2022 WL 4236665 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

STARKIST CO.; Dongwon Industries Co., Ltd., et al., Petitioners,

v.

OLEAN WHOLESALE GROCERY COOPERATIVE, INC., et al., Respondents.

No. 22-131.
September 9, 2022.

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

Brief of the Chamber of Commerce of the United States of America, the Pharmaceutical Research and Manufacturers Association of America, and the Software & Information Industry Association as Amici Curiae in Support of the Petition

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*1 INTEREST OF *AMICI CURIAE* [1]

Amici curiae and their members represent a diverse array of businesses and business interests across the United States. They support the petition because they are concerned about the Ninth Circuit's failure to enforce the essential requirements of Rule 23 of the Federal Rules of Civil Procedure. *Amici* have a strong interest in ensuring that courts undertake the rigorous analysis that Rule 23 requires *before* they allow a case to proceed as a class action. They also have a strong interest in ensuring that courts do not certify class actions that improperly include significant numbers of uninjured class members. Because the Ninth Circuit's en bane decision opens conflicts in lower-court authority, contravenes this Court's precedent, and eviscerates important limits on class-action abuse, *amici* urge the Court to grant certiorari. The Court should take this opportunity to clarify Rule 23's requirements and direct lower courts to stop bending the rules in favor of class certification.

The three organizations joining this brief are:

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly ***2** represents the interests of more than three million companies and professional organizations of every size, in every industry sector, 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. The Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The **Pharmaceutical Research and Manufacturers of America ("PhRMA")** is a voluntary, nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies. PhRMA's member companies research, develop, and manufacture medicines that allow patients to live longer, healthier, and more productive lives. Since 2000, PhRMA member companies have invested nearly $1 trillion in the search for new treatments and cures--more R&D investment than any other industry in America. PhRMA's mission is to advocate for public policies that encourage the discovery of life--saving and life-enhancing medicines. PhRMA frequently participates as *amicus curiae* in cases, like this one, that affect its members.

The **Software & Information Industry Association ("SIIA")** is the principal trade association for the software and digital information industries. SIIA's membership includes over 400 software companies, search engine providers, data and analytics firms, information service companies, and digital publishers that serve nearly every segment of society, including business, education, government, ***3** healthcare, and consumers. SIIA's members have been defendants in class action litigation involving alleged statutory violations that have caused no concrete injury, and it is very difficult in those suits to defend against even meritless claims after the certification stage.

*4 INTRODUCTIONc AND SUMMARY OF ARGUMENT

This case should not have been difficult. As the Ninth Circuit panel initially concluded, the district court improperly certified a class that includes large numbers of uninjured parties with no conceivable claim against defendants. The Ninth Circuit panel also correctly concluded that the district court, not a jury, must resolve factual disputes bearing on Rule 23's commonality and predominance requirements before a class can be certified. As every other court of appeals to have considered the issue has concluded, and as two panel members recognized, a district court may not certify a class unless it first concludes that no more than a *de minimis* number of class members are potentially uninjured. That requirement is essential to protecting against class-action abuse, where oversized classes engorged with uninjured parties are used to coerce defendants into settlement, and to avoiding overreach by the judiciary, which has no authority under Article III to adjudicate claims of uninjured parties.

Instead of enforcing Rule 23's requirements, the en bane Ninth Circuit reversed the panel and fundamentally undermined the standards for class certification. In direct conflict with its sister circuits, the en bane court concluded that a class should be certified even if it includes large numbers of uninjured parties. It also concluded that a district court may assume that each class member suffered the same injury as the average class member, dramatically changing when representative evidence may be used to satisfy Rule 23. In doing so, the Ninth Circuit ***5** embraced a certify-now, worry-later approach that defers resolving essential questions until after the class is certified, increasing the pressure on defendants to settle even the most non-meritorious claims.

The Ninth Circuit's doctrinal departures should not stand. Nor should this Court allow the circuit splits created by the Ninth Circuit's decision to fester. Instead, the Court should grant certiorari to clarify the affirmative showing that plaintiffs must make when seeking to certify a class. This case presents an ideal vehicle to address the questions presented and to reaffirm that class actions remain the exception to the usual rule of individual litigation. Contrary to the Ninth Circuit's misguided approach, courts should not bend the requirements for class certification or avoid the rigorous analysis that Rule 23 mandates.

ARGUMENT

I. The Petition Satisfies the Requirements for Granting Certiorari.

The petition should be granted because it easily satisfies the standards for this Court's review. The important questions it presents should be considered by this Court, for at least four reasons.

First, as the petition explains, the circuit courts are divided on two recurring questions of federal law: (1) whether Rule 23 permits courts to certify a class that is defined to include more than a *de minimis* number of uninjured class members, and (2) whether Rule 23 permits plaintiffs to employ representative evidence--examining the purported average impact ***6** on the average class member--to meet plaintiffs burden of establishing class-wide proof of injury.

By answering both questions in the affirmative, the Ninth Circuit's decision dramatically loosens the requirements for class certification and conflicts with decisions from other courts of appeal. In particular, the Ninth Circuit's decision cannot be reconciled with decisions by the D.C. and First Circuits holding that a putative class fails to meet Rule 23's predominance requirement when anything more than a *de minimis* number of class members may not have suffered any injury. *See In re Rail Freight Fuel Surcharge Antitrust Litig. -MDL No. 1869,* 934 F.3d 619, 624-25 (D.C. Cir. 2019); *In re Asacol Antitrust Litig.,* 907 F.3d 42, 53-54 (1st Cir. 2018). Nor can it be reconciled with decisions by the First and Third Circuits rejecting the use of representative evidence as insufficient to prove that individual class members suffered actual injury. *See Asacol,* 907 F.3d at 54-55; *In re Lamictal Direct Purchaser Antitrust Litig.,* 957 F.3d 184, 192 (3d Cir. 2020). In the class-action context, where enterprising plaintiffs' lawyers can easily shop for both clients and forums, this lack of uniformity is untenable. It creates incentives for plaintiffs to file their largest and least precisely defined class actions in the Ninth Circuit solely because of its unduly lenient approach to class certification.

Second, the Ninth Circuit's approach contravenes this Court's governing precedent and raises significant concerns that the judiciary is exceeding the scope of its Article III authority. *See Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 367 (2011); *see also* ***7** *TransUnion LLC v. Ramirez,* 141 S. Ct. 2190, 2207-08 & n.4 (2021) (noting these Article III concerns but leaving open the question whether "every class member must demonstrate standing *before* a court certifies a class"). Certifying a class action with large numbers of uninjured class members grants those class members a substantive right that they otherwise would not possess. Because that approach deprives defendants of their right to litigate individual defenses against uninjured class members, it violates due process and the Rules Enabling Act, which mandates that courts interpret Rule 23 in a manner that does not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Contrary to the Ninth Circuit's approach, because "every plaintiff must be able to show antitrust injury that is common to the class," *Lamictal,* 957 F.3d at 194-95 (quotation marks omitted), a court must account for individualized defenses on injury *before* certifying a class. Antitrust injury is a required element for liability under section 4 of the Clayton Act; it therefore must be addressed at the outset, unlike calculating the amount of damages, which can be addressed at a later stage of proceedings. *See Asacol,* 907 F.3d at 53 (emphasizing that injury in fact is an element of liability in an antitrust class action).

The Ninth Circuit brushed aside these concerns, contending that disputes over the existence of uninjured class members should not preclude class certification because they raise "merits" questions properly reserved for the jury. *See* App. 17a-21a. But that reasoning departs from controlling precedent and conflicts with decisions from other courts of appeal. As this Court has held, courts must "conduct a 'rigorous analysis' to determine whether" a proposed class ***8** satisfies Rule 23, "even when that requires inquiry into the merits of the claim." *Comcast Corp. v. Behrend,* 569 U.S. 27, 35 (2013) (citing *Wal-Mart,* 564 U.S. at 351). Merits questions are appropriately (indeed necessarily) addressed at the class-certification stage whenever they are "necessary" to determining whether plaintiffs satisfy Rule 23's prerequisites. *See Wal-Mart,* 564 U.S. at 350-51; *see also Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.,* 482 F.3d 372, 381 (5th Cir. 2007) (explaining that the prohibition on conducting "wide-ranging inquiries into the merits" applies only when there is no "reference to the criteria for class certification"). Because plaintiffs must "affirmatively demonstrate" their compliance with Rule 23, a court must "look beyond the pleadings to understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." *Yates v. Collier,* 868 F.3d 354, 362 (5th Cir. 2017) (quotation marks omitted).

The need to address these issues *before* a class is certified is especially important when the existence of uninjured class members raises questions of constitutional standing. As this Court has recognized, because "standing is not dispensed in gross," every class member must have Article III standing to recover individual damages, *TransUnion,* 141 S. Ct. at 2208, and each class member must maintain a personal stake in the dispute at "all stages" of the litigation, *Davis v. FEC,* 554 U.S. 724, 732-33 (2008) (quoting *Arizonans for Off. English v. Arizona,* 520 U.S. 43, 67 (1997)). Given these requirements, there is no reason plaintiffs should not be required to ***9** demonstrate that absent class members have a sufficient personal interest to participate *before* they are brought into the dispute as parties. *See Am. Pipe & Constr. Co. v. Utah,* 414 U.S. 538, 550-51 (1974) (explaining that absent class members stand "as parties" to the suit until and unless they receive notice and elect "not to continue"); *see also Halvorson v. AutoOwners Ins. Co.,* 718 F.3d 773, 778 (8th Cir. 2013) ("In order for a class to be certified, each member must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision."). At a minimum, even if individual class members are not required to demonstrate standing before they may participate in class litigation, a court cannot brush aside evidence showing that large numbers of class members lack any concrete, particularized injury. *See Ariz. Christian Sch. Tuition Org. v. Winn,* 563 U.S. 125, 146 (2011) ("In an era of frequent litigation [and] class actions ... courts must be more careful to insist on the formal rules of standing, not less so.").

Third, the questions presented raise important and recurring questions of federal law. Reflecting the importance of the issues, the Ninth Circuit *sua sponte* initiated en banc proceedings and granted rehearing en banc. Because the en bane court has now spoken, the Ninth Circuit's approach is engrained and there is no possibility that further developments will refine it. Nor is there any doubt that this Court's guidance is needed to address confusion among the lower courts. In this case, numerous well-respected judges have reached different conclusions over the same issues, including a carefully reasoned dissent that highlights the underlying circuit split "needlessly" created by the ***10** en bane decision. App. 70a. As the petition explains, the Ninth Circuit's decision has already been cited by dozens of lower courts, confirming that if review is not granted, the decision will spur other courts to certify class actions even when there are large numbers of uninjured class members.

Fourth, this case presents an ideal vehicle for addressing the questions presented. The issues it raises are relevant to "a wide sea of class action cases," App. 71a (Lee, J., dissenting), including a rapidly growing number of cases where class members seek massive recoveries for alleged statutory violations even though they have not suffered any concrete injury. Antitrust claims are similar to many mass-tort claims where "injury" is an element of the cause of action that must be proven to establish liability, and is distinct from the question of damages. Granting certiorari in this case thus affords the Court an opportunity to clarify the important distinction between "injury" (an element of a claim) and the amount of "damages" (a monetary remedy).

Moreover, because this case arises in the antitrust context class-action abuse raises particular concerns. Antitrust laws provide for treble damages, injunctive relief, and the costs of the action (including attorney fees) against a party that violates federal antitrust laws, *see* 15 U.S.C. § 15, and, as a result, this is not the type of case where it is necessary "to pool claims which would be uneconomical to litigate individually." *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 809 (1985); *see also Castano v. Am. Tobacco Co.,* 84 F.3d 734, 748 (5th Cir. 1996) (noting that the absence of a "negative value suit" should be considered when ***11** evaluating the appropriateness of class treatment). For the same reason, certified classes create especially significant pressures for defendants to settle regardless of the merits of the claims. *See* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Antitrust Modernization Committee Remarks 9-10 (June 8, 2006) (noting that "treble damage class actions ... are almost as scandalous as the price-fixing cartels that are generally at issue in the cases").

II. The Court's Review Is Needed to Ensure that Lower Courts Comply with Controlling Precedent.

The Court should also grant review to safeguard its own authority by ensuring that the lower courts comply faithfully with controlling precedent. In the class-action context, there are too many judges who, despite this Court's instructions, continue to put a heavy thumb on the scale in favor of class certification. As a result, the class-action exception ends up swallowing the rule favoring individual litigation. While the Ninth Circuit cloaked its decision in citations to relevant cases and soothing references to Rule 23's requirements, its decision fundamentally subverts this Court's precedents and substantively weakens Rule 23.

This Court has long emphasized that class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast,* 560 U.S. at 33 (quoting *Califano v. Yamasaki,* 442 U.S. 682, 700-01 (1979)). As the Court has explained, Rule 23' s requirements provide crucial safeguards, grounded in constitutional due-process principles, that must be satisfied *before* ***12** plaintiffs can benefit from the class-action device. *See Taylor v. Sturgell,* 553 U.S. 880, 901 (2008). Closely adhering to Rule 23's requirements ensures that courts do not stray beyond the bounds of the judicial power, offering advisory opinions to the uninjured. Accordingly, a court must "conduct a 'rigorous analysis' to determine whether" a proposed class satisfies Rule 23, *Comcast,* 569 U.S. at 35 (citing *Wal-Mart,* 564 U.S. at 351), and unless plaintiffs "affirmatively demonstrate" their compliance with all of Rule 23's requirements, including that common questions predominate over individual ones, the court cannot certify a class. A rigorous analysis is required to avoid holding defendants liable to plaintiffs who have not been harmed or against whom they have strong individualized defenses. *Wal-Mart,* 564 U.S. at 361-61. It is also necessary to protect against extinguishing individualized claims that absent class members could otherwise press in individual litigation.

Article III standing is an important part of the predominance analysis that Rule 23 requires. In combination with Rule 23(a)'s commonality requirement, the "demanding" predominance requirement ensures that "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 623, 624 (1997). That cohesion exists only when all class members "possess the same interest and *suffer the same injury." E. Tex. Motor Freight Sys., Inc. v. Rodriguez,* 431 U.S. 395, 403 (1977) (emphasis added) (quoting *Schlesinger v. Reservists Comm. to Stop War,* 418 U.S. 208, 216 (1974)). Merely pleading "a violation of the same provision of law" and ***13** labeling it a common question is not enough, because "'[a]ny competently crafted class complaint literally raises common questions.'" *Wal-Mart,* 564 U.S. at 349-50 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof,* 84 N.Y.U. L. Rev. 97, 131-32 (2009)). The need to prove predominance by establishing a common, class-wide injury is essential to ensuring "sufficient unity so that absent members can fairly be bound by decisions of class representatives." *Amchem,* 521 U.S. at 620-21.

The Ninth Circuit's en banc decision begins by reciting the correct legal standards, "but it quickly stray[s]" from them. *Horne v. Flores,* 557 U.S. 433, 451 (2009) (describing another situation where the Ninth Circuit invoked the correct legal standards but failed to apply them). Instead of enforcing the principle that class actions are an exception to the usual rule of individual litigation, the Ninth Circuit's approach dismantles Rule 23's protections and significantly changes the standards for certification, making certification almost a foregone conclusion in any case in which it is requested.

In particular, the Ninth Circuit's decision makes it more likely that courts will avoid the rigorous analysis that must be performed *before* a class may be certified under Rule 23. Because plaintiffs can almost always find an expert willing to opine about representative evidence, disputes over whether an element of a claim is susceptible to class-wide proof will arise in virtually *every* class action. By backhanding those issues as "merits" determinations to be resolved by the jury, the Ninth Circuit's decision invites courts to certify "monstrously oversized ***14** classes" containing large numbers of uninjured class members designed to "pressure and extract settlements." App. 70a-71a (Lee, J., dissenting). It also creates incentives for "dubious" class actions to be filed--cases that "would never be filed as individual lawsuits because they involve negligible or no real alleged harm"--merely because of "the prospect of aggregating thousands of weak or frivolous individual claims into a single sprawling class action" that can "coerce companies into settlement." John H. Beisner et al., Unfair, Inefficient, Unpredictable: Class Action Flaws and the Road to Reform 22, 23 (2022).

Our class action system cannot work if the largest circuit in the country is allowed to undermine the careful limits on class actions that are required to protect the due-process rights of defendants and absent class members alike. *See id.* at 38 (explaining that "'no-injury' class actions undermine the proper administration of justice and put a strain on the U.S. economy"). Certiorari is warranted.

III. This Case Affords the Court an Opportunity to Clarify Several Important Points of Law Governing Class Actions.

This Court should also grant review because this case presents an ideal opportunity to reaffirm core principles of class-action adjudication, and also to clarify the connection between Rule 23 and Article III standing, an issue the Court left unaddressed in *TransUnion*. *See* 141 S. Ct. at 2208 n.4. By reaffirming essential baseline limitations on class certification, this Court can prevent district courts from improperly shifting the burden to defendants or-postponing ***15** difficult questions of predominance and commonality.

First, the burden of satisfying Rule 23's predominance and commonality requirements falls squarely on the named plaintiffs. *See Wal-Mart,* 564 U.S. at 350. In meeting that burden, "actual, not presumed, conformance" with the rule is "indispensable." *Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 160 (1982). Accordingly, a "party seeking class certification must affirmatively demonstrate his compliance with [Rule 23]--that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart,* 564 U.S. at 350. If the party seeking class certification cannot meet that burden, the class should not be certified and there is no need for the court to address questions of Article III standing. *See Amchem,* 521 U.S. at 622-24 (noting that class certification issues are "logically antecedent to the existence of any Article III issues").

In considering whether a plaintiff has satisfied Rule 23, however, a class is overbroad and should *never* be certified if it is known to include identifiable, uninjured class members. Courts have no authority to adjudicate claims of plaintiffs--whether named or unnamed--who lack Article III standing. A class may be certified if there is possibility that it includes a *de minimis* number of uninjured class members, but only if, at the time of certification, those potentially uninjured class members are neither known nor identified. In those circumstances, it is sufficient at the class-certification stage that the class is defined in such a way that everyone within it presumptively has ***16** standing, the number of potentially uninjured class members is very small, and Rule 23's other requirements are satisfied. *See Denney v. Deutsche Bank AG,* 443 F.3d 253, 263 (2d Cir. 2006).

Second, what counts as a *de minimis* deviation "from a prescribed standard must, of course, be determined with reference to the purpose of the standard." *Wisc. Dep't of Revenue v. William Wrigley, Jr., Co.,* 505 U.S. 214, 232 (1992). The purpose of the predominance standard is to promote economy and uniformity of decision without sacrificing procedural fairness. *SeeAmchem,* 521 U.S. at 615. Courts should bear in mind that if common issues "truly predominate over individualized issues in a lawsuit, then the addition or subtraction of any of the plaintiffs to or from the class [should not] have a substantial effect on the substance or quantity of evidence offered." *In re Nexium Antitrust Litig.,* 777 F.3d 9, 30 (1st Cir. 2015) (quoting *Vega v. T-Mobile USA, Inc.,* 564 F.3d 1256, 1270 (11th Cir. 2009)). For example, in *In re Rail Freight Fuel Surcharge Antitrust Litigation-MDL No. 1869,* the D.C. Circuit assessed a damages model that could "reliably show injury and causation for 87.3 percent of the class" and concluded that it was insufficient to prove class-wide injury because it "leaves the plaintiffs with no common proof of those essential elements of liability for the remaining 12.7 percent." 934 F.3d at 623-24.

Third, a class that could potentially include a *de minimis* number of uninjured parties still should not be certified unless plaintiffs are able to propose at the certification stage an administratively feasible method of identifying and removing any uninjured ***17** parties, consistent with the "defendants' Seventh Amendment and due process rights to contest every element of liability and to present every colorable defense" with respect to the claims of each and every class member. *Id.* at 625. If plaintiffs cannot meet their burden, they are not entitled to class certification, even if they can show that only a *de minimis* number of potentially uninjured class members may exist. As the First Circuit has noted, "[t]he fact that plaintiffs seek class certification provides no occasion for jettisoning the rules of evidence and procedure, the Seventh Amendment, or the dictate of the Rules Enabling Act." *Asacol,* 907 F.3d at 53. Any doubts should be resolved in favor of individual litigation, which is the default. *See Comcast,* 560 U.S. at 33.

Fourth, each of these determinations-that there are only a *de minimis* number of potentially uninjured class members, that there is an administratively feasible method of identifying and removing them before entry of judgment, and that the addition or subtraction of any of the plaintiffs to or from the class does not vitiate predominance-must be done *before* any class is certified. *In re New Motor Vehicles Can. Exp. Antitrust Litig.,* 522 F.3d 6, 28 (1st Cir. 2008) (requiring the district court to evaluate a

proposed model for proving fact of injury prior to certification). Contrary to the Ninth Circuit's decision, a certify-now, worry-later approach cannot be reconciled with this Court's precedent or basic principles of due process. *Wal-Mart,* 564 U.S. at 350.

There are good policy reasons for rigorously enforcing Rule 23's requirements. "With vanishingly ***18** 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." Nagareda, 84 N.Y.U. L. Rev. at 99. Class certification inflicts "hydraulic pressure" on defendants to settle because it threatens them with the possibility of losing many cases at once. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 259 F.3d 154, 165, 167 & n.8 (3d Cir. 2001), *as amended* (Oct. 16, 2001).

As this Court has recognized, class actions can "unfairly place pressure on the defendant to settle *even unmeritorious* claims." *Epic Sys. Corp. v. Lewis,* 138 S. Ct 1612, 1632 (2018) (emphasis added) (cleaned up); Fed. R. Civ. P. 23(f), note (Advisory Comm. 1998) (defendants may "settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"). Indeed, the pressure exists even when the outcome is likely to be favorable for defendants. *See Coopers & Lybrand v. Livesay,* 437 U.S. 463, 476 (1978); *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 740 (1975). That is particularly true in antitrust cases given the threat of treble damages. *AT&TMobility LLC v. Concepcion,* 563 U.S. 333, 350 (2011) (noting that "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims"). Not surprisingly, in 2021, companies reported settling 73.1 percent of class actions. *See* Carlton Fields, 2022 Class Action Survey 26 (2022) (*available at* https://classactionsurvey.com/).

The Ninth Circuit's approach ignores these pressures, which may lead defendants to settle with a sprawling class that includes individuals and entities ***19** who suffered no injury and thus have no claim. The resulting economic distortions would harm not just defendants, but also the consumers who end up bearing the costs of litigation (and litigation avoidance) in the form of higher prices. *See* Joseph A. Grundfest, *Why Disimply?,* 108 Harv. L. Rev. 727, 732 (1995). This Court can and should defuse the risks posed by the Ninth Circuit's en banc decision by granting review.

***20 CONCLUSION**

The petition should be granted.

Respectfully submitted,

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Footnotes

1 The parties received timely notice of this brief under Rule 37.2(a). Petitioners and respondents have consented to the filing of this brief. Pursuant to Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that 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.

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