decided. The Court cannot decide how many uninjured members a class may contain without first deciding whether proof of injury is required at that stage.

The consequence of leaving the split unresolved is that whether a class is certified now turns on geography. The classes certified here would have failed in any of the eight circuits that have addressed the question. Pet. 15–19. A uniform Federal Rule was meant to prevent that. Only this Court can restore that uniformity, and this case gives it the best vehicle yet for doing so.

III. THE DECISION BELOW SOWS UNCERTAINTY THAT THE ECONOMY CANNOT PRICE.

The final reason to grant review lies beyond doctrine. Yes, the decision below erodes Rule 23 and Article III, but the more immediate harm is practical. It withdraws from the business community the one thing that makes risk bearable, the ability to know in advance what the law requires and what exposure it creates.

Certainty is the foundation on which commerce is built. A firm calculates risk, allocates capital, prices its products, and reserves against liability, all against a baseline of predictable rules. Clear rules let a business translate an uncertain future into decisions it can execute. That is how capital moves in a free market. A knowable liability, however large, can be planned for. An unknowable one cannot.

A certification standard that rewards vagueness turns a knowable risk into an unknowable one. When injury need not be proven at certification, when a class may be certified on the promise of a model rather than evidence of harm, a company can no longer estimate its exposure based on its actual conduct. The exposure floats free of the harm. It attaches instead to the number of people a plaintiff can name and a court will certify, no matter whether anyone was hurt.

This case shows the measure of that mischief. Bayer sold the product for two years and discontinued it in 2022. 3-ER-400–01. Its sales in New York and California together came to less than \$2 million. 6-ER-1204–09. The plaintiffs seek \$36.2 million in statutory damages for the New York class alone—roughly twenty

times the sales at issue—and they seek it even though their own expert found no evidence that anyone was deceived by the label. Pet. 8, 27–28. No reserve can be set against a number like that, because the exposure does not come from anything the company did. It comes from the class size and the statute, and the class size is fixed by a definition the courts below never tested against proof.

That mismatch is what makes certification so coercive. Certification “of a large class may so increase the defendant’s potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.” *Microsoft Corp. v. Baker*, 582 U.S. 23, 29 (2017) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978)). The Advisory Committee said the same when it created Rule 23(f): an order granting certification “may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.” Fed. R. Civ. P. 23 advisory committee’s note to 1998 amendment; see *Labcorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting from dismissal of certiorari). The data bear this out: “virtually all cases certified as class actions and not dismissed before trial end in settlement.” Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (2010). Once a class is certified, the defendant chooses between a settlement it does not owe and a trial it cannot afford to lose. Inflating the class adds nothing to the merits. It adds only to the price of settlement, and it does so by design.

And those costs do not stop at the company’s door. They are passed on “to consumers in the form of higher

prices; to retirement account holders in the form of lower returns; and to workers in the form of lower salaries and lesser benefits.” *Labcorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting from dismissal of certiorari). The consumer for whom the class action was nominally brought pays for it again in the price of the next product she buys. The dilution runs inward as well: every dollar that flows to a class member who was never deceived is a dollar unavailable to one who was. A rule that lets vagueness set the price of settlement harms the very people it claims to vindicate.

If the decision below stands, any plaintiff who alleges a premium and promises a model can run the same playbook. On the other side is a business trying to price a risk it cannot see and a market absorbing a cost that corresponds to no proven harm. Denying review here tells every plaintiff that the way to certify a class is to withhold proof of injury. And it tells every defendant that no amount of contrary evidence, not even from the plaintiff’s own expert, will reliably prevent it. The predictability on which our free economy stands cannot survive a certification standard built on the absence of proof.

* * *

For 60 years, Rule 23 has promised that a class action will give a class of injured people a common answer to a common question. By affirming certification on the strength of a model no one ran, against the weight of the plaintiffs’ own survey showing the label deceived no one, the decision below keeps the form of that promise while abandoning its substance. This case presents the question squarely, on a record that leaves no doubt what the plaintiffs proved—and what they failed to prove.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

CORY L. ANDREWS

Counsel of Record

WASHINGTON LEGAL FOUNDATION

2009 Mass. Ave., NW

Washington, DC 20036

(202) 588-0302

candrews@wlf.org

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