No. 23-1940

In the

United States Court of Appeals
For the Sixth Circuit

DENNIS SPEERLY, et al.,

Plaintiffs-Appellees,

v.

GENERAL MOTORS LLC,

Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of Michigan, No. 2:19-cv-11044
Hon. David M. Lawson

EN BANC BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN TORT REFORM ASSOCIATION, AND THE ALLIANCE FOR AUTOMOTIVE INNOVATION AS AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLANT

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Amici make the following disclosures under Sixth Circuit Rule 26.1:

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No. The Chamber of Commerce of the United States of America, the American Tort Reform Association, and the Alliance for Automotive Innovation are nonprofit corporations organized under the laws of the District of Columbia. None of the Amici has a parent company and none has issued stock.

2. Is there a publicly owned corporation, not a party to the appeal or an amicus, that has a financial interest in the outcome?

None known.

/s/ Brian D. Schmalzbach
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IDENTITY AND INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents around 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the nation's business community.

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed amicus briefs in cases involving important liability issues.

The Alliance for Automotive Innovation ("Auto Innovators") is a collective trade organization representing the voice of the automotive industry. Focused on creating a safe and transformative path for sustainable industry growth, Auto Innovators represents the manufacturers producing nearly 95 percent of cars and light trucks sold in the United States. Auto Innovators is directly involved in regulatory and policy matters affecting the light-duty vehicle market across the country. Members include motor vehicle manufacturers, original equipment suppliers, and technology and other automotive-related companies.

Amici's members and their subsidiaries are frequent targets of class actions. Amici thus are familiar with class-action litigation, both from the perspective of individual defendants and from a more global perspective. Amici have a significant interest in this case because the proper application of Article III and Rule 23 raise issues of immense significance not only for their members, but also for the customers, employees, and other businesses that depend on them.[1]

INTRODUCTION

The district court steamrolled constitutional and fundamental Rule 23 obstacles to class certification. Unfortunately, that court was not alone in that error, as the vacated panel opinion and other mistaken certification decisions illustrate. District courts under this Court's supervision need more guidance than mere vacatur of the certification order would provide. To improve adherence to Article III and Rule 23, this Court sitting en banc should reverse and model the rigorous analysis that applies at class certification in cases like this.

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amici curiae, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

This case presents an excellent opportunity to explain that courts cannot certify a class bloated with uninjured individuals. Here, the district court certified 26 statewide classes of largely satisfied buyers of GM vehicles with alleged transmission defects. Most class members had no transmission problem with their vehicles, and thus received what they paid for. Indeed, the panel opinion acknowledged that many class members received a pre-delivery or warranty repair that "resolved" an alleged issue. *Speerly v. Gen. Motors, LLC*, 115 F.4th 680, 690 (6th Cir. 2024). But class members who receive a product that functions as promised lack standing to sue for an alleged defect that never affected them. The panel opinion ignored that problem because, in its view, all those uninjured class members were a concern for another day. *See also id.* at 696 ("the appropriate time" to address uninjured absent class members is at summary judgment). On the contrary, "[i]n an era of frequent litigation"—and especially in "class actions"—"courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011).

Reversal is needed to address two fundamental errors that invite bloated classes grossly disproportionate to any actual injury.

First, this Court should join its sister circuits in holding that it is never permissible under Article III to certify a largely (if not entirely) uninjured class. Certification makes absent class members parties subject to the same standing requirements as named plaintiffs. Yet here, even if *some* class members had standing, certification allowed many more uninjured class members to ride their coattails. Neither Article III nor Rule 23 permits that approach, and this Court should confirm what the logic of *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), necessarily requires: no damages class can be certified without evidence that each class member has Article III standing.[2] The district court's proposal to kick the can down the road by "identify[ing] and cull[ing]" uninjured class members after they have already bloated the certified class flouts Article III. *Speerly v. Gen. Motors, LLC*, 343 F.R.D. 493, 523 (E.D. Mich. 2023).

Second, even if it were ever permissible to certify a class with uninjured class members, the Court should show why this is not one of those cases. Here, the need to winnow out uninjured class members before judgment raises individual inquiries that would predominate over any common questions. Under Rule 23(b)(3), plaintiffs must show that common questions "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). That is Plaintiffs' burden of *proof*, not just a "pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule." *Wal-Mart Stores, Inc. v. Dukes*, 564

[2] After GM filed its en banc brief, the Supreme Court granted a petition for a writ of certiorari to resolve "[w]hether a federal court may certify a class action pursuant to Federal Rule of Civil Procedure 23(b)(3) when some members of the proposed class lack any Article III injury." *Lab. Corp. of Am. Holdings v. Davis*, No. 24-304 (Jan. 24, 2025).

U.S. 338, 350 (2011). That obligation applies to Article III standing and the merits alike. District courts cannot dodge the fundamental standing issue by declaring it "sufficient that the plaintiffs have *alleged* that every class member suffered a loss." *Speerly*, 343 F.R.D. at 523. Nor can they punt that question to summary judgment, which will only preview the detailed individualized inquiries needed at trial to test the proof of each class member's injury-in-fact. Class certification should be reversed.

ARGUMENT

I. These substantially uninjured classes cannot be certified.

Most buyers of the GM vehicles with 8-speed transmissions never had transmission problems, and thus received the benefit of their bargain. Yet the district court (and the vacated panel opinion) treated that mountain of uninjured class members as an afterthought to be addressed down the line. That was error. As a straightforward Article III matter, these classes could not be certified because they would contain uninjured class members. In any event, the need to separate all the uninjured class members from any with standing would destroy the predominance of any common issues required by Rule 23(b)(3).

A. This Court should confirm that Rule 23(b)(3) classes must exclude the uninjured.

In this Circuit, a fundamental class-certification question has escaped resolution: Can a damages class be certified without evidence that each class member has Article III standing? This Court should resolve this issue and join the other circuits in holding that every member of a class certified under Rule 23(b)(3) must have proof of standing at certification. *See Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981, 987 (8th Cir. 2021) ("[A] class cannot be certified if it contains members who lack standing."); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) ("[N]o class may be certified that contains members lacking Article III standing.").

TransUnion held that "[e]very class member must have Article III standing in order to recover individual damages." 594 U.S. at 431. But that decision addressed a final judgment—not the class-certification order itself. So the Supreme Court did not explicitly resolve "the distinct question whether every class member must demonstrate standing *before* a court certifies a class." *Id.* at 431 n.4.

Yet those same fundamental Article III principles confirm why each putative class member must show standing before certification. First, "'each element [of 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 the litigation.'" *Ward v. Nat'l Patient Acct. Servs. Sols., Inc.*, 9 F.4th 357, 360-61 (6th Cir. 2021). At class certification, the necessary manner and degree of evidence is, at a minimum, proof by a preponderance of the evidence. *See Olean Wholesale Grocery Coop., Inc. v. Bumble*

Bee Foods LLC, 31 F.4th 651, 665 & n.6 (9th Cir. 2022) ("We therefore join our sister circuits in concluding that plaintiffs must prove the facts necessary to carry the burden of establishing that the prerequisites of Rule 23 are satisfied by a preponderance of the evidence."). So before certifying a class and exercising jurisdiction over the claims of absent class members, the district court must find by a preponderance of evidence that it may do so. *See Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011) (unnamed class members are not "part[ies] to the class-action litigation *before the class is certified*").

Second, in the analogous context of intervention-by-right, each plaintiff requires Article III standing to seek money damages. *See Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433, 439 (2017). Like mandatory intervention, class-action procedures "enabl[e] a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality). In each case, additional plaintiffs are in some sense joined. These plaintiffs would need independent Article III standing to bring an unjoined lawsuit. The rules for efficient claim resolution cannot relax that irreducible constitutional requirement. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act.").

This Court thus should join the sister circuits refusing to certify damages classes containing uninjured members. That holding would require reversing the district court, which fully excused the plaintiffs from the burden of proving *at certification* that each class member suffered an injury-in-fact. *See Speerly*, 343 F.R.D. at 523 ("[I]t is sufficient that the plaintiffs have *alleged* that every class member suffered a loss." (emphasis in original)); *see also Speerly*, 115 F.4th at 696 ("the appropriate time" to address uninjured absent class members is at summary judgment).

B. Even if the uninjured could be damages class members, the absence of classwide proof of injury defeats predominance.

In any event, these damages classes could not be certified because the many uninjured class members destroy predominance under Rule 23(b)(3). Because the district courts have struggled with that predominance analysis in this context, this Court should reverse and illustrate how courts must analyze this issue.

Before certifying a damages class, a court must engage in "rigorous analysis"—based on evidentiary proof—to determine that common issues will predominate over individualized questions. *Fox v. Saginaw Cnty., Michigan*, 67 F.4th 284, 300 (6th Cir. 2023). "If many or most" absent class members lack an injury-in-fact, "that is assuredly a relevant factor that a district court must consider when deciding whether and how to certify a class." *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1273 (11th Cir. 2019). Standing for unnamed class members thus presents a "powerful problem under Rule 23(b)(3)'s predominance factor." *Id.*; *accord In re Asacol Antitrust Litig.*, 907 F.3d 42, 53 (1st Cir. 2018) (if a substantial number of class members "in fact suffered no injury," the "need to identify those individuals will predominate").

The overwhelming number of class members with no transmission issue creates an inescapable predominance problem here. And there are no workable fixes. That all the named Plaintiffs assert manifest defects is unsurprising, *Speerly*, 343 F.R.D. at 522, but testing even just their asserted experiences (let alone all class members' experiences) would require burdensome individualized inquiries. For example, GM would be entitled at a minimum to inquire into what specific "transmission" issue each owner perceived; test whether that issue is replicable; and investigate how that owner maintained the vehicle's tires (which can cause similar complaints). *See Speerly*, 115 F.4th at 688-90. And Plaintiffs' expert's say-so that all class members will experience the purported defects could not prevent GM from proving that many individual class members never did. *Speerly*, 343 F.R.D. at 522; *see also Dukes*, 564 U.S. at 367 ("[A] class cannot be certified on the premise that [a defendant] will not be entitled to litigate … defenses to individual claims."). After all, "[w]hat matters to class certification … is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* at 350.

So even if *any* class member had Article III standing here, many would not, and that alone should have precluded class certification. This Court should reverse to demonstrate that such a glut of uninjured class members precludes a damages class, and in any event, that the individualized efforts needed to winnow them out would destroy predominance under Rule 23(b)(3).

In reversing, the Court should conclusively reject three common tactics to undermine rigorous analysis of injury and predominance. First, the Court should confirm that *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016), does not (as the panel opinion suggested) let plaintiffs whitewash class members' lack of individual injury through a purported "representative sample." 115 F.4th at 712. *Tyson Foods* allowed the representative evidence in that FLSA collective action only because "each class member could have relied on that sample to establish liability if he or she had brought an individual action" for unpaid donning-and-doffing time. 577 U.S. at 455. That rationale cannot extend to cases where individualized evidence is needed to determine whether each class member's product worked as promised.

Second, the Court should clarify that its own precedent does not excuse the predominance problems with individualized proof of injury. For example, *Rikos v. Procter & Gamble Co.* did not address products (as here) that worked as intended for most but not all consumers; instead, the nutritional supplement at issue was alleged to be "snake oil" that "does not yield benefits to *anyone*." 799 F.3d 497, 506 (6th Cir. 2015) (emphasis in original). If *Rikos* suggests courts need not rigorously analyze the effect of uninjured class members on predominance, *see id.* at 505 (not requiring plaintiffs to "prove at the class-certification stage that all or most class members were in fact injured"), this Court should abjure that implication.

Third, the Court should inter obsolete precedent turning a blind eye to customers who receive products that work as promised. *Daffin v. Ford Motor Co.*, for example, relied on pre-*Dukes* authority to waive away the satisfied-customer problem as "a preliminary inquiry into the merits" irrelevant to "determin[ing] whether it may be maintained as a class action." 458 F.3d 549, 553 (6th Cir. 2006) (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974)). But *Dukes* rejected *Daffin*'s reading of that authority, 564 U.S. at 351 n.6, and confirmed that rigorous analysis will frequently "entail some overlap with the merits of the plaintiff's underlying claim." *Id.* at 351. "That cannot be helped," *id.*, so this Court should reject that excuse once and for all.

II. Enforcing Article III and Rule 23 restrictions on class actions protects the American economy.

The district court's laissez-faire approach to uninjured class members magnifies the burdens of class-action litigation on Americans and their businesses. That approach thus exacerbates "the procedural unfairness to which class actions are uniquely susceptible." *In re Ford Motor Co.*, 86 F.4th 723, 729 (6th Cir. 2023).

Class-action litigation costs in the United States continue to surge. *See* 2024 Carlton Fields Class Action Survey, at 6-7, available at https://ClassActionSurvey.com ($3.9 billion in 2023). Those class actions routinely drag on for four or more years, accruing legal fees without resolving class certification—let alone the dispute as a whole. *See* U.S. Chamber Institute for Legal Reform, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, at 1, 5 (Dec. 2013), available at http://bit.ly/3rrHd29. And the extraordinary exposure created by certifying a class also coerces defendants into "blackmail settlements" even in cases that ought to be resolved in their favor. Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973).

Rigorous enforcement of Article III and Rule 23 at the class-certification stage would be much-needed progress. Those requirements serve to prevent bloated settlements and trials when a court would "conclude at final judgment that significant portions of the certified class lack standing." U.S. Chamber Institute for Legal Reform, TransUnion *and Concrete Harm: One Year Later*, at 51 (June 2022), available at https://instituteforlegalreform.com/wp-content/uploads/2022/06/ILR-Research-Paper-Spokeo-Transunion-v9-FINAL.pdf. But without that enforcement, the immense pressure on businesses to settle improper class actions will keep ballooning regardless of actual harm. That coercion hurts consumers and employees through higher prices and lower wages; it helps no one except "attorneys who claim to represent the interests of uninjured class members." U.S. Chamber Institute for Legal Reform, *Unfair, Inefficient, Unpredictable: Class Action Flaws and the Road to Reform*, at 40 (Aug. 2022), available at https://instituteforlegalreform.com/wp-content/uploads/2022/08/ILR-Class-Action-Flaws-FINAL.pdf.

CONCLUSION

For these reasons, this Court should reverse class certification.

Dated: January 30, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the length limitation of Fed. R. App. P. 29(a)(5) because it does not exceed one-half the maximum length of twenty-five pages authorized by this Court's December 19 briefing order (ECF 88) for a party's principal supplemental brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced, 14-point Times New Roman font using Microsoft Word.

/s/ Brian D. Schmalzbach
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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2025, the foregoing was filed with the Clerk of the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system, which will also serve counsel of record.

/s/ Brian D. Schmalzbach
Brian D. Schmalzbach