

No. 26-400

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 WASHINGTON LEGAL FOUNDATION AS
AMICUS CURIAE SUPPORTING PETITIONER**

Cory L. Andrews
Jerome P. DeSanto, Jr.
Counsel of Record
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
jdesanto@wlf.org

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QUESTION PRESENTED

Whether a damages class may be certified
when some members lack Article III standing.

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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 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). It also participates in important class actions to combat abuse of 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).

This case sits at the intersection of those longstanding interests. It presents a question that has divided the lower courts for years and that this Court has twice agreed to review but has yet to resolve: whether a federal court may certify a damages class that includes members who lack Article III standing. *See Lab. Corp. of Am. Hldgs. v. Davis*, 605 U.S. 327 (2025); *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 460 (2016).

* No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, paid for the brief's preparation or submission. Counsel for all parties were timely noticed of WLF's intent to file this brief.

INTRODUCTION

The question that lower courts have “struggled with . . . for decades” returns to the Court in Nestlé USA’s petition: may a federal court certify a damages class that includes members who lack Article III standing? *Speerly v. Gen. Motors, LLC*, 143 F.4th 306, 336 (6th Cir. 2025) (en banc) (Thapar, J., concurring). Few questions pose higher stakes for the Constitution’s limits on federal judicial power than this one. Under the lower court’s approach, federal courts may exercise judicial power through thousands, or even millions, of class-member claims before determining whether Article III allows them to do so at all. The resulting risk is not merely procedural error, but the exercise of judicial power beyond constitutional limits on a massive scale.

This Court most recently agreed to resolve this question in *Laboratory Corp. of America Holdings v. Davis*, 605 U.S. 327 (2025). But after briefing and argument, it dismissed the writ as improvidently granted apparently because of complications in the record. *Labcorp*, 605 U.S. at 328, 330-31 (Kavanaugh, J., dissenting from dismissal of cert.). Those complications are absent here. The class certified below is untethered to injury and, by its terms, includes individuals who have suffered none. Pet. App. 43a.

Cocoa and chocolate are at the center of this suit. Falcone alleges that certain Nestlé products bore product labels stating that the products were “responsibly” or “sustainably” sourced. Pet. App. 1a. She claims those statements misled her and others into buying Nestlé products because they allegedly

believed Nestlé could guarantee a supply chain entirely free of child labor. *Id.* 2a. She sued under California consumer-protection statutes, seeking to represent both a Rule 23(b)(2) injunctive-relief class and a Rule 23(b)(3) damages class. The district court certified both classes, and the Ninth Circuit affirmed, later denying Nestlé’s request for rehearing en banc. Pet. App. 6a, 42a-43a, 45a.

This brief is about the damages class and its tension with the federal judicial power. That class, as certified, consists of “[a]ll persons who purchased” specified Nestlé products during certain designated periods. Pet. App. 43a. The class definition doesn’t require that customers saw, interpreted, or relied on the challenged statements when deciding to buy chocolate. Indeed, Falcone’s own expert found that more than 30% of chocolate consumers are indifferent to supply-chain issues. Pet. 8. And Nestlé’s expert found that for “one of the most popular products at issue, ‘virtually no one indicated seeing any of the challenged’ statements.” *Id.* The class definition sweeps in uninjured members, and the record shows that the class includes them.

But the Ninth Circuit brushed this issue aside, stating in a footnote, “the possibility that some class members suffered no injury does not, by itself, defeat class certification.” Pet. App. 3a n.1 (citing *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669, 680-81 (9th Cir. 2022)). This casual approach to the niceties of Article III standing cries out for the writ.

Five years after *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021)—where this Court held that

“[e]very class member must have Article III standing in order to recover individual damages,” *id.* at 431—lower courts remain divided over whether absent class members must establish standing *at certification*. The petition ably recounts the entrenched circuit split. Pet. 20-21. The Ninth Circuit sits on the wrong side of it.

WLF writes to emphasize the constitutional stakes raised by this issue. Article III’s injury-in-fact requirement fundamentally limits judicial power. A claimant must establish standing before invoking that power for any claim that it seeks to bring. And for the claims of absent class members, that power is triggered at certification. By relaxing standing requirements for large classes, courts are blessing constitutionally doubtful exercises of judicial power in some of the Nation’s largest and most costly lawsuits. That this practice occurs often in the Ninth Circuit, the circuit that sees more class actions than any other, intensifies the problem.

Nestlé’s petition presents the same consequential question that the Court agreed to review in *Labcorp*, but in a cleaner posture and with a class definition that openly sweeps in uninjured members. The Court should take the issue here and insist on fidelity to Article III in the class-certification context nationwide.

ARGUMENT

I. REVIEW IS NEEDED BECAUSE THE DECISION BELOW PERMITS A VAST EXERCISE OF JUDICIAL POWER WITHOUT FIRST DETERMINING WHETHER ARTICLE III AUTHORIZES IT.

Article III of the Constitution grants federal courts the “judicial Power” but limits that power to specified circumstances. U.S. Const. art. III, § 1. The power may be exercised through only “Cases” and “Controversies,” U.S. Const. art. III, § 2, which mean “disputes . . . appropriately resolved through the judicial process,” *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citation and quotation marks omitted).

With this limitation, federal courts can’t exercise “general legal oversight” over “private entities,” issue advisory opinions, or adjudicate “abstract disputes.” *TransUnion*, 594 U.S. at 423-24. Federal courts possess the power to “redress harms that defendants cause plaintiffs,” but not “a freewheeling power to hold defendants accountable for legal infractions.” *Id.* at 427 (internal citation and quotation marks omitted). They may “not sally forth each day looking for wrongs to right.” *United States v. Sineneng-Smith*, 590 U.S. 371, 376 (2020) (punctuation altered, citation omitted).

The lower court’s decision breezes through these limits to the judicial power, most specifically Article III standing. Whether an Article III tribunal may exert power over manifestly uninjured claimants at certification is a serious question that warrants this Court’s review. Otherwise, courts, including

those in the Ninth Circuit, will continue to exercise judicial power in some of the biggest, most expensive lawsuits across the land without constitutional authority to do so.

A. Article III standing is a constitutional prerequisite to invoking the judicial power.

Every 1L learns that the federal courthouse door can't open unless a claimant demonstrates some concrete "injury in fact" to invoke the judicial power. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). The injury requirement isn't a policy preference. It's a constitutional prerequisite. It ensures that federal courts remain confined to "tasks that are, in Madison's words, 'of a Judiciary nature.'" John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1232 (1993) (internal citation and quotation marks omitted). It "serves to prevent the judicial process" from being used to aggrandize courts with power outside the "judicial role." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (internal citations and quotation marks omitted).

This Court has applied these principles using straightforward logic. Injury-in-fact is what makes a claim fit for the judicial power. "No concrete harm, no standing." *TransUnion*, 594 U.S. at 417. Without standing, there's no case or controversy. *Id.* at 423; *see also Raines v. Byrd*, 521 U.S. 811, 818 (1997). And without a case or controversy, a federal court lacks the authority to act. *See Lujan*, 504 U.S. at 559.

Standing is a claim-specific requirement, and injury is the gateway for invoking judicial power

through each specific claim. See *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352-53 (2006). A claimant “must demonstrate standing for each claim” and “for each form of relief.” *TransUnion*, 594 U.S. at 431. Standing “is not dispensed in gross.” *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Claimants without an injury “may not litigate as suitors in the courts of the United States.” *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475-76 (1982). This bedrock, constitutional prerequisite to the exercise of judicial power can’t “be removed” or waived—it’s “a hard floor of Article III jurisdiction.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

This Court has explained that class actions don’t merit special constitutional treatment. “That a suit may be a class action adds nothing to the question of standing.” See *Spokeo*, 578 U.S. at 338 n.6 (cleaned up). In *TransUnion*, the Court put the point beyond dispute as to who may recover damages: “Every class member must have Article III standing in order to recover individual damages” because “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)).

The Ninth Circuit’s case law, as illustrated by the decision below, sits uneasily with these rules. In an unpublished decision, it disposed of Nestlé’s standing objection in a single footnote, explaining that “the possibility that some class members suffered no injury does not, by itself, defeat class certification.” Pet. App. 3a (citing *Olean*, 31 F.4th at 669, 680-81). In doing so, it treated the standing of absent class

members as a question that should be addressed, if at all, after certification and closer to final judgment.

That approach is at odds with this Court's precedents showing that judicial power begins at the outset of a claim, not at the end.

B. Federal courts exercise judicial power long before final judgment.

Federal courts don't just exercise judicial power by entering judgments. They begin exercising coercive powers as soon as they take jurisdiction over a claim.

A claimant must demonstrate standing through well-pleaded allegations at the "outset of litigation," *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000), and must continue to support standing with increasing evidentiary rigor as the case progresses. *See Lujan*, 504 U.S. at 561. Article III standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of litigation." *Id.*

Courts can't just assume Article III jurisdiction, begin exercising judicial power through a claim, and confirm standing later. To the contrary, they have a "special obligation" to assure themselves of plaintiff standing at the beginning of suit and must continue to do so throughout the litigation, including appeal. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998).

This rule exists because the judicial power isn't confined to simply entering a final judgment. Once a federal court takes jurisdiction of a claim, it may exert any number of the "inherent" or "implied" powers in the "judicial power" for that claim. Evan Caminker, *Allocating the Judicial Power in a "Unified Judiciary,"* 78 Tex. L. Rev. 1513, 1519 (2000) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46 (1991)). These include the power to compel discovery, issue subpoenas, oversee litigation, decide interim motions, and render judgments. See *U.S. Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988) (explaining that Article III inherently limits exercises of these judicial powers); *Brown v. Maxwell*, 929 F.3d 41, 50 (2d Cir. 2019) ("[A] court's authority to oversee discovery and control the evidence introduced at trial surely constitutes an exercise of judicial power.").

The judicial power can thus "profoundly affect the lives, liberty, and property of those to whom it extends," well before judgment. *Valley Forge*, 454 U.S. at 473; *Speerly*, 143 F.4th at 348 (en banc) (Nalbandian, J., concurring). That's why standing inquiries can't wait until the end of a case. By that point much judicial power has already been exercised, and if standing is ultimately absent, the Constitution will have been violated by the court committing "ultra vires" acts. *Steel Co.*, 523 U.S. at 101-02 (explaining that it's an "ultra vires" act for a court to "pronounce upon the meaning" of law when "it has no jurisdiction to do so").

The Court applied these principles in *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433 (2017). There, a proposed intervenor sought to bring its own

claims in an existing lawsuit under Federal Rule of Civil Procedure 24(a)(2). The Court vacated the Second Circuit’s decision and held that the intervenor needed to demonstrate standing before proceeding. *See Town of Chester*, 581 U.S. at 440-42. When an intervenor seeks relief on its own behalf, it “must establish its own Article III standing in order to intervene” and “seek damages.” *Id.* at 442. *Town of Chester* thus affirms the constitutional principle: when a claimant seeks to invoke federal judicial power on its own behalf, standing must be established before that claim can proceed. *Id.* at 440-42.

The Court’s review is especially needed to ensure these well-established principles are honored in the civil suit most in need of checks on the judicial power: the class action.

C. Certification is the moment absent class-member claims invoke judicial power.

Article III doesn’t permit federal courts to exercise judicial power first and check for constitutional permission later. *Steel Co.*, 523 U.S. at 101 (rejecting the concept of “hypothetical jurisdiction” for resolving merits questions first before resolving Article III jurisdiction). The same principle necessarily governs absent class-member claims.

Before certification, the claims of unnamed class members are not yet part of the litigation. *See Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011) (observing that a “nonnamed class member” is not a party to class litigation “before the class is certified”) (cleaned up); *Molock v. Whole Foods Mkt. Grp., Inc.*,

952 F.3d 293, 298 (D.C. Cir. 2020). But certification changes that.

Certification transforms absent persons to the suit from mere bystanders into “parties” in various respects, whose rights and claims become subject to adjudication. *Devlin v. Scardelletti*, 536 U.S. 1, 9-11 (2002). It’s the moment at which the court authorizes prosecution of claims belonging to those people. *See Sosna v. Iowa*, 419 U.S. 393, 399 (1975) (explaining that the “class of unnamed persons described in the certification” acquires “legal status” at certification).

Certification is among the most consequential decisions in modern litigation because it determines whether a court will take jurisdiction over—and exercise judicial power through—a massive number of claims. It “can propel the stakes of a case into the stratosphere.” *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (Easterbrook, J.). It enables “enormous aggregation of claims and parties,” “magnifies the stakes of litigation,” and can “have massive ramifications for plaintiffs and defendants alike.” *In re Ford Motor Co.*, 86 F.4th 723, 725–26 (6th Cir. 2023) (internal citation and quotation marks omitted). And in many cases, certification effectively ends the case. As Judge Nalbandian of the Sixth Circuit recently put it, “[f]or many damages class actions, certification is the whole ballgame.” *Speerly*, 143 F.4th at 351 (en banc) (Nalbandian, J., concurring). That’s because it so “increase[s] the defendant’s potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978).

If Article III standing must be established when a single claimant initiates a claim, *see, e.g., Town of Chester*, 581 U.S. at 442, there’s no principled basis to ignore that constitutional requirement at certification, which triggers immense judicial power by bringing thousands—or even millions—of added claims within a court’s jurisdiction.

Yet that is effectively what the decision below permits. It allows a federal court to exercise judicial power through massive aggregations of claims first, only to determine later whether the Constitution authorized that exercise of power at all. Where lower courts have embraced such an approach, they risk “ultra vires” exercises of judicial power on an ultra-massive scale. *Steel Co.*, 523 U.S. at 101-02. And where a branch of government exercises its power at the outer bounds of constitutional authority, it “remains one of the most vital functions of this Court to police with care” that conduct. *Public Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in the judgment).

Every claim is a vessel through which judicial power is exercised. The more claims, the more judicial power is wielded. Article III doesn’t wilt at certification. It becomes more important. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011) (explaining that in our “era of frequent litigation [and] class actions . . . courts must be more careful to insist on the formal rules of standing, not less so”).

And that’s why the question presented is so consequential. Courts that minimize Article III at certification risk permitting federal judicial power to expand beyond its constitutional limits in exactly the category of cases where that power is often exercised on the largest scale.

II. REVIEW IS ESPECIALLY WARRANTED BECAUSE THE NINTH CIRCUIT IS BOTH THE NATION’S LEADING CLASS-ACTION FORUM AND ONE OF THE MOST PERMISSIVE CIRCUITS ON ARTICLE III STANDING.

This Court’s review is especially needed because the question presented arises repeatedly in the Ninth Circuit, the Nation’s most significant class-action jurisdiction by volume.

Across the United States, class actions generate billions of dollars in defense costs each year. *See Ben Edwards, US class action defence spending hits record \$4.53bn in 2025 – Carlton Fields survey, THE GLOBAL LEGAL POST* (Mar. 20, 2026), <https://perma.cc/66FF-SCBY>. And they result in tens of billions in settlements. *See Edward Segal, Class Action Lawsuit Settlements Set Another Record in 2025, FORBES* (Jan. 6, 2026) (noting that in 2025 U.S. class action settlements totaled \$79 billion).

But those outcomes often turn less on the merits and more on certification itself. As explained at Section I(C) *supra*, “[o]verbroad and incorrectly certified classes” exert overwhelming pressure to settle regardless of the merits. *Labcorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting). Empirical research confirms it: “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).

No court plays a bigger role in this dynamic than the Ninth Circuit. It’s home to California, the Nation’s largest consumer market, and most populous State. *See* U.S. Census Bureau, *U.S. and World Population Clock* (accessed Oct. 18, 2026), <https://perma.cc/5926-87DP>. It sees more class-action appeals than any other circuit. *See* Lex Machina, *Class Action Litigation Report 2026*, at 10 (Apr. 2026), <https://perma.cc/3HNX-92Q5>. And its district courts collectively handle more class actions than just about any other region of the federal judiciary. *Id.* at 9.

Worse yet, of the circuits participating in the split on class-member standing, the Ninth takes one of the most permissive positions. While some courts require that classes be limited to persons with standing, and others at least attempt to police the problem through a “*de minimis*” Rule 23 predominance requirement, Pet. 20-21 (collecting cases), the Ninth Circuit permits certification even where the class may contain “more than a *de minimis* number of uninjured class members.” *Olean*, 31 F.4th at 669.

Courts within the Ninth Circuit follow this approach year after year, case after case. *See, e.g., Solano v. Kroger Co.*, No. 25-536, 2026 WL 1396385, at *2 (9th Cir. May 19, 2026) (“The possibility that a class potentially includes more than a *de minimis* number of uninjured class members does not preclude certification.”) (internal citation and quotation marks

omitted); *Guzman v. Polaris Indus., Inc.*, 345 F.R.D. 174, 185 (C.D. Cal. 2023) (same); *Bush v. Rust-Oleum Corp.*, No. 20-cv-03268, 2024 WL 422080, at *5 (N.D. Cal. Feb. 5, 2024) (same); *see also Lytle v. Nutramax Labs., Inc.*, 114 F.4th 1011, 1026-27 (9th Cir. 2024) (explaining that “the possibility that an ascertainable portion of the class may be unable to recover . . . does not itself demonstrate class certification was improper”).

This Court has seen the Ninth Circuit approach before, *see, e.g., Labcorp*, 145 S. Ct. 1133 (2025) (granting cert over Ninth Circuit appeal before the dismissal). And it continues to appear at the Court’s doorstep. *See Drake v. Bayer Healthcare LLC*, 2026 WL 1079027 (9th Cir. Apr. 21, 2026), petition for cert filed Sept. 18, 2026, No. 26-376.

Indeed, the “unpublished” nature of the decision below shows how settled no-injury class actions have become within the Ninth Circuit, and makes review more necessary, not less. That the panel thought the Article III issue was so routine that it could dispose of it in a footnote of an unpublished decision shows just how much the Ninth Circuit has internalized its approach following *Olean*. Pet. App. 3a n.1.

The Constitution deserves better than that. Review is warranted not only because the lower courts remain divided, but because one of the circuits most willing to relax Article III’s requirements is also the circuit most responsible for shaping modern class-action litigation.

CONCLUSION

Absent this Court's intervention, federal courts will continue exercising judicial power over the claims of absent class members whose standing has never been established. The circuit split is recurring, and the Nation's most significant class-action circuit sits in the camp most inclined to lift Article III's limits. This case cleanly presents the question the Court agreed to review in *Labcorp* but did not answer. It should answer it now and grant the petition.

Respectfully submitted,

Cory L. Andrews

Jerome P. DeSanto, Jr.

Counsel of Record

WASHINGTON LEGAL FOUNDATION

2009 Massachusetts Ave., NW

Washington, DC 20036

(202) 588-0302

jdesanto@wlf.org

October 23, 2026