2022 WL 3284604 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

STARKIST CO.; Dongwon Industries Co., Ltd., Petitioners,
v.
OLEAN WHOLESALE GROCERY COOPERATIVE, INC., et al., Respondents.

No. 22-131.
August 8, 2022.

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

Petition for a Writ of Certiorari

Christopher S. Yates, Belinda Lee, Ashley M. Bauer, Latham & Watkins LLP, 505 Montgomery Street, Suite 2000, San Francisco, CA 94111.

Samir Deger-Sen, Latham & Watkins LLP, 1271 Avenue of the Americas, New York, NY 10020, Gregory G. Garre, Counsel of Record, Blake E. Stafford, Latham & Watkins LLP, 555 Eleventh Street, NW, Suite 1000, Washington, DC 20004, (202) 637-2207, gregory.garre@lw.com, Counsel for Petitioners.

***i QUESTIONS PRESENTED**

1. Whether, and in what circumstances, the presence of uninjured class members precludes the certification of a class under Federal Rule of Civil Procedure 23(b)(3).

2. Whether, and in what circumstances, a plaintiff may rely on representative evidence such as averaging assumptions to establish classwide proof of injury to satisfy Rule 23's requirements.

***II PARTIES TO THE PROCEEDING**

Petitioners (defendant-appellants below) are StarKist Co. and Dongwon Industries Co., Ltd.

Respondents (plaintiffs-appellees below) are:
• Olean Wholesale Grocery Cooperative, Inc.; Pacific Groservice Inc. d/b/a PITCO Foods; Piggly Wiggly Alabama Distributing Co., Inc.; Central Grocers, Inc.; Trepco Imports and Distribution Ltd.; and Benjamin Foods LLC (collectively, the "Direct Purchaser Plaintiffs");

• Louise Adams; Nay Alidad; Jessica Bartling; Gay Birnbaum; Barbara Blumstein; Melissa Bowman; Sally Bredberg; Barbara Buenning; Michael Buff; Scott Caldwell; Jade Canterbury; Laura Childs; Casey Christensen; Jody Cooper; Kim Craig; Sundé Daniels; Elizabeth Davis-Berg; Brian Depperschmidt; Vivek Dravid; Gloria Emery; Robert Etten; Ana Gabriela Felix Garcia; John Frick; Kathleen Garner; Stephanie Gipson; Kathy Durand; Andrew Gorman; Tina Grant; Edgardo Gutierrez; Lisa Hall; Mary Hudson; Tya Hughes; Amy Jackson; Marissa Jacobus; Danielle Johnson; Zenda Johnston; Amy Joseph; Michael Juetten; Steven Kratky; Kathy Lingnofski; Carla Lown; Katherine McMahon; Diana Mey; Liza Milliner; Laura Montoya; Rick Musgrave; Jennifer A. Nelson; Corey Norris; Barbara Olson; Kirsten Peck; John Pels; Elizabeth Perron; Valerie Peters; John Peychal; Audra Rickman; Erica Rodriguez; Joelyna A. San Agustin; Amber Sartori; Rebecca Lee Simoens; Robert Skaff; Greg Stearns; Nancy Stiller; Christopher Todd; John Trent; Elizabeth Twitchell; Bonnie Vander ***iii** Laan; Nigel Warren; Julie Wiese; Thomas E. Willoughby III; and Daniel Zwirlein (collectively, the "End Payer Plaintiffs"); and

• Capitol Hill Supermarket; Janet Machen; Thyme Café & Market; Simon-Hindi LLC; LesGo Personal Chef, LLC; Maquoketa Care Center, Inc.; A-1 Diner; Francis T. Enterprises d/b/a Erbert & Gerbert's; Harvesters Enterprises, LLC d/b/a Harvester's Seafood and Steakhouse; Dutch Village Restaurant; Painted Plate Catering; GlowFisch Hospitality d/b/a Five Loaves Café; Rushin Gold LLC d/b/a The Gold Rush; Erbert & Gerbert, Inc.; Groucho's Deli of Raleigh; Sandee's Catering; Groucho's Deli of Five Points; and Confetti's Ice Cream Shoppe (collectively, the "Commercial Food Preparer Plaintiffs").

Bumble Bee Foods LLC was a defendant in the district court and an appellant in the court of appeals. On September 16, 2020, the court of appeals administratively closed the appeal as to Bumble Bee Foods LLC pursuant to the automatic stay for bankruptcy proceedings imposed by 11 U.S.C. § 362.

Tri-Union Seafoods LLC d/b/a Chicken of the Sea International and Thai Union Group PCL were defendants in the district court and appellants in the court of appeals until their voluntary dismissal from the appeal on May 5, 2021.

The following parties were defendants in the district court that did not participate in the proceedings in the court of appeals: Big Catch Cayman LP a/k/a Lion/Big Catch Cayman LP; Del Monte Corp.; Del Monte Foods Co.; Dongwon Enterprises; King Oscar, Inc.; Lion Capital ***iv** (Americas), Inc.; Thai Union Frozen Products PCL;

Thai Union North America, Inc.; Tri Marine International, Inc.; and Christopher D. Lischewski. The following parties were plaintiffs in the district court that did not participate in the proceedings in the court of appeals: 99 Cents Only Stores; Affiliated Foods, Inc., Affiliated Foods Midwest Cooperative, Inc.; Ahold U.S.A., Inc.; Albertsons Companies, LLC; Alex Lee, Inc.; Associated Food Stores, Inc.; Associated Grocers, Inc.; Associated Grocers of Florida, Inc.; Associated Grocers of New England, Inc.; Associated Wholesale Grocers, Inc.; Bashas' Inc.; Big Y Foods, Inc.; Bi-Lo Holding, LLC; Brookshire Brothers, Inc.; Brookshire Grocery Co.; Cash-Wa Distributing Co. of Kearney, Inc.; Certco, Inc.; The Cherokee Nation; CVS Pharmacy, Inc.; Delhaize America, LLC; Dolgencorp, LLC; Dollar General Corp.; Dollar Tree Distribution, Inc.; Family Dollar Services, LLC; Family Dollar Stores, Inc.; Fareway Stores, Inc.; Giant Eagle, Inc.; Gladys, LLC; Grand Supercenter, Inc.; Greenbrier International, Inc.; H.E. Butt Grocery Company; Hyvee, Inc.; John Gross & Co.; Kmart Corp.; Krasdale Foods, Inc.; The Kroger Co.; K-VA-T Food Stores, Inc. d/b/a Food City; Marc Glassman, Inc.; McLane Co., Inc.; Meadowbrook Meat Company, Inc.; Meijer Distribution, Inc.; Meijer, Inc.; Merchants Distributors, LLC; Moran Foods, LLC d/b/a Save-A-Lot; North Central Distributors, LLC; Publix Super Markets, Inc.; Sam's East, Inc.; Sam's West, Inc.; Schnuck Markets, Inc.; Spartannash Co.; Super Store Industries; SuperValu Inc.; Sysco Corp.; Target Corp.; Unified Grocers, Inc.; URM Stores, Inc.; US Foods, Inc.; W Lee Flowers & Co., Inc.; Wakefern Food Corp.; Walmart Stores East, LLC; Walmart Stores East, LP; Wal-Mart Stores, Inc.; Wal-Mart ***v** Stores Texas, LLC; Wegmans Food Markets, Inc.; Western Family Foods, Inc.; Winn-Dixie Stores, Inc.; Woodman's Food Market, Inc.; Janelle Albarello; Galyna Andrusyshyn; Robert Benjamin; Paul Berger; Marc Blumstein; Jessica Breitbach; Adam Buehrens; Lisa Burr; Michael Coffey; Sally Crnkovich; Debra Damske; Jessica Decker; Larry Demonaco; Scott Dennis; Ken Dunlap; Karren Fabian; Robert Fragoso; Danielle Greenberg; Sheryl Haley; Blair Hysni; Dwayne Kennedy; Sterling King; Herbert Kliegerman; Gabrielle Kurdt; Joseph A. Langston; Carl Lesher; Brian Levy; Barbara Lybarger; Louise Ann Davis Matthews; Kristin Millican; Beth Milliner; Jinkyoung Moon; Colin Moore; Evelyn Olive; Ellen Pinto; Jeffrey Potvin; Sandra Powers; Erica Pruess; Virginia Rakipi; Robby Reed; Bryan Anthony Reo; Jonathan Rizzo; Ramon Ruiz; Seth Salenger; Sarah Metivier Schadt; Samuel Seidenburg; Clarissa Simon; Harold Stafford; Truyen Ton-Vuong a/k/a David Ton; Kathy Vangemert; James Walnum; Amy Waterman; Jason Wilson; Edy Yee; Dennis Yelvington; and Beverly Youngblood. [*]

CORPORATE DISCLOSURE STATEMENT

Petitioner StarKist Co. is a subsidiary of Dongwon Industries Co., Ltd., which owns 10% or more of its stock.

Petitioner Dongwon Industries Co., Ltd. is a subsidiary of Dongwon Enterprise Co., Ltd., which owns 10% or more of its stock.

*VI RELATED PROCEEDINGS

United States Court of Appeals (9th Cir.):
Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC, No. 19-56514 (Apr. 8, 2022)

Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC, No. 19-80108 (Dec. 20, 2019)

United States District Court (S.D. Cal.):

In re Packaged Seafood Products Antitrust Litig., No. 3:15-md-2670-JLS-MDD (July 30, 2019)

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*1 PETITION FOR A WRIT OF CERTIORARI

Petitioners StarKist Co. and Dongwon Industries Co., Ltd. (collectively, "StarKist") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the en bane court of appeals (App. la-71a) is reported at 31 F.4th 651. The opinion of the court of appeals panel (App. 72a-109a) is reported at 993 F.3d 774. The order of the district court (App. 110a-87a) is reported at 332 F.R.D. 308.

JURISDICTION

The en bane court of appeals entered its judgment on April 8, 2022. On June 27, 2022, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including August 8, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

Relevant portions of Article III of the United States Constitution; the Clayton Act, 15 U.S.C. § 15; and Federal Rule of Civil Procedure 23 are reproduced at App. 195a-208a.

INTRODUCTION

This petition presents two recurring questions of foundational importance to class action law that have divided the courts of appeals, split both the en banc and three-judge panels of the Ninth Circuit below, and urgently warrant resolution by this Court.

The first question concerns whether, or in what circumstances, the presence of uninjured class ***2** members precludes the certification of a class under Federal Rule of Civil Procedure 23(b)(3)-an issue this Court acknowledged as one of "great importance," but was unable to address due to case-specific reasons in *Tyson Foods, Inc. v. Bouaphakeo,* 577 U.S. 442, 460-61 (2016). Since *Tyson Foods,* the conflict among the courts of appeals has only grown on this important issue-as well as the subsidiary question whether a district court must determine the extent of uninjured class members before certifying any class.

That discord has been thrown into sharp relief by the Ninth Circuit's en banc decision in this case. That decision upheld certification of a class even though a *third* of that class may be uninjured, on the premise that the extent of uninjured members is a "merits" question that should be resolved by a jury. App. 17a-18a, 46a-48a. As the dissent below explained, that ruling squarely conflicts with the decisions of other circuits. *Id.* at 70a-71a (Lee, J.). It flouts this Court's admonition that district courts must determine whether Rule 23's requirements are met *before* certifying any class, even when doing so "overlap[s] with the merits." *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 350-51 (2011). And it contravenes the limits imposed by Article III itself. *See Tyson Foods,* 577 U.S. at 466 (Roberts, C.J., concurring). Ultimately, the Ninth Circuit's approach will invite "monstrously oversized classes designed to pressure and extract settlements." App. 71a (Lee, J., dissenting).

The second question is also critical, and likewise implicates a clear conflict among the courts of appeals. The decision below interprets this Court's decision in *Tyson Foods* as "establish[ing] the rule" that a class may be certified based on the *assumption* that each class member suffered the same injury as ***3** the average person in the class, so long as a juror might find that assumption "plausible." *Id.* at 18a, 39a-40a. But other circuits have rejected that reading of *Tyson Foods* and refused to allow the use of representative evidence to satisfy Rule 23 in the same circumstances as here. The limits recognized by these courts are essential to ensuring that representative evidence is not allowed to mask individualized differences among class members or eliminate the individualized defenses that defendants would have in an individual action, in violation of the Rules Enabling Act. The Ninth Circuit's decision in this case dramatically lowers the bar for using representative evidence to satisfy Rule 23.

If allowed to stand, the Ninth Circuit's decision will "weaponize Rule 23 to impose an in terrorem effect on defendants" by sanctioning the certification of "grossly oversized classes." *Id.* at 68a, 70a (Lee, J., dissenting). Certiorari is warranted.

STATEMENT OF THE CASE

A. Factual Background

This case tests the certification of three enormous and widely divergent classes of direct and indirect purchasers of packaged tuna products, including hundreds of retailers ranging from mega-buyers like Costco and Amazon to local grocery stores and delis, and many millions of individual consumers. It arises from antitrust suits brought against the three largest suppliers of packaged tuna in the United States-StarKist, Chicken of the Sea ("COSI"), and Bumble Bee Foods LLC (collectively, "Defendants"). *Id.* at 5a. Plaintiffs claim that Defendants conspired to manipulate the list prices of hundreds of different tuna products. *Id.* at 112a. But the list price for the ***4** products at issue is virtually never the price paid by direct purchasers, like a Costco, or passed through to individual consumers downstream. Instead, the actual price paid derives from purchaser-specific negotiations and a host of other factors that often result in variations from the list price.

1. The underlying market in this case is characterized by numerous, highly individualized factors affecting price. Defendants sell hundreds of different packaged tuna products to an array of different entities. These products include both branded products and private label products (*e.g.,* store-brand products sold by Trader Joe's and Costco), packaged both for individual consumers and for food preparers. The purchasers of Defendants' products vary greatly in size and negotiating power, procurement and retail strategies, and other factors, which influence the prices they actually pay.

The prices paid by direct purchasers are reached through individualized negotiations, depending on the type of product. *Id.* at 94a; *see* Defs.' C.A. Br. 6 (collecting record cites). And certain products are sold under a direct purchaser's private label, like Costco's Kirkland brand, which are manufactured according to specifications set by the purchaser, with prices set by a bespoke bidding process. *See, e.g.,* C.A. Excerpts of Record (E.R.) 1713, 1717, 1944-47.

The direct purchasers range from nationwide outlets like Target, Costco, and Amazon to local supermarkets and convenience stores. These purchasers have significantly "different bargaining power." App. 54a. Large retailers wield significant leverage to "fiercely negotiate the list price down." *Id.* at 64a (Lee, J., dissenting). They are also frequently able to negotiate rebates and other promotional ***5** concessions that offset any price increases. *Id.* at 64a-65a; *see* Defs.' C.A. Br. 6-7 (collecting cites).

Prices also vary based on differences in procurement and retail strategies. For example, some retailers use an everyday-low-price strategy that requires persistent negotiation over prices, whereas others may offer aggressive promotional deals for short periods, sometimes using tuna as a loss-leader by selling it below acquisition cost. C.A. E.R. 1627-28, 1662-63, 2204-05; *see* App. 94a. And private label products-at least 15-20% of the packaged tuna market-are subject to a distinct bidding process that typically produces prices far lower than those for branded products. *See* C.A. E.R. 1944-47.

All this results in broad variations in prices across these stores and markets. For example, as the graph below shows, the prices paid by different California direct purchasers for the *same* 5-ounce can of branded tuna during the *same* month varied by as much as *23 cents* on cans that cost just 66 to 89 cents each:

TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLE
TABLE

C.A. E.R. 1018.

***6** 2. This variation in prices flows downstream to indirect purchasers such as individual consumers. Direct purchasers not only pay different prices for packaged tuna, but the degree to which they pass through any changes in those prices to consumers also varies. Large retailers like Costco may choose to absorb some or all of any price increase, whereas small retailers are more likely to pass through some or all of an increase in their wholesale cost. C.A. E.R. 1094-98, 1102-03, 1662-65, 1768-69; *see*

App. 51a-53a. Different retailers also use different pricing strategies, such as focal point pricing (*e.g.,* prices ending in $0.99). As a result, the prices paid by ordinary individual consumers vary significantly based on where they buy their packaged tuna products-e.g., from Amazon or a local deli. And large indirect purchasers, such as restaurant chains, often negotiate special price reductions unavailable to ordinary consumers. Defs.' C.A. Br. 9-12.

Because of highly individualized factors affecting pricing down the line, and because buyers have multiple (and varying) ways of *resisting* any price increases in their individual case, a change in the list price can and does leave many direct and indirect purchasers entirely unaffected. In fact, the evidence showed that numerous direct purchasers-including Amazon, Trader Joe's, and Food Lion-paid *less* than the price Plaintiffs claimed would have been paid absent the alleged price-fixing. C.A. E.R. 1076; *see* Defs.' C.A. Suppl. Record Cites (Doc. No. 99) (collecting record cites). And, as noted, private label products-accounting for some 20% of the packaged tuna market-do not appear on any price list and, instead, are negotiated separately. *Supra* at 4-5.

***7 B. District Court Proceedings**

1. This litigation follows on the heels of a federal criminal investigation into price-fixing in the packaged tuna market more than a decade ago. The investigation revealed that, following an increase in the cost of raw tuna in late 2010, sales executives from Bumble Bee and COSI, and one former executive from StarKist, coordinated the *timing* of when each company would issue new list prices for tuna products in late 2011 through 2013. *See* App. 6a. The investigation ultimately led to guilty pleas and criminal convictions for Bumble Bee and StarKist and certain of their employees. *Id.*

Plaintiffs initiated this litigation in 2015. *Id.* at 111a. Three putative class actions were filed, along with dozens of individual suits brought by large and small retailers, grocery stores, and distributors. The scope of the antitrust allegations in these cases sweeps far beyond the scope of the government's criminal case in terms of both the conduct and time period alleged. *See id.* at 6a-7a.

Following discovery, Plaintiffs sought to certify three putative classes of packaged tuna purchasers:

• A Direct Purchaser Plaintiff (DPP) class of all persons and entities that "directly purchased" Defendants' packaged tuna products from June 2011 to July 2015. *Id.* at 115a-16a. The direct purchasers vary significantly, ranging from major nationwide retailers like Amazon and Walgreens, to regional grocery store chains, to mom-and-pop stores and corner markets.

• An End Payer Plaintiff (EPP) class of millions of individuals, spanning 30 States, D.C., and Guam, who indirectly purchased Defendants' ***8** packaged tuna for personal consumption from June 2011 to July 2015. *Id.* at 170a-71a.

• And a Commercial Food Preparer Plaintiff (CFP) class of individuals and commercial entities from 27 States and D.C. that, between June 2011 and December 2016, indirectly purchased Defendants' bulk-sized packaged tuna products from one of six large direct purchasers (Walmart, Sam's Club, Costco, Sysco, US Foods, and Dot Foods). *Id.* at 143a-44a. This class ranges from local food preparers like corner delis and restaurants to the nation's largest food service company, Aramark. [1]

As in any private antitrust case for damages, Plaintiffs are required to demonstrate that they suffered an "injur[y] in [their] business or property," 15 U.S.C. § 15-here, in the form of overcharges created by supra-competitive prices as a result of the alleged price-fixing conspiracy. *See* App. 14a-15a. This showing of injury is required both to establish an element of the antitrust claim, where it is sometimes called "antitrust impact," *Comcast Corp. v. Behrend,* 569 U.S. 27, 30 (2013), and Article III standing, *TransUnion LLC v. Ramirez,* 141 S. Ct. 2190, 2207-08 (2021). In markets characterized by individualized negotiations and the kinds of other factors discussed above, injury does not automatically follow from a price-fixing conspiracy, even when one exists. Certain direct purchasers, for example, may have sufficient market power to resist any attempted price increase, and they may not pass through any price ***9** increase to the indirect purchasers. And private label products do not even appear on a price list.

2. Plaintiffs sought class certification in this case under Federal Rule of Civil Procedure 23(b)(3), which permits certification only if the district court "finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3).

As is frequently the case, the crux of the certification dispute turned on whether Plaintiffs' statistical models actually showed classwide impact. Although their methodologies differed slightly, Plaintiffs' experts all used regression models that purported to calculate "average" overcharges that would apply across-the-board to each member of the putative classes. Thus, for the DPP class:

• Plaintiffs' expert (Dr. Russell Mangum) pooled all of the direct purchasers together and first concluded that the average overcharge was 10.28%. App. 77a-78a. Dr. Mangum *assumed* that all direct purchasers were overcharged by this same 10.28% average overcharge, no matter their circumstances or the prices they actually paid. *Id.* at 78a.

• Dr. Mangum used a pooled regression to compute a "predicted actual price" paid by all direct purchasers. *Id.* He then subtracted the assumed common overcharge of 10.28% from the predicted actual price for every transaction to get a predicted "but-for price"-i.e., the price his model predicted each purchaser should have paid but for the alleged conspiracy. *Id.*

• Dr. Mangum then compared the predicted but-for price with the actual prices that each direct ***10** purchaser paid on their purchases. *Id.* If the predicted but-for price was lower than the actual price for even a single transaction, Dr. Mangum deemed the purchaser "injured." *Id.*

Even under this approach-which embedded his assumed 10.28% overcharge into almost every step-Dr. Mangum's model showed injury only to 94.5% of the DPP class. *Id.* For the remaining 5.5% of the class, the actual price paid was *lower-for every* transaction-than the price Dr. Mangum's model predicted the purchaser should have paid absent the alleged conspiracy. In other words, 5.5% of the class was uninjured even under Plaintiffs' own expert's model. The models used to predict injury for the EPP and CFP classes also used pooled regressions and average overcharges. *See id.* at 50a, 53a, 80a.

In response, Defendants' experts showed that Plaintiffs' models could not show classwide impact due to their inability to establish injury for a significant part of the class, and instead improperly masked the realities of the marketplace-where packaged tuna prices are individually negotiated, and direct purchasers are differently situated in those negotiations. *Id.* at 128a-29a; *see id.* at 64a (Lee, J., dissenting). To illustrate this flaw, Defendants' expert (Dr. John Johnson) re-ran Dr. Mangum's model with one modification: Instead of calculating only one average overcharge for all direct purchasers (10.28%), Dr. Johnson allowed the overcharge to vary by individual direct purchaser. *Id.* at 128a-29a. With that one modification, Dr. Johnson explained, Dr. Mangum's model could not show injury to at least ***11** 28%-nearly a third-of the putative DPP class members. *Id.* at 129a; *see* C.A. E.R. 718-24, 1479-81. [2]

Accordingly, Defendants argued that Plaintiffs' models failed to show the classwide impact necessary to meet Rule 23's requirements.

3. The district court agreed with Defendants that predominance was the "most important[]" issue at class certification, and that this issue hinged on whether the element of injury could be resolved on a common basis. App. 120a-22a. The court also acknowledged Defendants' expert's conclusion that, after allowing for variation in the purported overcharge, Dr. Mangum's model could not show impact for at least 28% of the putative DPP class. *Id.* at 129a. And the court recognized that a "model unable to show impact to over 28% of the class members would unquestionably" fail to satisfy Rule 23(b)(3)'s predominance requirement. *Id.* The court further recognized that "Defendants' criticisms [of Plaintiffs' models] are serious." *Id.* at 140a.

But instead of ruling on the parties' dispute over whether injury could be resolved on a classwide basis, in light of Defendants' expert's criticisms of Dr. Mangum's model, the district court just deferred that question to a jury at trial. The court reasoned

that "determining which expert is correct is beyond the scope" of class certification and was, instead, "a merits decision" for a jury. *Id.* at 140a-41a (citation omitted). The district court thus certified the DPP ***12** class. The court applied a similar analysis with respect to the EPP and CFP classes-certifying the classes on the premise that the parties' dispute over the experts' models should be deferred to the jury at a class trial. *See id.* at 149a-55a, 173a-77a.

C. Ninth Circuit Proceedings

1. The Ninth Circuit granted Defendants' petition for interlocutory review of the district court's class certification decision. *See* Fed. R. Civ. P. 23(f). And a panel of the Ninth Circuit unanimously concluded, in an opinion by Judge Bumatay, that the district court's certification order could not stand. App. 76a-109a. [3]

Agreeing with decisions from the First and D.C. Circuits, the panel majority held that the significant presence of uninjured class members may "defeat predominance" by requiring individualized inquiries, and that the district court erred by "fail[ing] to resolve the factual disputes as to how many uninjured class members are included in Plaintiffs' proposed class" before certification. *Id.* at 95a-102a (citing *In re Rail Freight Fuel Surcharge Antitrust Litig.,* 934 F.3d 619, 624-25 (D.C. Cir. 2019); *In re Asacol Antitrust Litig.,* 907 F.3d 42, 47, 51-58 (1st Cir. 2018)). The court likewise explained that the presence of a large number of uninjured members also raises "serious" Article III concerns. *Id.* at 96a-97a & n.7.

The panel further held that Plaintiffs' representative evidence-their experts' "averaging assumptions"-could "be used to satisfy predominance" only if the district court had rigorously analyzed that evidence to determine if it ***13** "does *in fact* mask individualized differences." *Id.* at 95a. The panel then remanded for the district court to resolve the experts' dispute over the extent of uninjured members in the putative classes and to rigorously analyze whether Plaintiffs' averaging assumptions "mask[ed] individual differences among the class members," such that they could not be used to show predominance. *Id.* at 99a-102a.

Judge Hurwitz concurred in part and dissented in part. *Id.* at 102a-09a. He acknowledged that "a large percentage of uninjured plaintiffs may raise predominance concerns," and he agreed with the panel majority that the district court's class certification decision could not stand because of the court's failure to resolve the extent of uninjured class members in the putative classes. *Id.* at 102a-03a, 106a-07a. But he disagreed that either Rule 23 or Article III established any *"de minimis"* threshold for uninjured class members. *Id.* at 107a-09a.

2. The Ninth Circuit *sua sponte* called for, and granted, rehearing en banc. *Id.* at 188a-94a. Following argument, a divided, 11-judge en banc panel then issued a decision affirming the district court's class certification order. *Id.* at la-71a.

The en banc majority squarely "reject[ed] the ... argument that Rule 23 does not permit the certification of a class that potentially includes more than a *de minimis* number of uninjured class members." *Id.* at 21a (italics added). It then went further, and held that district courts are not permitted to resolve expert disputes over the extent of uninjured class members, because such disputes are "merits" questions reserved for the jury. *Id.* at 18a, 46a-48a. In the majority's view, a plaintiff need only proffer "admissible" evidence that would be ***14** "capable" of establishing injury on a classwide basis *if found persuasive by a jury. See id.* at 40a-41a. Once a plaintiff has satisfied that threshold, the majority found, "a district court *cannot* decline certification ... because it considers plaintiffs' evidence ... to be unpersuasive." *Id.* at 18a (emphasis added); *see id.* at 27a n.16 ("[T]he persuasiveness of Dr. Mangum's analysis is not at issue at this phase of the proceeding."). Accordingly, the court held that "it is for the jury, not the court," to resolve the parties' dispute over whether Dr. Mangum's model in fact provides classwide proof of harm, even though the district court acknowledged that there are "serious[]" challenges to Dr. Mangum's model and, if that model is rejected, the class would flunk the predominance requirement. *Id.* at 35a, 40a-41a.

The en bane majority further held that representative evidence-here, in the form of "averaging assumptions" applied to "different purchasers with different bargaining power" that pay prices derived from "individualized negotiations"-- could establish liability

on a classwide basis under this Court's decision in *Tyson Foods*. *Id.* at 38a-39a, 54a-55a; *see id.* at 18a-20a. In reaching this conclusion, the court overruled prior Ninth Circuit precedent that had confined *Tyson Foods* to the "wage and hour context" in which it arose. *Id.* at 19a n.11 (citation omitted). In the majority's view, Plaintiffs' averaging assumptions could be used to establish classwide impact in order to satisfy Rule 23 as long as it is "plausible" that the alleged conspiracy could have had an effect on "baseline prices"-even if the underlying "'market involves diversity in products, marketing, and prices,"' and even where prices are ***15** subject to "individualized negotiations." *Id.* at 39a-41a (citation omitted).

Judge Lee, joined by Judge Kleinfeld, dissented. *Id.* at 56a-71a. He disagreed with the majority's holding that a class with a more-than-de *minimis* number of uninjured members could be certified, explaining that this ruling contradicts "Rule 23's language, common sense, and precedent from other circuits." *Id.* at 69a-71a; *see id.* at 69a ("The majority's rejection of a *de minimis* rule creates a circuit split."). Judge Lee further noted that the majority's requirement that district courts must defer to a jury at trial factual disputes critical to determining compliance with Rule 23 "gives a free pass to the intractable problem of highly individualized [injury and] damages analyses" in a way that "conflicts with the Supreme Court's" decisions. *Id.* at 66a. Indeed, as Judge Lee explained, by affirming the grant of class certification despite the presence of many "class members-perhaps almost a third of the class-who may not have suffered any harm," the majority's decision will plunge the parties and the district court into "individualized mini-trials to figure out who suffered an injury." *Id.* at 68a.

Ultimately, Judge Lee concluded, the majority's decision has the potential to "unleash a tidal wave of monstrously oversized classes designed to pressure and extract settlements." *Id.* at 71a.

REASONS FOR GRANTING THE PETITION

This petition readily satisfies the Court's criteria for certiorari. First, the questions presented each implicate direct circuit conflicts. Second, the Ninth Circuit's resolution of those questions is deeply flawed and directly contravenes this Court's own precedent. ***16** And, third, the questions presented are undeniably important and, indeed, ones that this Court has already recognized are critical to class action law.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS

A. The Circuits Are Divided Over The First Question Presented

The Ninth Circuit's en bane decision in this case squarely "reject[s]" any requirement that a class cannot be certified when it "includes more than a de minimis number of uninjured class members" (even where up to a *third* of the class may be uninjured), and holds that a district court must defer to a jury at a class trial any dispute over the extent of uninjured class members. App. 21a, 47a. As the en bane dissent recognized, that decision "creates a circuit split." *Id.* at 69a-71a (Lee, J. dissenting); *see id.* at 101a & n.14 (initial panel) (discussing out-of-circuit cases); *id.* at 107a-08a & n.2 (Hurwitz, J., concurring in part and dissenting in part) (acknowledging conflict).

1. First, the Ninth Circuit's decision creates a clear split with the D.C. Circuit's decision in *In re Rail Freight Fuel Surcharge Antitrust Litigation,* 934 F.3d 619 (D.C. Cir. 2019). *Rail Freight* involved an alleged price-fixing conspiracy for fuel surcharges among freight railroads. The district court found that the "regression analysis" by plaintiffs' expert was "reliable enough to be admissible," but that it did not support class certification because it could not show injury to 12.7% of the class. *Id.* at 621-23. As the court explained, the "need for 'individualized inquiries to determine which of at least 2,037 (and possibly more) class members were actually injured ***17** by the alleged conspiracy,' precluded a finding of predominance." *Id.* at 624 (citation omitted).

The D.C. Circuit affirmed, in a decision by Judge Katsas, holding that a class cannot be certified in circumstances virtually identical to those here. The court of appeals first noted that, "to establish predominance," a plaintiff must "'show that they can prove, through common evidence, that *all* class members were in fact injured by the alleged conspiracy."' *Id.* (emphasis added)

(citation omitted). That requirement, the court explained, is grounded in the common-sense concern that, because "[u]ninjured class members cannot prevail on the merits, ... their claims must be winnowed away as part of the liability determination." *Id.* And when there is no way to "'segregate the uninjured from the truly injured,"' the court reasoned, then "the need for individualized proof of injury and causation destroy[s] predominance." *Id.* at 624-25 (citation omitted).

The D.C. Circuit further concluded that, even assuming "[f]or the sake of argument" there was "a *de minimis* exception to th[e] general rule" that a class containing any uninjured members cannot be certified, 12.7% uninjured class members was far above any *de minimis* threshold. *Id.; see also id.* at 625 (suggesting that "5% to 6% constitutes the outer limits of a *de minimis* number" (citation omitted)). The court further held that district courts considering class certification may not "defer questions about the number and nature of any individualized inquiries that might be necessary to establish liability." *Id.* at 626. Such questions, the court explained, were "part-and-parcel of the 'hard look' required by *Wal-Mart* and *Comcast,"* and therefore could not simply be left for resolution by the jury at trial. *Id.*

***18** The decision below directly conflicts with *Rail Freight.* While the D.C. Circuit found that a class *cannot* be certified if it contains a more-than-de *minimis* number of uninjured members, because the need for "individualized" injury determinations will defeat predominance, *id.* at 625, the Ninth Circuit expressly "reject[ed]" any *de minimis* requirement, App. 2 la. And while the Ninth Circuit held that a court must defer disputes regarding the extent of uninjured class members to the jury, the D.C. Circuit held that the inquiry over uninjured members was "part-and-parcel of the 'hard look' required by" this Court's precedent *before* any class can be certified. *Rail Freight,* 934 F.3d at 626; *see also In re Rail Freight Fuel Surcharge Antitrust Litig.,* 725 F.3d 244, 253 (D.C. Cir. 2013) (A district court must "scrutinize the evidence before granting certification"; "[i]f the damages model cannot withstand this scrutiny then that is not just a merits issue," because the model is "essential to the plaintiffs' claim they can offer common evidence of classwide injury.").

2. The Ninth Circuit's decision likewise conflicts with the First Circuit's decision in *In re Asacol Antitrust Litig.,* 907 F.3d 42 (1st Cir. 2018). *Asacol* concerned antitrust claims against a drug manufacturer that allegedly improperly blocked entry of generic substitutes into the market. *Id.* at 45. The district court found that approximately 10% of class members would have opted for the defendant's branded products "even in the presence of a generic," and thus were uninjured. *Id.* at 47 (citation omitted). But the court nonetheless certified the class. *Id.*

The First Circuit reversed. In a decision by Judge Kayatta, the court of appeals held that the presence of 10% uninjured class members defeated ***19** predominance. As the court explained, "this is not a case in which a very small absolute number of class members might be picked off in a manageable, individualized process at or before trial"; instead, "there are apparently thousands who in fact suffered no injury," and the "need to identify those individuals will predominate and render an adjudication unmanageable." *Id.* at 53-54; *see also id.* at 57 (citing *Rail Freight).* A contrary holding, the court explained, would provide "no logical reason" against the certification of a class with "forty-nine percent or even ninety-nine percent" uninjured class members-an untenable result. *Id.* at 55-56.

Just like *Rail Freight,* the First Circuit's decision in *Asacol* is irreconcilable with the Ninth Circuit's holding here. The First Circuit squarely held that a class with 10% uninjured members could *not* be certified given that the need for individualized inquiries into injury would predominate at a class trial, and the court resolved the dispute between the parties' experts regarding plaintiffs' proffered classwide proof (instead of deferring it to a jury). *Id.* at 53-56. The decision below, by contrast, holds that a class may be certified even if a third (or more) of its members are uninjured, and that a district court must refer this issue to a jury at a class trial. As in *Rail Freight, Asacol* would have come out the opposite way under the Ninth Circuit's decision here.

3. The Ninth Circuit's decision also conflicts with the Third Circuit's decision in *In re Lamictal Direct Purchaser Antitrust Litigation,* 957 F.3d 184 (3d Cir. 2020). *Lamictal* concerned an allegedly anti-competitive settlement between drug manufacturers concerning the drug lamotrigine. *Id.* at 189. The Third Circuit noted that "in a market characterized ***20** by individual negotiations and a discounted-brand competition strategy," "up to one-third of the entire class" may have "paid no more, or even *less,* for lamotrigine than they would have" without the allegedly anti-competitive conduct. *Id.* at 192. The court

further held that, "even though it touche[d] on the merits," the district court erred in declining to resolve a battle of the experts over the extent of uninjured class members before certifying the class, since resolving that issue was "necessary in order to determine whether the Direct Purchasers ... could show that common issues predominated by a preponderance of the evidence." *Id.* at 194.[4]

In short, the first question presented involves a clear and acknowledged circuit conflict, and certiorari is warranted on that basis alone.

B. The Circuits Are Divided Over The Second Question Presented

The circuits are also split on the second question presented and, in particular, the limits imposed by *Tyson Foods* on the use of representative evidence to satisfy Rule 23's requirements.

1. The Ninth Circuit below found that representative evidence-in the form of averaging assumptions-is broadly permissible based on an ***21** expansive reading of this Court's decision in *Tyson Foods-one* that plaintiffs have been aggressively pursuing in cases across the country (until now, with little success). In doing so, the Ninth Circuit disavowed its prior precedent cabining *Tyson Foods* to the "wage and hour context," App. 19a n.11 (citation omitted), and then adopted a sweeping rule that would allow the use of representative evidence to satisfy Rule 23's requirements any time a minimal "plausib[ility]" threshold is met, *id.* at 40a. Under the Ninth Circuit rule, even when there is substantial variation within a class as to the fact in question, the *only* limitation on when an averaging assumption may serve as "class-wide" proof is whether a jury could find the assumption "plausible" at a class trial. *Id.* at 40a-44a. Applying that rule, the court held that the averaging assumptions here are permissible, because it was "not *implausible* to conclude that a conspiracy could have a class-wide impact, even when the market involves diversity in products, marketing, and prices," and even where prices were subject to "individualized negotiations." *Id.* at 39a-41a (emphasis added) (citation omitted).

2. The Ninth Circuit's ruling allowing the use of such representative evidence here sharply conflicts with the Third Circuit's decision in *Lamictal* and the First Circuit's decision in *Asacol.*

In *Lamictal,* the plaintiffs, relying on *Tyson Foods,* similarly claimed that there would be no need for individualized inquiries, because their expert could prove antitrust impact by relying on the average impact to the class. In the plaintiffs' view, "unless no reasonable juror could believe the common proof at trial," the evidence was sufficient to satisfy the predominance requirement. 957 F.3d at 191. But the ***22** Third Circuit rejected that argument, explaining: *"Tyson Foods* was discussing representative evidence in the [Fair Labor Standards Act] context, a unique labor situation in which, often due to inadequate record keeping, 'a representative sample ... may be the only feasible way to establish liability.'" *Id.* (citation omitted). The court then rejected the plaintiffs' reliance on averaging assumptions to show classwide impact in "a market characterized by individual negotiations." *Id.* at 192; *see Reinig v. RBS Citizens, N.A.,* 912 F.3d 115, 128-30 (3d Cir. 2018) (similarly discussing limits imposed by *Tyson Foods).*

In *Asacol,* the plaintiffs, relying on the same reading of *Tyson Foods* that the Ninth Circuit adopted here, claimed that they could "prove 'class-wide impact' with the testimony of their expert, Dr. Conti," who used a regression model to "estimate that a generic drug would achieve roughly ninety percent market penetration." 907 F.3d at 54. But, just like the Third Circuit in *Lamictal,* the First Circuit in *Asacol* squarely rejected that argument, holding that Dr. Conti's study could not serve as classwide proof because, unlike in *Tyson Foods,* "plaintiffs point to no ... substantive law that would make an opinion that ninety percent of class members were injured both admissible and *sufficient to prove* that any given individual class member was injured." *Id.* (emphasis added). As in *Lamictal,* it was not sufficient that a reasonable juror in a *class* trial might find the averaging assumption plausible. *Id.* at 54-55.

Once again, this conflict is outcome-determinative for purposes of class certification: Plaintiffs' averaging assumptions here would not have been allowed in the First and Third Circuits. That conflict also warrants this Court's review.

*23 II. THE DECISION BELOW IS WRONG

The Ninth Circuit's en bane decision is also deeply flawed and at odds with this Court's precedent.

A. The Ninth Circuit Erred In Holding That Class Certification Is Proper Despite The Parties' Dispute Over The Extent Of Uninjured Class Members

Rule 23(b)(3) requires a plaintiff to make an additional-and "even more demanding," *Comcast Corp. v. Behrend,* 569 U.S. 27, 34 (2013)-showing: that common questions will "predominate over any questions affecting only individual class members." Fed. R. Civ. P. 23(b)(3). That requirement applies to the essential elements of a plaintiffs claim, including (as here) the injury required to establish antitrust liability. Where uninjured class members are present, the need to determine *which* class members have been injured-and, in turn, which may establish liability-will predominate. *See Asacol,* 907 F.3d at 53-54; App. 62a (Lee, J., dissenting) ("If a large number of class members 'in fact suffered no injury,' identifying those class members 'will predominate.'" (quoting *Asocal,* 907 F.3d at 53-54)); *Tyson Foods, Inc. v. Bouaphakeo,* 577 U.S. 442, 463-64 (2016) (Roberts, C.J., concurring) ("[I]t is undisputed that hundreds of class members suffered no injury in this case. The question is: which ones?" (citations omitted)). Yet, under the decision below, a district court "cannot" resolve the parties' dispute over the extent of uninjured members within the class-even if a third of the class may be uninjured-before certification; ***24** instead, that is a "merits" issue that must be referred to a jury. App. 18a. That is error. [5]

As discussed, the First and D.C. Circuits have held that the presence of a more-than-de *minimis* number of uninjured class members indicates a fatal predominance problem. *Rail Freight,* 934 F.3d at 624-35 ("5% to 6% constitutes the outer limits of a de minimis number"); *Asacol,* 907 F.3d at 54 ("around 10%"). This *de minimis* threshold is simply a rough proxy for determining when individualized questions of which class members are injured will predominate. The presence of uninjured members is an obvious red flag that everyone in the class has *not* "suffered the same injury." *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 349-50 (2011) (citation omitted). How could a class be "sufficiently cohesive to warrant adjudication by representation," *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 623 (1997), if a substantial portion of that class has not been injured by the alleged misconduct? As Judge Lee explained, "[i]f one-third-or half or two-thirds-of the class members suffered no injury, it follows that 'common' issues would not 'predominate,' as required under the text of Rule 23, because those uninjured class members have little in common with those who have been harmed." App. 70a (dissenting). And, as Judge Bumatay recognized in his initial panel decision, regardless of the "upper bound of what is *de minimis,* ***25** it's easy enough to tell that 28% would be out-of-bounds." *Id.* at 100a. Even the district court acknowledged that if 28% of the class were uninjured, then Plaintiffs would "unquestionably" fail to satisfy the predominance requirement. *Id.* at 129a.

The en bane majority nonetheless found that the class could be certified-despite the number of uninjured members there may be within the class-because determining the extent of uninjured class members would impermissibly inquire into the "merits." *Id.* at 17a-21a. That rationale is sharply inconsistent with this Court's precedents. Indeed, it is virtually identical to the reasoning this Court rejected from a prior Ninth Circuit en bane panel in *Dukes v. Wal-Mart Stores, Inc.,* 603 F.3d 571 (9th Cir. 2010). In *Wal-Mart,* the Ninth Circuit certified a Title VII class on the premise that the plaintiffs' proffered expert testimony was capable of proving liability on a classwide basis. Similar to here, the Ninth Circuit found that, "[w]hile a *jury* may ultimately agree with Wal-Mart that ... Dr. Bielby's analysis [does not show] Wal-Mart engaged in actual gender discrimination, that question must be left to the merits stage of the litigation." *Id.* at 603. This Court reversed, holding that a district court cannot simply accept a plaintiffs proffer of common harm, but instead must engage in a "rigorous analysis" of whether the prerequisites of certification have been met, even if that analysis "overlap[s] with the merits of the plaintiffs underlying claim." *Wal-Mart,* 564 U.S. at 350-51. And the Court concluded that the class could not be certified because, notwithstanding the plaintiffs expert's proffer to the contrary, the claims at issue in *Wal-Mart* did not, in fact, "depend ***26** upon a common contention" that was "capable of classwide resolution." *Id.* at 350.

Yet, here, the Ninth Circuit held that it was enough for a plaintiff to proffer evidence that *might* establish Rule 23's requirements have been satisfied. In the en bane majority's view, so long as Plaintiffs' evidence was "capable of" showing injury, "it [was] for the jury, not the court, to decide" whether up to a third of the class was, in fact, uninjured. App. 40a-41a. But, as even the district court appeared to recognize, the extent of uninjured members is a predicate for determining whether the predominance requirement is satisfied. *Id.* at 129a (recognizing that if 28% of the class were uninjured, predominance would "unquestionably" not be satisfied). By certifying a class where a third of its members may be uninjured, the district court essentially certified a class that *may or may not* satisfy the predominance requirement-depending on what the jury *later* finds. That "certify now, decide later" approach abdicates the district court's vital gate-keeping role in determining whether Rule 23 is met. *See Comcast,* 569 U.S. at 35 ("[O]ur cases requir [e] a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim").

The Ninth Circuit's repeated use of the term "capable of" classwide resolution to justify its rule was misplaced. App. 43a. As this Court explained in *Wal-Mart,* an issue is "capable of classwide resolution" only if it can be "resolve [d]" for all class members "in one stroke." 564 U.S. at 350. It is not enough for a district court simply to inquire whether the plaintiffs have proffered evidence supporting a plausible inference of classwide injury. Plaintiffs can virtually *always* present an expert report proffering such ***27** evidence, as the plaintiffs did in *Wal-Mart* itself. *Id.* at 354-55. Rather, a court must also ask whether there are individualized reasons-reasons that the defendants are entitled to litigate-that particular class members may have escaped injury. If so, the issue of injury *does not* stand or fall for all class members together, and *cannot* be resolved in "one stroke" at a classwide trial based only on the success or failure of the plaintiffs' proposed common proof.

The district court thus was required to resolve the experts' dispute over whether Plaintiffs' model actually shows classwide injury. If Defendants' expert is correct that Plaintiffs' model fails to show injury for a third of the class, that is not just a "merits" problem to be deferred for trial-it is a red flag that there is a fatal predominance defect. Yet, the district court made clear that it *declined* to resolve "which expert is correct," even while recognizing that Dr. Johnson's "criticisms are serious." App. 140a. And the Ninth Circuit affirmed that ruling, declaring that "the persuasiveness of Dr. Mangum's analysis is *not* at issue at this phase of the proceeding." *Id.* at 27a n.16 (emphasis added). That ruling squarely conflicts with the decisions of this Court, which require a district court to determine whether Rule 23's requirements are met before certifying a class. *See Wal-Mart,* 564 U.S. at 350; *Comcast,* 569 U.S. at 35-36; App. 61a-62a (Lee, J., dissenting).

Deferring this critical issue to a class trial on the merits also violates the Rules Enabling Act and its "instruction that use of the class device cannot 'abridge ... any substantive right.'" *Tyson Foods,* 577 U.S. at 455 (quoting 28 U.S.C. § 2072(b)). Ordinarily, a plaintiff who has not been injured cannot invoke the power-and machinery-of the federal courts to ***28** subject a defendant to the pain of litigation. But the decision below allows a class including potentially *thousands* of uninjured members to proceed to a class trial, which could deprive defendants of the ability to challenge liability on an individualized basis. That discrepancy "violate[s] the Rules Enabling Act by giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." *Id.* at 458.

Likewise, certifying classes populated with uninjured class members presents fundamental Article III concerns. "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not," and, accordingly, "if there is no way to ensure that the jury's damages award goes only to injured class members, that award cannot stand." *Id.* at 466 (Roberts, C.J., concurring). The Ninth Circuit's approach flouts this principle by permitting the certification of classes engorged with uninjured individuals, with nothing to prevent damages (or settlements) being directed to such individuals-a particular concern given the enormous pressures for settlement as soon as a class is certified, regardless of how strong a defendant's defenses to the claims may be on the merits. *See infra* at 32-33.

The result will be "monstrously oversized classes" that contravene Rule 23, this Court's precedent, and Article III itself. App. 71a (Lee, J., dissenting).

B. The Ninth Circuit Erred In Allowing Plaintiffs To Establish Classwide Impact Through Averaging Assumptions

The Ninth Circuit's ruling that averaging assumptions are broadly permissible under *Tyson* ***29** *Foods* whenever a reasonable juror could find the assumption "plausible" at a trial is also deeply flawed.

Tyson Foods involved a claim for overtime payments under the Fair Labor Standards Act (FLSA). This Court explained that, under *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680 (1946), when an "employer[] [has] violate[d] their statutory duty to keep proper records," an FLSA claimant may establish her hours worked from a representative sample to prove her own injury. 577 U.S. at 456. Moreover, in *Tyson Foods,* plaintiffs were similarly situated-"each employee worked in the same facility, did similar work, and was paid under the same policy." *Id.* at 459. For these reasons, the representative study in *Tyson Foods* "could have been sufficient to sustain a jury finding as to hours worked if it were introduced in each employee's individual action." *Id.* And reliance on that study did not "deprive [the defendant] of its ability to litigate individual defenses," because "there w[as] *no alternative means* for the employees to establish their hours worked," in light of their employer's record-keeping failures. *Id.* at 457 (emphasis added).

In so holding, the *Tyson Foods* Court contrasted *Wal-Mart,* where the Court refused to permit the plaintiffs to rely on representative evidence of alleged discrimination across workplaces. In *Wal-Mart,* the Court explained, "the experiences of the employees ... bore little relationship to one another." *Id.* at 459. Thus, because "the employees [there] were not similarly situated," they could *not* "have *prevailed in an individual suit* by relying on [representative evidence] detailing the ways in which other employees were discriminated against." *Id.* at 458 (emphasis added). Thus, even assuming it was ***30** admissible, the representative evidence in *Wal-Mart,* was *not* permissible classwide proof to satisfy Rule 23, because it could not "sustain a jury finding" in each class-member's "individual action." *Id.* at 459.

In the decision below, the Ninth Circuit en bane majority disavowed the court's prior precedent holding that *Tyson Foods* is limited to the "wage and hour context" and, in its place, adopted a rule of astonishing breadth. App. 19a n. 11 (citation omitted). The court held that evidence that averages impact across class members can justify class certification so long as it would be "admissible" and "not implausible." *Id.* at 39a-41a. But as *Wal-Mart* shows, *admissibility* is not sufficient to allow the use of representative evidence to satisfy Rule 23. 564 U.S. at 354 (noting that even if it were admissible, plaintiffs' expert's "testimony does nothing to advance respondents' case"). Rather, under *Tyson Foods,* a plaintiff must show that the representative evidence "could have been *sufficient to sustain* a jury finding ... if it were introduced in each [class member's] *individual* action," under the specific law governing that claim. *Tyson Foods,* 577 U.S. at 459 (emphasis added); *see Asacol,* 907 F.3d at 54 (evidence must be both "admissible and sufficient to prove that any given individual class member was injured").

Here, the representative evidence plainly would not have been "sufficient to sustain" a jury finding on injury in an individual action. Unlike in *Tyson Foods,* (1) there is no substantive rule allowing a plaintiff to show antitrust impact through averaging assumptions in an individual case, and (2) the class members here are *not* similarly situated; there are innumerable individualized factors differentiating class members. The individual actions involving ***31** purchasers who opted out of the class prove the point. More than 100 direct purchasers opted out of the proposed DPP class and filed their own individual actions against defendants-yet *none* relied on Plaintiffs' averaging assumptions to attempt to show injury. That confirms that the key assumption underpinning *Tyson Foods* is inapplicable here. 577 U.S. at 456-57 (relying on the premise that "each employee likely would have had to introduce" the same representative study in their individual case).

The Ninth Circuit's decision is flawed in another important respect. As Judge Bumatay explained in the initial panel decision, even if representative evidence might be allowed in some circumstances, a district court must rigorously analyze that evidence to ensure that it is not masking individualized differences among class members *before* certifying any class. *See* App. 95a; *Tyson Foods,* 577 U.S. at 467 (Thomas, J., dissenting) ("Our precedents" require that, "[b]efore class action plaintiffs can use representative evidence in this way, district courts must undertake a rigorous analysis to ensure that such evidence is sufficiently probative of the individual issue to make it susceptible to classwide proof."). The district court below, however, never engaged in that critical analysis here.

The upshot is that, in the Ninth Circuit, a plaintiff can now "prevail on class certification by merely offering a well-written and plausible expert opinion." App. 63a (Lee, J., dissenting).

*32 III. THE QUESTIONS PRESENTED ARE EXTRAORDINARILY IMPORTANT AND WARRANT REVIEW IN THIS CASE

1. This case is one of the most closely watched class actions in more than a decade. Respondents themselves have recognized that "[t]his case presents questions of exceptional importance." C.A. Resp. to En Banc Order 13 (C.A. Doc. No. 117). And the Ninth Circuit believed that the questions were so important that it not only granted rehearing en banc, but initiated en banc proceedings *sua sponte.* The rulings in this case have already been cited more than sixty times in judicial opinions, underscoring how quickly the decision below can-and will-take root.

None of this is surprising. The questions presented "strike[] at the heart" of class certification under Rule 23(b)(3). *Asacol,* 907 F.3d at 51. And class certification is the seminal event in class litigation. As Judge Lee observed, "[i]f a court certifies a class, the potential liability at trial becomes enormous, maybe even catastrophic, forcing companies to settle even if they have meritorious defenses." App. 56a (Lee, J., dissenting); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof,* 84 N.Y.U. L. Rev. 97, 99 (2009) ("With vanishingly rare exception[s], class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial."). Nowhere is this pressure greater than in the antitrust context, where defendants face the threat of "massive damages." 2A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 331a (5th ed. 2022). Indeed, Defendant Bumble Bee-a major tuna *supplier-already* has been forced into bankruptcy.

***33** The requirement that a district court rigorously analyze whether Rule 23(b)'s requirements are met *before* certification is a crucial "safeguard[]" for class action defendants. *Comcast,* 569 U.S. at 34. By permitting class certification without resolving the extent of uninjured class members and vastly lowering the threshold for use of averaging assumptions, the decision below "create[s] an unacceptable risk" that StarKist will "be held liable to a large class without adequate proof that each individual class member" was actually injured. *Tyson Foods,* 577 U.S. at 472 (Thomas, J., dissenting). And it "allow[s] plaintiffs to weaponize Rule 23 to impose an in terrorem effect on defendants," compounding the pressure to settle. App. 68a (Lee, J., dissenting).

The questions presented are also frequently recurring. "[A]round 10,000 class action lawsuits are filed annually." *Id.* at 59a (Lee, J., dissenting). The issue of predominance will be at the forefront of a large majority of those lawsuits, with district courts frequently grappling with conflicting standards and rules. Indeed, district courts in the Ninth Circuit are already relying on the en banc majority's decision in this case to justify the certification of classes with uninjured class members on the basis of dubious expert evidence. *See, e.g., Utne v. Home Depot U.S.A., Inc.,* No. 16-cv-01854, 2022 WL 1443338, at *8 (N.D. Cal. May 6, 2022); *Lytle v. Nutramax Lab'ys, Inc.,* No. 19-cv-0835, 2022 WL 1600047, at *14, *18 (C.D. Cal. May 6, 2022). Yet, class certification disputes typically escape appellate review, as interlocutory review is the exception and most defendants are forced to capitulate to settlement following certification rather than pursue final judgment.

***34** The circuit splits alone are enough to warrant review. But these conflicts are especially intolerable given that the Ninth Circuit-the nation's largest judicial circuit-is an outlier on these issues. If the decision below is allowed to stand, it will inevitably spawn rampant forum-shopping, with plaintiffs flocking to file the biggest cases-i.e., nationwide class-actions-in the Ninth Circuit. Moreover, as Judge Lee explained, the "implications" of the Ninth Circuit's decision are not limited to antitrust cases but will wreak havoc on "a wide sea of class action cases." App. 71a (Lee, J., dissenting). It is thus imperative for the Court to grant certiorari here.

2. This case is also an ideal vehicle to resolve the questions presented. The questions were pressed and passed upon at length in opinions by the district court, the Ninth Circuit panel majority and concurrence, and the Ninth Circuit en bane majority and dissent. Well-respected judges at almost every step of this case have sharply disagreed on the proper outcome, underscoring the confusion that persists on these issues. The questions presented are also outcome-determinative on the crucial class certification

issue here. And because this case comes to the Court on an interlocutory appeal of a class certification decision, it does not present the complications that often attend post-verdict appeals, such as the problem of untangling damages awarded to classes that should not have been certified in the first place. *Cf. Tyson Foods,* 577 U.S. at 465-66 (Roberts, C.J., concurring). In short, this case cleanly presents the Court with a much-needed opportunity to address pressing issues of class action law.

*35 CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHRISTOPHER S. YATES

BELINDA LEE

ASHLEY M. BAUER

LATHAM & WATKINS LLP

505 Montgomery Street

Suite 2000

San Francisco, CA 94111

SAMIR DEGER-SEN

LATHAM & WATKINS LLP

1271 Avenue of the Americas

New York, NY 10020

GREGORY G. GARRE

Counsel of Record

BLAKE E. STAFFORD

LATHAM & WATKINS LLP

555 Eleventh Street, NW

Suite 1000

Washington, DC 20004

(202) 637-2207

gregory.garre@lw.com

Counsel for Petitioners

August 8, 2022

Appendix not available.

Footnotes

* Although some of these parties are designated as "plaintiffs-appellees" on the court of appeals' docket, none participated in the proceedings in the court of appeals.

1 The arguments in this petition apply to all three classes, though-as in the decisions below-the focus is on the DPP class.

2 Dr. Mangum disputed Dr. Johnson's findings. But even Dr. Mangum conceded that, without his averaging assumption, his model could not calculate any statistically significant overcharge for 16.7% of the class. *See* App. 32a-33a; C.A. E.R. 627-29, 720-23, 1351.

3 On appeal, Bumble Bee filed for bankruptcy, *see* App. 5a n. 1, and COSI voluntarily dismissed its appeal, *see* C.A. Doc. No. 102.

4 Other circuits have similarly recognized problems with certifying classes with uninjured members. *See, e.g., Denney v. Deutsche Bank AG,* 443 F.3d 253, 264 (2d Cir. 2006); *Bell Atl. Corp. v. AT&T Corp.,* 339 F.3d 294, 302-05 (5th Cir. 2003); *Messner v. Northshore Univ. HealthSystem,* 669 F.3d 802, 824 (7th Cir. 2012); *Johannessohn v. Polaris Indus. Inc.,* 9 F.4th 981, 987 (8th Cir. 2021); *Halvorson v. Auto-Owners Insurance Co.,* 718 F.3d 773, 779-80 (8th Cir. 2013); *Cordoba v. DIRECTV, LLC,* 942 F. 3d 1259, 1273, 1277 (11th Cir. 2019).

5 Whether a class member has been injured at all concerns a necessary element of liability-antitrust impact-and the existence of Article III standing. But to the extent that the *degree* of injury requires individualized damages determinations, that presents its own predominance problem. *See Comcast,* 569 U.S. at 35-36. As Judge Lee noted, this case raises both problems. App. 66a (Lee, J., dissenting).