No. 26-1

In the Supreme Court of the United States

SUNOCO, INC. (R&M), ET AL.,

Petitioners,

v.

PERRY CLINE, 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 Tenth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

Erica Klenicki
Caroline McAuliffe
THE NAM LEGAL CENTER
733 10th Street, N.W.
Suite 700
Washington, D.C. 20001

Philip S. Goldberg
Counsel of Record
Christopher E. Appel
Andrew J. Trask
SHOOK, HARDY & BACON L.L.P.
1800 K Street, N.W.
Suite 1000
Washington, D.C. 20006
(202) 783-8400
pgoldberg@shb.com

July 31, 2026

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Under Rule 21.2(b), the National Association of Manufacturers ("NAM") respectfully requests leave to submit a brief as *amicus curiae* in support of Petitioners. Rule 37.2 requires providing notice of the intent to file an *amicus* brief in support of a petition for certiorari no less than ten days before the brief is due. Under this rule, the brief is due "30 days after the case is placed on the docket or a response is called for by the Court, whichever is later." This Court docketed the Petition on July 1 and set July 31 as the due date for the brief in opposition and *amicus* briefs.

Respondent's counsel was notified on July 22—nine days before the July 31 due date—of the intent to file this *amicus* brief and was asked if Respondent would waive the 10-day notice requirement. Respondent's counsel replied that Respondent would not consent to such a waiver. The following day, counsel for *amicus* notified Respondent's counsel that it would be filing this motion for leave along with the *amicus* brief and asked whether Respondent would oppose this motion as well. Respondent counsel stated he must do so.

The notice to Respondent was late because the NAM learned of this case and its importance to class action jurisprudence in the afternoon on July 21 and quickly took steps to retain counsel and ensure notice was provided on July 22. The NAM fully appreciates rules should generally be enforced, but here the notice was late by a small amount, and no prejudice resulted to the parties. The *amicus* brief will be filed on the same date as if notice were provided timely, and Respondent received from the Court a 30-day extension for its brief in opposition. The NAM, therefore, respectfully requests leave to file this *amicus* brief.

Philip S. Goldberg
Counsel of Record
SHOOK, HARDY & BACON L.L.P.
1800 K Street, N.W., Suite 1000
Washington, D.C. 20006
(202) 783-8400
pgoldberg@shb.com

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, 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 50 states. Manufacturing employs 13 million men and women, contributes $2.96 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The NAM has a strong interest in ensuring that courts comply with this Court's class action precedents, including undertaking the rigorous analysis required by Federal Rule of Civil Procedure 23 ("Rule 23"). The decision below, affirming a $100 million class-action judgment where thousands of class members cannot be ascertained, raises serious concerns regarding the application of Rule 23, Article III standing, and basic fairness that cannot be squared with the Court's precedents and would adversely impact *amicus*'s members if allowed to stand.

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. Respondent's counsel received notice of *amicus's* intent to file this brief nine days before filing, giving rise to the motion for leave above.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case vividly illustrates the importance of ensuring that class member ascertainability is an explicit requirement of Rule 23's "rigorous analysis" and that claims without Article III standing must be excluded from class litigation. Here, the Tenth Circuit affirmed a $100 million class-action judgment even though the class representatives could not identify—and, indeed, had no plan for identifying—*thousands* of class members who account for nearly two-thirds of the damages awarded, which raises the basic question of whether Rule 23 was intended to facilitate such class actions or prevent them because these unidentified class members would have no claim on their own.

The Court's Rule 23 jurisprudence recognizes that a class action is reserved for a limited set of cases that satisfy "stringent requirements." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013). Certification is proper only after a "rigorous analysis" establishes that all Rule 23 requirements have been met. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). Yet that analysis becomes impossible when neither the parties nor the court can determine who belongs in the class. The resulting injustice is glaring here because these unascertainable claimants were nevertheless required to be paid, even though many of them may lack Article III standing. The issues this Petition presents—ascertainability and standing—are not merely peripheral concerns but threshold requirements needed to safeguard the Rule 23 class-action mechanism and assure that judgment can be administered in a fair, reliable, and efficient manner.

The Circuits are deeply split on both of these recurring and consequential issues. First, as the Tenth Circuit recognized below, they are divided on whether and how to consider ascertainability in class certifications. Most Circuits agree that ascertainability is an implied factor under Rule 23, but they disagree on how it applies: whether ascertainability requires only objective criteria for defining the class or whether it also requires class counsel to show an administratively feasible way of ascertaining class members—as needed here. As detailed below, the First, Third and Fourth Circuits require such feasibility, whereas the Second, Sixth, Seventh, Eighth, Ninth, Eleventh and Federal Circuits—along with the Tenth Circuit here—have not included this feasibility requirement.

Second, the Tenth Circuit's ruling allowed unidentified class members to be certified into the class action *and receive damages* for injuries that no one has shown—or could show—they suffered, creating untenable tension with this Court's recognition that, even in class actions, Article III standing requires a real person to assert a real injury to have a justiciable case or controversy. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021). Multiple Circuits have refused to certify classes where a significant number of members have not demonstrated such standing. But the Tenth Circuit below and several other Circuits have certified such classes despite these constitutional deficiencies, often on the presumption that class members who do not prove injury will be removed before damages are paid. This case—where the district court awarded damages to unidentified plaintiffs who did not demonstrate the requisite injury, and the Tenth Circuit affirmed—underscores the risks of this "certify now, worry later" approach to class certification.

As a result, this case epitomizes the perverse incentives and outcomes that undermine the integrity of the class-action litigation system. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting the "risk of 'in terrorem' settlements that class actions entail"). If the ruling below stands, class counsel, rather than representing real people with real harms, will be rewarded for sweeping large swaths of unascertainable claimants into theoretical class actions. They will generate large awards, here tens of millions of dollars, for people who cannot be identified, will never demonstrate any injury, and will never recover any money. Meanwhile, defendants will be denied the ability to defend the individual claims because no claimant will ever come forward to present evidence of any injury. This dynamic violates the Rules Enabling Act, which provides that Rule 23 cannot "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Further, class counsel will leverage the award total to maximize their attorneys' fees.

For these reasons, as detailed below, *amicus* respectfully requests that the Court grant the Petition. America's manufacturers are often targeted by these speculative class actions and, like all litigants, rely on the federal judiciary to adhere to the Federal Rules, protect their constitutional rights, and ensure true justice can prevail and not be gamed.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW TO MAKE CLEAR THAT ASCERTAINABILITY IS AN ESSENTIAL COMPONENT OF RULE 23'S RIGOROUS ANALYSIS

This Court has explained on multiple occasions that the class action mechanism in Rule 23 "imposes stringent requirements," applies to a limited set of cases, and, when a properly rigorous analysis of each Rule 23 requirement is conducted, will necessarily "in practice exclude most claims" from class treatment. *Am. Express Co.*, 570 U.S. at 234. A class action is, after all, "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979).

For this reason, this Court has instructed district courts to conduct a "rigorous analysis" that requires plaintiffs to demonstrate that all Rule 23 requirements have been satisfied before certifying a class. *Wal-Mart Stores, Inc.*, 564 U.S. at 351. That requirement is not a mere speed bump on the road to inevitable certification. It serves a critical gatekeeping function, ensuring certification is denied to claims that should not be tried—or settled—on a class-wide basis. Further, the Federal Rules Committee amended Rule 23 in 2003 "to abrogate the certify-first-ask-questions-later practice followed in some circuits." *Allen v. Ollie's Bargain Outlet, Inc.*, 37 F.4th 890, 907 (3d Cir. 2022) (Porter, J concurring). But as this case shows, not all Circuits have upheld their obligation to ensure that class actions are properly tailored to resolving real disputes for real people.

One of the key issues that has flummoxed the Circuits is ascertainability: if claims are being brought on behalf of real people, can those people actually be identified? Ascertainability serves both to protect plaintiffs from having their rights adjudicated by others with no ability to opt out and to protect defendants from paying claims to no one (or someone not entitled to recover). Most Circuits agree that any legitimate rigorous analysis of a class requires that class members be, at minimum, "ascertainable" if they are to be swept into a class action. *See, e.g., Career Counseling, Inc. v. AmeriFactors Fin. Grp., LLC*, 91 F.4th 202, 208 (4th Cir. 2024) (reaffirming court will "acknowledge and enforce the ascertainability requirement"); *Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914, 933 (5th Cir. 2023) ("The Fifth Circuit has also articulated an 'ascertainability' requirement for Rule 23 class actions."); *Cherry v. Dometic Corp*., 986 F.3d 1296, 1303 (11th Cir. 2021) ("A district court must decide that a class is ascertainable before it may turn to the requirements of Rule 23(a)."). Although Rule 23 does not include an express ascertainability requirement, it is "implied" by the Rule. *Bowles v. Sabree*, 121 F.4th 539, 550 (6th Cir. 2024) ("Class actions come with an 'implied requirement' of ascertainability.").

Where the Circuits differ sharply is on the standards for determining whether the class members are, in fact, ascertainable. The First, Third, and Fourth Circuits have held that plaintiffs must show "there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015) (cleaned up); *In re Nexium*, 777 F.3d 9 (1st Cir. 2015); *EQT Prod. Co. v. Adair,* 764 F.3d 347 (4th Cir. 2014). These courts have explained that to protect defendants' due process and Seventh Amendment rights, courts must be satisfied *at certification* that "prior to judgment, it will be possible to establish a mechanism" for determining who is in the class and then distinguishing injured from uninjured class members. *In re Nexium*, 777 F.3d at 19. These Circuits do not allow the "certify now, worry later" approach when there is no feasible means of identifying whose interests are being litigated.

In a case with factual similarities to this one, the Fourth Circuit held that when "numerous heirship, intestacy, and title-defect issues plague many of the potential class members' claims to the gas estate …. these complications pose a significant administrative barrier to ascertaining the ownership classes." *EQT Prod. Co.*, 764 F.3d at 359. "The fact that verifying ownership will be necessary for the class members to receive royalties does not mean it is not also a prerequisite to identifying the class." *Id.* Here, the district court and Tenth Circuit failed to require ascertainability at the certification stage, at trial, or even before awarding damages. Under their rulings, Petitioner must pay royalty damages to unascertained class members with unactionable claims; they can provide no proof of their right to damages or the amount owed.

This case, therefore, illustrates the shortcomings of the ascertainability approach taken by the Sixth, Seventh, Ninth, Eleventh, and Federal Circuits, which have rejected this feasibility requirement. *Rikos v. P&G*, 799 F.3d 497, 525 (6th Cir. 2015); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015); *Walker v. Life Ins. Co. of the Sw.*, 953 F.3d 624, 632–633 (9th Cir. 2020); *Cherry*, 986 F.3d at 1303; *Freund v. McDonough*, 114 F.4th 1371, 1378 (Fed. Cir.

2024). In these Circuits, now including the Tenth, a class is ascertainable so long as its members are identifiable through "objective criteria"—regardless of whether there is a feasible means for actually identifying them. *Career Counseling, Inc.*, 91 F.4th at 206.

The courts on that side of the split have offered several reasons for not requiring identification, including that they "lack discretion" under this Court's jurisprudence to ensure feasibility, *Cherry*, 986 F.3d at 1303, and the policy imperatives for feasibility are "better addressed" through Rule 23's predominance or superiority requirements. *See Mullins*, 795 F.3d at 663. This approach, though, is often premised on ensuring a defendant is given "the opportunity to challenge each class member's claim to recovery during the damages phase." *Id.* at 671. Yet, when unascertainable plaintiffs remain in a class action past certification, there clearly is no guarantee their claims will not be the basis for damages and attorney fees.

This Circuit split is well-recognized and needs this Court's guidance; the Eleventh Circuit has called administrative feasibility "[o]ne of the most hotly contested issues in class action practice." *Cherry*, 986 F.3d at 1301 (quoting Rhonda Wasserman, *Ascertainability: Prose, Policy, and Process*, 50 CONN. L. REV. 695, 697-99 (2018)). Indeed, judges and litigants have been seeking clarity on ascertainability for years. As Judge Ambro wrote in 2014 when dissenting from the Third Circuit's denial of an *en banc* review of the ascertainability standard: "Even if, as I believe, the ability to identify class members is a set piece for Rule 23 to work, how far we go in requiring plaintiffs to prove that ability at the outset is exceptionally important and requires a delicate balancing of interests."

Carrera v. Bayer Corp., 2014 WL 3887938, at *1 (3d Cir. May 2, 2014). He added the issue "merits … review by the Judicial Conference's Committee on Rules of Practice and Procedure." *Id.*

The Advisory Committee on Rules of Practice and Procedure also recognized the significance of this issue and at one point had preliminary discussions on whether to "[d]evis[e] a rule provision that would replace the 'implied requirement of ascertainability' and [that] would provide useful guidance on class definition (a prime feature of ascertainability)." ADVISORY COMMITTEE ON CIVIL RULES, OCTOBER 30, 2014 AGENDA BOOK at 510. Judge Ambro and his colleagues were joined by litigators and numerous business and civil justice groups in calling for this rulemaking. *See* ADVISORY COMMITTEE ON CIVIL RULES, APRIL 25, 2017 AGENDA BOOK at 182–84. However, the Advisory Committee declined to propose an explicit ascertainability rule and did not resolve the core issue of whether feasibility is a requirement. *See* ADVISORY COMMITTEE ON CIVIL RULES, NOVEMBER 7, 2017 AGENDA BOOK at 47.

Consequently, this Court is the only body with the authority to resolve this Circuit split and provide a uniform rule on ascertainability for the Federal Judiciary to follow.

This case shows why this Court's guidance is needed. The district court *certified and awarded damages* to a class of approximately 53,000 members alleging failure to pay statutory interest under Oklahoma's Production Revenue Standards Act, Okla. Stat. tit. 52, §§ 570 *et seq.* ("PRSA"). However, the class of "interest owners" included thousands of unidentified members whose claims were never individually evaluated to ensure "marketable title"—a prerequisite for the damages awarded. Instead, the court permitted liability to be established with a 20,000-page spreadsheet it had not reviewed—and Petitioner had no realistic opportunity to assess—before defending against the individual claims.

This result cannot be reconciled with the Court's Rule 23 jurisprudence. The Court has made clear that class-action plaintiffs must offer "a theory of liability that is … capable of classwide proof." *Comcast Corp. v. Behrend*, 569 U.S. 27, 37-38 (2012). It is not enough to propose "any method[ology] … so long as it can be applied classwide." *Id.* at 35-36. Rule 23 also generally does not permit "Trial by Formula" in which liability or damages are determined through extrapolation rather than proof. *Wal-Mart*, 564 U.S. at 367. Yet that is effectively the approach taken below.

The Court should grant the Petition to expressly adopt and define the role of ascertainability in Rule 23's rigorous analysis to include administrative feasibility and reject the decision below.

II. THE COURT SHOULD GRANT REVIEW TO MAKE CLEAR THAT ARTICLE III STANDING MUST BE ESTABLISHED FOR ALL CLASS MEMBERS

This case also raises critical Article III standing questions about whether a case or controversy exists when individuals in the purported class cannot show injury and about when courts must undertake this inquiry. As the Court has explained, under Article III of the Constitution, a federal court has jurisdiction to "resolve only a real controversy with real impact on real persons." *TransUnion*, 594 U.S. at 424 (cleaned up). Persons without injuries and injuries without persons do not meet this threshold. The Court should grant review to reaffirm this requirement in this context and direct courts to ensure that all class members have standing at all times in the litigation.

Over the past twenty years, this Court has issued several rulings reining in sprawling class actions so that defendants are not required to litigate and pay claims of class members who have not articulated—and likely cannot articulate—an injury-in-fact. The Court has required that each "plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (quoting *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560 (1992)). This requirement applies "at all stages" of litigation. *TransUnion*, 594 U.S. at 431. However, in *TransUnion*, the Court left open "the distinct question of whether every class member must demonstrate [standing] *before* a court certifies a class." *TransUnion,* 594 U.S. at 431 n.4 (emphasis in original). At the very least, the Court stated, "[e]very class member must have Article III standing in order to recover individual damages." *Id.* at 431.

As a result, the Circuits have remained split on whether a court may certify a class that contains a material number of claims for which real people are not seeking damages based on real injuries. *See In re Asacol Antitrust Litig.*, 907 F.3d 42, 58 (1st Cir. 2018) (discussing "divergence … in which our sister circuits have addressed the treatment of uninjured putative class members" and citing cases); *see also Tyson Foods, Inc. v. Bouphakeo*, 577 U.S. 442, 460 (2016) (acknowledging split). For example, in the Second and

Eighth Circuits, courts may not certify classes where not all members demonstrate standing. *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006); *Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981, 987-88 (8th Cir. 2021). Other Circuits require courts to determine whether class members have standing at the certification stage and to deny certification if individualized inquiries would be necessary to determine standing. *See In re Asacol Antitrust Litig.,* 907 F.3d at 53, 58; *Mr. Dee's Inc. v. Inmar, Inc.,* 127 F.4th 925, 933–34 (4th Cir. 2025); *In re Rail Freight Surcharge Antitrust Litig.,* 934 F.3d 619, 625 (D.C. Cir. 2019). These approaches make sense: if a plaintiff must have standing to assert a claim (because a class is simply an aggregation device), then the court should determine that each class member has standing at the time it certifies the class.

By contrast, the Ninth Circuit allows this inquiry to be conducted at summary judgment. *See Healy v. Milliman, Inc.*, 164 F.4th 701, 705 (9th Cir. 2026) ("We conclude that the logic of *TransUnion LLC v. Ramirez* requires unnamed members of a certified class for money damages to demonstrate standing at summary judgment.") (cleaned up). And other Circuits allow claims without standing to remain in class actions through trial and all the way until the time damages are awarded. *See Kohen v. Pac. Inv. Mgmt. Co.,* 571 F.3d 672, 677 (7th Cir. 2009); *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1277 (11th Cir. 2019); *see also Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC,* 31 F.4th 651, 669 (9th Cir. 2022) (*en banc*). In this case, the Tenth Circuit stands alone in requiring Petitioner to *pay claims* even when no real person asserting a real injury has ever justified them.

This Court has already recognized the need to resolve this dispute, having granted certiorari in a case to decide this very issue. *See Lab. Corp. of Am. Holdings v. Davis*, 145 S. Ct. 1133, 1134 (2025) (granting certiorari to consider whether "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"). However, once the specific facts in *Lab. Corp.* became clear, the Court determined certiorari had been improvidently granted because the case did not present these issues cleanly. *See Lab. Corp. of Am. Holdings v. Davis*, 605 U.S. 327 (2025). As a result, this Circuit split remains unresolved, and the Court's guidance is urgently needed.

This case presents an ideal vehicle to decide this standing issue. As with ascertainability, the standing inquiry was never properly conducted—at certification, summary judgment, or in post-verdict rulings. The trial court certified (and the Tenth Circuit affirmed) a class in which large numbers of members had not asserted and will never assert a valid claim—in large part because these plaintiffs are unascertainable. *Cline v. Sunoco, Inc. (R&M)*, 159 F.4th 1171, 1182 (10th Cir. 2025). As a result, the courts required Petitioner to litigate, try, and pay thousands of claims worth tens of millions of dollars even though no individual demonstrated injury by presenting marketable title to the oil-well interests. These plaintiffs also did not show the extent of any injury, specifically whether they were entitled to PRSA's 12% or 6% interest rates. *See* Okla. Stat. tit. 52, § 570.10(D). These individual plaintiffs—not the Petitioner—bore the burden of establishing marketable title and the right to the 12% interest rate. *See id.* §§ 570.4(C)–(D), 570.10(B)(4). Yet, the court made Petitioner pay the highest penalty—12% interest—to every class member even though many, if not most, were not identified or identifiable *because* they lacked the marketable title needed to qualify for the higher rate.

Thus, in many ways, the standing issues here parallel *TransUnion*, where two-thirds of the class similarly were also awarded damages based on the named plaintiff's injury, even though these individuals did not and could not satisfy their standing burdens. 594 U.S. at 433–34. As the Court held in *TransUnion*, because these claims were not viable on their own, their inclusion in a class action cannot make them suddenly viable. So, while Petitioner is required to pay $100 million in claims and two-thirds of this money will sit in unclaimed funds indefinitely, attorneys' fees will be based on the total amount awarded without any incentive to identify the actual plaintiffs the class counsel purported to represent to determine if these individuals had real losses. The Court should grant the Petition to address the Article III issue and resolve the Circuit split left unresolved by *TransUnion*.

III. THE COURT SHOULD GRANT REVIEW TO INSTRUCT LOWER COURTS TO ENSURE CLASS ACTIONS INVOLVE ONLY REAL PEOPLE WITH REAL INJURIES

Manufacturers are often the targets of highly speculative litigation, including class actions where class counsel purport to represent far more people than is appropriate under the facts and legal theories of the case. Requiring class counsel to show that the putative class members—their clients—are ascertainable and can demonstrate a concrete injury must be a basic requirement for certifying a class, let alone for the payment of damages. Ascertainability and standing serve as important gatekeepers, protecting courts and defendants from prolonged, expensive litigation, as well as from the abusive, in terrorem settlements these lawsuits often generate—regardless of justice. As the Court has observed, merely having to litigate a putative class action, regardless of the merits, "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); *accord Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975).

Manufacturers and other corporate defendants are often placed in an untenable position when facing these overly speculative lawsuits. Defense costs can run into tens of millions of dollars, and the threat of damages can be even higher, including damages that are awarded to individuals who have no real legal or factual claim. *See* Adeola Adele, *Dukes v. Wal-Mart: Implications for Employment Practices Liability Insurance* 1 (July 2011) (noting defense costs of up to $100 million). These actions also can drag on for years, even before a court takes up class certification. *See* U.S. Chamber Inst. for Legal Reform, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, at 1 (Dec. 2013) ("Approximately 14 percent of all class actions remained pending four years after they were filed, without resolution or even a determination of whether the case could go forward on a class-wide basis."). When litigation costs and the threat of excessive verdicts far exceed reality—or the settlement demand—taking the case to trial and risking this type of loss may not be viable.

Because of these dynamics, when class counsel know their classes can be certified and damages paid even when most of a class's claims do not represent real people with real injuries, class counsel can "extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 149 (2008). This risk of injustice is heightened, as the late Justice Ruth Bader Ginsburg observed, when "a class action poses the risk of massive liability unmoored to actual injury." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting). Experience has shown that it is particularly difficult to value a class action for litigation or settlement purposes when it is unknown or unknowable who the class members are, whether they have even sustained any real-world injury, and if so, how much that injury is. *See generally* Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 L. & CONTEMPORARY PROBLEMS 97 (1997).

Given these dynamics, it is not surprising that class action costs in the United States have increased dramatically over the past decade. These costs exceeded $4.5 billion in 2025, continuing a rising trend that started in 2015. *See* Carlton Fields, Class Action Survey 7 (2026).[2] Around 57% of major companies are engaged in class actions, with the average number of class matters per company rising from 4.4 in 2011 to 9.4 projected in 2026. *See id.* at 18.

These costs could be justifiable if the lawsuits resulted in real people receiving compensation for real injuries. But few, if any, of the benefits from these

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[2] https://www.carltonfields.com/getmedia/1ff719d2-dfec-46d3-8994-b88809435444/2026-carlton-fields-class-action-survey.pdf.

cases end up going to the class. *See* Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 419 (2014) (finding "very small percentages of class members actually file and receive compensation"). In a 2019 study, the Federal Trade Commission found a weighted mean claims rate of just 4%—meaning that 96% of class members in consumer classes recovered nothing. *See* Fed. Trade Comm'n, Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns, at 11 (Sept. 2019). Undoubtedly, the claims rate is lowest when the class is composed of *unascertainable* members who can never show they sustained any harm needed to claim an award.

Although not directly at issue here, because of these trends, the parties in these cases sometimes resort to *cy pres* or coupon settlements, which have become clear signs the underlying classes have no real injuries. However, here the Tenth Circuit essentially affirmed a form of *cy pres* relief—requiring Petitioner to pay the highest amount of potential damages into unclaimed property funds based on perceived, not proven, harm, even though no one actively sought the relief except a far smaller number of active litigants. That kind of relief raises constitutional concerns on its own. *See* Martin H. Redish, et al., *Cy Pres Relief & the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 623 (2010) (*cy pres* "violates the constitutional dictates of separation of powers by employing a Federal Rule of Civil Procedure to alter the compensatory enforcement mechanism dictated by the applicable substantive law being enforced in the class action proceeding"). Paying damages to no one is not justice.

In addition, when classes include unidentifiable members, the traditional incentives for those with injury claims to monitor the litigation and hold class counsel accountable may evaporate. The result is that "class counsel effectively appoint themselves as agents for the class, wielding power to transact in class members' rights." Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 150-51 (2003). It is not surprising, then, that the bulk of the money in these actions ends up going to class counsel.

Indeed, a 2020 study of 44 class settlements by an international law firm found that class counsel recovered almost as much as class members. *See* Jones Day, *An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2010–2018)*, at 12 (Apr. 2020). Another review of 510 consumer class actions found that "the cost of using the consumer class-action procedural device to compensate" the small number of class members who submit claims "outweighs the aggregate amount delivered as compensation to consumers" —sometimes 300%-400% of the actual aggregate class recovery. Jason S. Johnson, *High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions under Federal Consumer Protection Statutes*, 2017 COLUM. BUS. L. REV. 1, 5 (2017). These class actions, therefore, not only fail to provide value to many class members, they are likely to make goods and services more expensive, costing people money.

Here, the Court should make clear that class counsel must demonstrate that class members are feasibly ascertainable and have a concrete injury—at certification and before damages are paid. Otherwise, the Court will further the perception among the American people that class-action litigation is driven by the financial interests of lawyers rather than justice.

CONCLUSION

For these reasons, *amicus curiae* respectfully requests that this Court grant the Petition.

Respectfully submitted,

Philip S. Goldberg
Counsel of Record
Christopher E. Appel
Andrew J. Trask
SHOOK, HARDY & BACON L.L.P.
1800 K Street, N.W., Suite 1000
Washington, D.C. 20006
(202) 783-8400
pgoldberg@shb.com

Erica Klenicki
Caroline McAuliffe
THE NAM LEGAL CENTER
733 10th Street, N.W., Suite 700
Washington, D.C. 20001

Dated: July 31, 2026