No. 14-123

IN THE
Supreme Court of the United States

BP EXPLORATION & PRODUCTION INC., ET AL.,
Petitioners,

v.

LAKE EUGENIE LAND & DEVELOPMENT, INC., ET AL.,
Respondents.

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

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF FOR AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE UNITED STATES HISPANIC CHAMBER OF COMMERCE, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE AMERICAN TORT REFORM ASSOCIATION, AND THE AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF PETITIONERS

RACHEL L. BRAND
TYLER R. GREEN
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062

Counsel for the Chamber of Commerce of the United States of America

CATHERINE E. STETSON
Counsel of Record
JACLYN L. DILAURO
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5491
cate.stetson@hoganlovells.com

Counsel for Amici Curiae

(Additional counsel listed on inside cover)

ADDITIONAL COUNSEL:

LINDA E. KELLY
QUENTIN RIEGEL
PATRICK FORREST
NATIONAL ASSOCIATION OF MANUFACTURERS
733 10th Street, N.W.
Suite 700
Washington, D.C. 20001

Counsel for the National Association of Manufacturers

LAUREN SHEETS JARRELL
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

Counsel for the American Tort Reform Association

HARRY NG
PETER TOLSDORF
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, D.C. 20005

Counsel for the American Petroleum Institute

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2(b) of the Rules of this Court, the Chamber of Commerce of the United States of America, the United States Hispanic Chamber of Commerce, the National Association of Manufacturers, the American Tort Reform Association, and the American Petroleum Institute move this Court for leave to file the attached *amicus curiae* brief in support of the petition for a writ of certiorari to review the judgment of the Court of Appeals of the Fifth Circuit in *In re Deepwater Horizon*, 744 F.3d 370 (5th Cir. 2014) ("*Deepwater Horizon III*"), and *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014) ("*Deepwater Horizon II*").

All parties were timely notified of the intent of these *amici* to file the attached brief as required by Rule 37.2(a). Petitioners have consented to filing of this brief, as have all respondents save Ancelet's Marina, L.L.C.; J.G. Cobb Construction, Ltd.; Ships Wheel; Allpar Custom Homes,

Inc.; and Sea Tex Marine Service, Ltd. A letter of consent to the filing of this brief is on file with the Clerk of Court, in addition to the blanket consents to the filing of *amicus curiae* briefs noted on the Court's docket.

In this case, the Fifth Circuit held that a class can be certified even when it includes many members who have suffered no injury at all caused by the defendants. This holding is of critical interest to *amici*, organizations that represent all segments of the business community and whose members frequently find themselves as class-action defendants. *Amici* have a particular and substantial interest in ensuring class certifications are clear and properly limited, such that those class action cases that are settled may be settled with confidence that courts will not later construe the class to include uninjured plaintiffs.

Accordingly, *amici* respectfully request that the Court grant the motion for leave to file an *amicus curiae* brief.

Respectfully submitted,

CATHERINE E. STETSON
Counsel of Record
JACLYN L. DILAURO
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W
Washington, D.C. 20004
(202) 637-5491
cate.stetson@hoganlovells.com
Counsel for Amici Curiae

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. THE FIFTH CIRCUIT'S DECISIONS ERODE THE PROPRIETY AND EFFICIENCY OF CLASS ACTION TREATMENT 6

A. Class Certification Demands Rigorous Analysis Because It Often Ends A Case 7

B. The Fifth Circuit's Decisions Are Inconsistent With Rule 23(a)'s Commonality and Adequacy Requirements 8

C. The Fifth Circuit's Decisions Are Inconsistent With Rule 23(b)(3)'s Predominance and Superiority Requirements 10

D. The Fifth Circuit's Failure To Abide By Rule 23's Requirements Harms Defendants, Class Members, The Courts, And Consumers 10

II. THE FIFTH CIRCUIT'S DECISIONS IMPROPERLY ALLOW PLAINTIFFS ACCESS TO THE COURTS AND TO SETTLEMENT FUNDS WITHOUT SATISFYING THE IRREDUCIBLE CONSTITUTIONAL MINIMUM OF STANDING 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES:

Am. Surety Co. v. *Baldwin*,
287 U.S. 156 (1932) 11

Amchem Prods, Inc. v. *Windsor*,
521 U.S. 591 (1997) 6, 7, 10

AT&T Mobility v. *Concepcion*,
131 S. Ct. 1740 (2011) 8

Avritt v. *Reliastar Life Ins. Co.*,
615 F.3d 1023 (8th Cir. 2010) 9

Bussey v. *Macon Cnty. Greyhound Park, Inc.*, 562 F. App'x 782
(11th Cir. 2014) 13

Chieftain Royalty Co. v. *XTO Energy, Inc.*,
528 F. App'x 938 (10th Cir. 2013) 13

Comcast Corp. v. *Behrend*,
133 S. Ct. 1426 (2013) 7

Coopers & Lybrand v. *Livesay*,
437 U.S. 463 (1978) 8

Denney v. *Deutsche Bank AG*,
443 F.3d 253 (2d Cir. 2006) 13

Dewey v. *Volkswagen Aktiengesellschaft*,
681 F.3d 170 (3d Cir. 2012) 9

Gen. Tel. Co. of the Sw. v. *Falcon*,
457 U.S. 147 (1982) 9

Halliburton Co. v. *Erica P. John Fund, Inc.*,
134 S. Ct. 2398 (2014) 7

Halvorson v. *Auto-Owners Ins. Co.*,
718 F.3d 773 (8th Cir. 2013) 12, 13

TABLE OF AUTHORITIES—Continued

Page

In re Deepwater Horizon ("*Deepwater Horizon I*"), 732 F.3d 326 (5th Cir. 2013) 6

In re Deepwater Horizon ("*Deepwater Horizon III*"), 744 F.3d 370 (5th Cir. 2014), *petition for cert. filed*, 83 U.S.L.W. 3095 (U.S. Aug. 1, 2014) (No. 14-123) 14

In re Deepwater Horizon (Economic and Property Damage Class Action Settlement) ("*Deepwater Horizon II*"), 739 F.3d 790 (5th Cir. 2014), *petition for cert. filed*, 83 U.S.L.W. 3095 (U.S. Aug. 1, 2014) (No. 14-123) 10, 12

In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244 (D.C. Cir. 2013) 12, 13

Kohen v. *Pac. Inv. Mgmt. Co.*, 571 F.3d 672 (7th Cir. 2009) 13

Lewis v. *Casey*, 518 U.S. 343 (1996) 12

Lindsey v. *Normet*, 405 U.S. 56 (1972) 11

Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 12

Mazza v. *Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012) 13

Sullivan v. *DB Investments, Inc.*, 667 F.3d 273 (3d Cir. 2011) (en banc), *cert denied*, 132 S. Ct. 1876 (2012) 13

Taylor v. *Sturgell*, 553 U.S. 880 (2008) 6, 11

TABLE OF AUTHORITIES—Continued

Page

Wal-Mart Stores, Inc. v. *Dukes*,
131 S. Ct. 2541 (2011) 7, 9, 10

Warth v. *Seldin*,
422 U.S. 490 (1975) 12

RULES:

Fed. R. Civ. P. 23 ..... *passim*

CONSTITUTION:

U.S. Const. art. III ..... *passim*

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Page

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William Rubenstein, Alba Conte & Herbert B. Newberg, 10 *Newberg on Class Actions* (4th ed. 2002) 8

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STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America, the United States Hispanic Chamber of Commerce, the National Association of Manufacturers, the American Tort

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae*, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties received at least 10 days prior notice of *amici*'s intention to file this brief. In addition to the blanket consents to filing of *amicus curiae* briefs reflected on the Court's docket, those parties who have given specific consent to this filing have reflected that consent in a letter that has been lodged with the Clerk.

Reform Association, and the American Petroleum Institute respectfully submit this brief as *amici curiae*.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents an underlying membership of more than three million U.S. businesses and organizations of every size, in every industry, and from every region of the country. One important Chamber function is to represent the interests of its members in matters before the courts. To that end, the Chamber regularly files *amicus* briefs in cases raising issues of vital concern to the nation's business community.

The United States Hispanic Chamber of Commerce ("USHCC") is the nation's largest Hispanic business association. The USHCC represents the interests of America's nearly 3.2 million Hispanic-owned firms and serves as an umbrella organization to more than 200 local chambers of commerce and business associations around the country. With the mission of fostering Hispanic economic development and creating sustainable prosperity for the benefit of American society, the USHCC encourages policy makers to prioritize the growth of America's wider business community. The USHCC regularly files *amicus* briefs in cases of particular importance to Hispanic-owned businesses.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty states. Manufacturing employs nearly twelve million men and women, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM regularly participates as *amicus*

curiae in cases of particular importance to the manufacturing industry.

The American Tort Reform Association ("ATRA"), founded in 1986, is a broad-based coalition of more than 170 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote a civil justice system that ensures fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

The American Petroleum Institute ("API") is a national trade organization representing over 600 companies involved in all aspects of the domestic and international oil and natural gas industry, including exploration, production, refining, marketing, distribution, and marine activities. Its members include many of the leading public companies in the oil, natural gas, and mining industries. API regularly participates as an *amicus curiae* in cases of particular significance to the oil and natural gas industry.

Together, *amici* represent all segments of the business community and frequent class-action defendants. Although *amici* and their members hail from all regions of the country and engage in a variety of business activities, they all share an interest in ensuring that courts properly apply Federal Rule of Civil Procedure 23 and Article III to class settlements. Litigating class actions can be expensive and time-consuming. When the parties decide it is mutually beneficial to settle a class case rather than litigate it, clear and final class certifications, consistent with the foundational requirements of Rule 23 and Article III, benefit defendants, class members, and the legal system itself. This is true for settlement and litigation classes alike, as class certification is either the final judicial review of a settlement class or a critical step in determining the scope of a litigated class for purposes of eventual settlement or trial. The Fifth Circuit's

decisions, which held that classes can be certified even if they include members who have suffered *no injury caused by the defendants*, ignore settled principles of Article III standing and class action practice. These decisions warrant this Court's review.

SUMMARY OF ARGUMENT

The Fifth Circuit improperly interpreted the certified class in a way that expanded it to include parties never injured. Although reached against the backdrop of a settlement, the result is a view of class certification in the Fifth Circuit that cannot be reconciled with Rule 23, Article III, or due process. Even if limited to the exercise of settlement interpretation, this contortion of class certification warrants review because of the central place of settlement in class litigation generally.

The decision whether to settle often occurs at or near the time of the court's class certification decision. Sometimes, parties propose a settlement class to the court for its approval. Even if they do not, and the class purports to be a "litigation class," a class certification decision puts a critical weight on the scale influencing the parties' settlement calculations. The contours of a certified class allow the parties to value the cost of settlement and the scope of the preclusive effect of any litigated class action. Those calculations inform the parties' decision about whether settlement would be a better allocation of resources than going to trial.

But this important procedural function can be realized only if the parties can count on the court to apply fundamental principles assuring the propriety and fairness of the class action procedure. The Fifth Circuit's decisions, however, reduce the assurance that settlement agreements will be implemented as intended. With such uncertainty, defendants may be considerably less likely to commit to settlement, knowing that the class of plaintiffs is subject to change at any

time, in a manner not limited even by the bedrock principles of Rule 23 or Article III.

Rule 23's requirements cannot be met when a class member who has suffered no injury at the hands of the defendant is permitted to recover from a class action settlement. In such a case, the very injury that should be at the center of the class certification decision is cast aside as irrelevant. The class certified in that case—which is *this* case—has no relation to the class envisioned by Rule 23.

This class also violates a foundational constitutional principle: Article III standing. Even as class procedure has evolved over time, Article III's "irreducible constitutional minimum"—that all plaintiffs seeking hearing in federal court present a live and true "case or controversy"—has never been altered. Yet the Fifth Circuit's erroneous interpretation here results in a class with many members who have suffered no injury caused by the defendants.

The Fifth Circuit's decisions thus allow improper plaintiffs to receive unwarranted settlement distributions. But this case risks becoming far more than just a one-off undeserved windfall. It may discourage future defendants from settling cases, portending a spike in costly class litigation as parties opt to forgo the efficiencies of class settlement.

The parties are not the only ones who will suffer the consequences of the Fifth Circuit's overreach. Every class action not settled because of uncertainty arising from the Fifth Circuit's decision will consume judicial resources that will not then be available for other litigants seeking to have their disputes timely resolved. Consumers will also be harmed, since they will ultimately bear the burden of paying increased costs to fund the litigation of class actions. Alternatively, under low standards for class certification, a defendant may forgo litigation and succumb, as many defendants do, to the enormous pressure to settle even a class that encompasses those who do not possess

legitimate claims. That type of decision also extracts enormous costs from defendants and consumers.

The Fifth Circuit recognized that "[t]his case is one of the largest and most novel class actions in American history." *In re Deepwater Horizon* ("*Deepwater Horizon I*"), 732 F.3d 326, 345 (5th Cir. 2013). That is true, and it is grounds enough to grant review. But the Fifth Circuit's decisions manage to endanger the certainty Rule 23 and Article III should provide in *every* class action: they throw open settlement coffers to all comers.

For all these reasons, and those in the petition, the Court should grant the writ and reverse.

ARGUMENT

I. THE FIFTH CIRCUIT'S DECISIONS ERODE THE PROPRIETY AND EFFICIENCY OF CLASS ACTION TREATMENT.

Class action practice is a growth industry. In 2006 and 2007 alone, over $33 billion was approved in settled class actions. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Studies 811, 826 (2010). The average settlement over this period was almost $55 million. *Id.* at 828. Class action lawyers were awarded nearly $5 billion in fees and expenses during this period. *Id.* at 836. Sixty-eight percent of those settlements were settlement classes. *Id.* at 819.

Given the sheer scope and scale of class practice, the constraints placed on class certification are of correspondingly immense importance. And they go beyond Rule 23. This Court has been clear that "Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act." *Amchem Prods, Inc.* v. *Windsor*, 521 U.S. 591, 612-613 (1997). These "procedural protections" against overreaching class actions are grounded in the defendants' foundational due process rights. *Taylor* v. *Sturgell*, 553 U.S. 880, 901 (2008).

A. Class Certification Demands Rigorous Analysis Because It Often Ends A Case.

"Rule 23 does not set forth a mere pleading standard." *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011). Rather, determining whether a proposed class meets Rule 23 certification requirements demands a "rigorous analysis," in which it "may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1432 (2013) (internal quotation marks and citations omitted). That holding was reiterated just this year in *Halliburton Co.* v. *Erica P. John Fund, Inc.*, in which this Court noted that "plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23." 134 S. Ct. 2398, 2412 (2014).

This is true for both settlement classes and litigation classes alike. *Amchem Prods.*, 521 U.S. at 620. That is so because the effects of class certification generally are conclusive for settlement purposes in both types of cases. "[V]irtually all cases certified as class actions and not dismissed before trial end in settlement." Fitzpatrick, *supra*, at 812 n.5 (citing Emery G. Lee III & Thomas E. Willging, Federal Judicial Center, *Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions* 11-12 (April 2008); Tom Baker & Sean J. Griffith, *How the Merits Matter: D&O Insurance and Securities Settlements*, 157 U. Pa. L. Rev. 755 (2009)). "With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009).

In four districts (the U.S. District Courts for the Eastern District of Pennsylvania, the Northern District of California,

the Southern District of Florida, and the Northern District of Illinois) studied over the course of two years in 1994 and 1995, a "substantial majority" of certified class actions ended in class-wide settlements. William Rubenstein, Alba Conte & Herbert B. Newberg, 10 *Newberg on Class Actions* Appendix XI 38 (4th ed. 2002). "In the four districts, the percentage of certified class actions terminated by a class settlement ranged from 62% to 100%, while settlement rates (including stipulated dismissals) for cases not certified ranged from 20% to 30%." *Id.* "Certified class actions were more than two times more likely to settle than cases that contained class allegations but were never certified." *Id.* at 38, Tables 39 and 40.

Those statistics confirm this Court's observation that class action defendants face enormous pressure to settle. *AT&T Mobility* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011). This pressure can take a dangerous turn. As this Court has observed, "[f]aced with even a small chance of devastating loss, defendants will be pressured into settling questionable claims." *Id.* In fact, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may feel it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). If defendants settle undeserving claims, the cost of settlement is not then attributable to compensating an injured party for its loss. Rather, business defendants, their consumers, the courts, and deserving plaintiffs are forced to expend resources that have been extracted from them by opportunists. It is critical to all involved that a court's certification decision weed out clearly unmeritorious claims.

B. The Fifth Circuit's Decisions Are Inconsistent With Rule 23(a)'s Commonality and Adequacy Requirements.

In the class action context, judges are tasked with determining "when class representatives and counsel are 'adequate'

and whether a settlement's terms are 'fair' to the class as a whole, 'reasonable' in relation to the class's legitimate claims, and 'adequate' to redress class members' actual losses." Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide For Judges* 2, Federal Judicial Center (3d ed. 2010). Courts work to ensure that class proceedings redress *actual* loss, not imagined loss; and certainly not loss unattributable to a defendant's actions.

This Court, in *Dukes*, explained that Rule 23(a)'s commonality requirement is not satisfied where plaintiffs can raise "common 'questions'—even in droves." 131 S. Ct. at 2551 (quoting Nagareda, *supra*, at 132). The class must, in fact, be able "to generate common *answers*" that are "apt to drive the resolution of the litigation." *Id.* Commonality is necessarily defeated where plaintiffs cannot "demonstrate that the class members 'have suffered the same injury.' " *Id.* (quoting *Gen. Tel. Co. of the Sw.* v. *Falcon*, 457 U.S. 147, 157 (1982)). Due to the Fifth Circuit's erroneous interpretation of the settlement agreement in this case, the class now includes many plaintiffs who cannot identify *any injury at all* caused by the defendants, let alone allege "the *same* injury." *See* Pet. 21.

A class representative also must be an adequate ambassador for the class. In the settlement context, after all, the class representative negotiates on behalf of absent class members. *See Dewey* v. *Volkswagen Aktiengesellschaft*, 681 F.3d 170, 189-190 (3d Cir. 2012). If interests diverge, as they do under the Fifth Circuit's opinions, it is impossible for the representative to negotiate an appropriate settlement for all class members. And even more to the point here, "a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves." *Avritt* v. *Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010).

C. The Fifth Circuit's Decisions Are Inconsistent With Rule 23(b)(3)'s Predominance and Superiority Requirements.

The predominance and superiority elements of a Rule 23(b)(3) class ensure "economies of time, effort, and expense, and promote * * * uniformity of decision as to persons similarly situated, without sacrificing procedural fairness." *Amchem Prods.*, 521 U.S. at 615. The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 623. The superiority inquiry asks if the class action mechanism is superior for addressing the dispute "over *individual* adjudication." *Dukes*, 131 S. Ct. at 2559.

As the Fifth Circuit interpreted these classes, they contain plaintiffs who are not "similarly situated"; their interests do not "cohe[re]." Far from it: Many of the claimants within the Fifth Circuit's reading of the class were not injured at all by the defendants. The Fifth Circuit confirmed that the Claims Administrator would "compensate * * * eligible * * * claimants for all losses payable under the terms of the Economic Loss frameworks in the Settlement Agreement, without regard to whether such losses resulted or may have resulted from a cause other than the Deepwater Horizon oil spill." *In re Deepwater Horizon (Economic and Property Damage Class Action Settlement)* ("*Deepwater Horizon II*"), 739 F.3d 790, 797 (5th Cir. 2014). This included $76 million to entities whose losses had *no connection to the spill*. Pet. App. 418a, 420a.

D. The Fifth Circuit's Failure To Abide By Rule 23's Requirements Harms Defendants, Class Members, The Courts, And Consumers.

The Fifth Circuit's decisions do not comport with Rule 23 in any of its particulars. And the Court of Appeals' overreaching is not just an instance of unfairness: "[P]rocedural protections" against overbroad class actions are "grounded in

due process." *Taylor*, 553 U.S. at 901. By acknowledging that many of the putative plaintiffs had losses that may not even have resulted from the Deepwater Horizon oil spill, the Fifth Circuit curtailed the defendants' due process right to " 'present every available defense.' " *See Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Surety Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)).

All businesses that may find themselves as class action defendants share these due-process concerns. But the Fifth Circuit's watered-down interpretation of Rule 23 may have additional consequences. If the Fifth Circuit's decisions are permitted to stand, putative plaintiffs have every incentive to jump on the bandwagon of any nearby mass tort litigation. Knowing that their claims will not be submitted to this Court's required "rigorous" standard of proof, nor, apparently, to any standard of proof at all, any clever party could submit a claim and receive an unquestioning windfall payment. These "me too" claims threaten to impose enormous, unsubstantiated liability on businesses that find themselves as class-action defendants. That liability would then affect consumers, in the form of higher prices. It would also affect future litigants and the courts, as defendants may be less willing to settle class-action lawsuits with the knowledge that settlement certifications cannot be relied on to exclude recovery by non-injured parties.

A defendant's rights also will depend to a large extent on the circuit in which plaintiffs choose to sue, a result that is fundamentally incompatible with the teachings of the Rules Enabling Act and with due process. This danger is particularly acute in the class action context, as the large number of putative plaintiffs often provides a broad choice of fora. Class action plaintiffs' counsel are apt to choose a forum that would permit an increase in the breadth of any eventual settlement; after all, a larger settlement results in larger fees. *See* Thomas E. Willging & Shannon R. Wheatman, Federal Judicial Center, *An Empirical Examination of Attorneys'*

Choice of Forum in Class Action Litigation 12 (2005). This Court's review is needed to set a uniform federal standard.

II. THE FIFTH CIRCUIT'S DECISIONS IMPROPERLY ALLOW PLAINTIFFS ACCESS TO THE COURTS AND TO SETTLEMENT FUNDS WITHOUT SATISFYING THE IRREDUCIBLE CONSTITUTIONAL MINIMUM OF STANDING.

Article III standing, like Rule 23, is not a "mere pleading requirement[]." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). "In its constitutional dimension, standing imports justiciability: * * * This is the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975). Standing must be evaluated in every case, at each stage of litigation. *Lujan*, 504 U.S. at 560-561.

Standing requires a plaintiff to demonstrate that he has suffered an injury traceable to the defendant's conduct and likely to be redressed by a favorable decision. *Id.* In *Lewis* v. *Casey*, this Court confirmed that "each element of standing must be supported * * * with the manner and degree of evidence required at the successive stages of the litigation." 518 U.S. 343, 358 (1996). In other words, the "manner and degree of evidence required" at class certification must be greater than the mere pleading standard required at the complaint stage. This fact is even more pronounced in a settlement class, where "there will be no additional stages for substantiating standing." *Deepwater Horizon II*, 739 F.3d at 826 (Garza, J., dissenting).

Seven circuits have agreed that Article III standing requirements do not evaporate in the class action context, and that injury caused by the defendant is a non-negotiable showing that all putative class plaintiffs must make. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252, 255 (D.C. Cir. 2013); *Halvorson* v. *Auto-Owners Ins.*

Co., 718 F.3d 773, 778-779 (8th Cir. 2013); *Mazza* v. *Am. Honda Motor Co.*, 666 F.3d 581, 594-595 (9th Cir. 2012); *Kohen* v. *Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009); *Denney* v. *Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006); *Bussey* v. *Macon Cnty. Greyhound Park, Inc.*, 562 F. App'x 782, 787-788 (11th Cir. 2014); *Chieftain Royalty Co.* v. *XTO Energy, Inc.*, 528 F. App'x 938, 943-944 (10th Cir. 2013).

Four of those circuits, the Second, Seventh, Eighth, and D.C. Circuits, have concluded that certification is inappropriate in cases where the proposed class contains numerous members who have not suffered any injury caused by the defendant. *See Denney*, 443 F.3d at 264, 266; *Kohen*, 571 F.3d at 677; *Halvorson*, 718 F.3d at 778; *Rail Freight*, 725 F.3d at 252.

But the Fifth Circuit's decisions in this case, and the Third Circuit's decision in *Sullivan* v. *DB Investments, Inc.*, 667 F.3d 273 (3d Cir. 2011) (en banc), *cert denied*, 132 S. Ct. 1876 (2012), held to the contrary. The Third Circuit in *Sullivan* upheld class certification even though "a large proportion of the [class] lack[ed] any valid claims under applicable state substantive law." *Id.* at 305. And the Fifth Circuit here upheld certification after interpreting the settlement agreement in a way that swept in uninjured plaintiffs.

This division among the lower courts on this fundamental issue is an open invitation to plaintiffs to engage in forum shopping. Plaintiffs' counsel have every incentive to choose a district court within one of these circuits to take advantage of their relaxed interpretation of Article III standing. Bringing suit in one of these favorable fora, as we have explained, increases the chance of broader settlements, concomitant higher attorney's fees, and greater unjustified cost to businesses.

The class in this case was proposed as a settlement class, but the implications of the Fifth Circuit's decisions are

considerably broader. A district court's decision to certify sets most so-called "litigation classes" on the path to settlement as well. Given that class certification is so often a district court's last opportunity to evaluate the plaintiffs' standing in class action cases, it is critical that the court's analysis be as close as possible to that which would be appropriate for the final stage of litigation.

When that is not the case, as here, defendant businesses make settlement payouts to claimants who have made no showing that they were injured at all by the defendant's conduct. That also results in a deleterious impact on the judiciary: Uninjured plaintiffs recover undeserved payout with the blessing of the federal courts, undermining their legitimacy and devaluing their imprimatur. This creates two problems at once. The judicial power is simultaneously under-involved in scrutinizing the standing of those parties before it and over-extended to those who do not present a live case or controversy.

As Judge Clement explained in dissent, Article III's "constitutional principles are important because they assure the vigorous and fair resolution of disputes and respect the limitations on the power of the federal judiciary." *In re Deepwater Horizon* ("*Deepwater Horizon III*"), 744 F.3d 370, 384 (5th Cir. 2014). Businesses rightly rely on this "vigorous and fair resolution" of legitimate disputes. The Fifth Circuit's resolution of this dispute was neither vigorous nor fair, and it sets the stage for others of like kind in the future. This Court should set the issue to rights.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition should be granted.

Respectfully submitted,

CATHERINE E. STETSON
Counsel of Record
JACLYN L. DILAURO
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5491
cate.stetson@hoganlovells.com

Counsel for Amici Curiae

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