# RECONCILING UNINJURED CLASS MEMBERS AT THE CERTIFICATION STAGE WITH ARTICLE III STANDING AND RULE 23'S PREDOMINANCE INQUIRY

*Rocco D. Basile*[*]

## I. INTRODUCTION

*"A personal stake in the outcome of the controversy" ensures "that concrete adverseness sharpens the presentation of issues."*[1]

Class certification is a watershed stage in class action litigation. A district court's ruling on the issue of class certification is often determinative of settlement. In California, less than one percent of class action cases concluded with a trial verdict, while just under thirty-two percent resolved with settlement.[2] Further, when a class is certified, "the settlement rate skyrockets to 89.2%."[3] Although class actions provide defendants with a "single determination of the merits of the claims, protecting them from repeated lawsuits,"[4] certifying a class with even a de minimis number of plaintiffs who have suffered no injury could result in devastating consequences for defendants. Courts should not enable plaintiffs' attorneys to inflate their classes with uninjured members—who have no stake in the case or controversy—at the expense of the defendant.

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."[5]

---

[*] J.D. Candidate, May 2025, Southwestern Law School. I would like to thank my parents, Chad and Elizabeth Basile, for their unwavering support. I am also grateful to Dean Darby Dickerson, President and Dean of Southwestern Law School, for her continuous support and encouragement.

1. Baker v. Carr, 369 U.S. 186, 204 (1962).

2. Hilary Hehman, *Highlights from the Study of California Class Action Litigation*, DATAPOINTS, 1, 3, (Nov. 2009), https://www.courts.ca.gov/documents/datapoints-classactionlit.pdf.

3. *Id.*

4. Stevenson & Fitzgerald, *Guide for Fed. Proc. Before Trial*, ¶ 10:252 (2023).

5. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348-49 (2011) (internal quotes omitted).

Essentially, class actions "avoid multiplicity of actions" and "enable persons to assert [] claims that could not be litigated individually because the costs would far outweigh any recovery."[6] Put another way, class action lawsuits save resources by enabling litigation of numerous, similar claims while also providing a group of plaintiffs with consistent judgments without the cost and delay of bringing individual lawsuits.[7] Federal Rule of Civil Procedure 23 governs class action litigation.[8] In *Wal-Mart*, the Supreme Court further explained that the "Rule's four requirements—numerosity, commonality, typicality, and adequate representation—effectively limit the class claims to those fairly encompassed by the named plaintiff's claims."[9] Specifically, in a damages class action, the predominance requirement also promotes economy and efficiency because where "common questions 'predominate,'" the "same issue can be adjudicated the same way for the entire class," achieving "economies of time, effort, and expense."[10] But "[i]f common issues do not 'predominate,' then little time or effort is saved and a class action for damages is not appropriate."[11]

It is clear there is inextricable tension between Rule 23's predominance requirement and Article III standing. After all, "[p]laintiffs must maintain their personal interest in the dispute at all stages of litigation."[12] In *Lujan v. Defenders of Wildlife*, the Supreme Court further stated that a plaintiff must meet their burden of demonstrating standing "with the manner and degree of evidence required at the successive stages of the litigation."[13] The Second, Third, Fifth, and Eighth Circuits' approach strictly tracks the text of Article III, while the First, Seventh, and D.C. Circuits run afoul of standing's injury requirement.[14] Certifying a damages class action containing uninjured members is at odds with Article III and exacerbates oppressive settlements.

---

6. Stevenson & Fitzgerald, *supra* note 4, ¶ 10:250.

7. *Id.* ¶ 10:252.

8. Fed. R. Civ. P. 23.

9. *Wal-Mart*, 564 U.S. at 348-49 (citing General Telephone Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982)).

10. Stevenson & Fitzgerald, *supra* note 4, ¶ 10:411.

11. *Id.*

12. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208 (2021).

13. Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992).

14. *See* Denney v. Deutsche Bank AG, 443 F.3d 253, 264-65 (2d Cir. 2006); *In re* Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625, 634 (3d Cir. 2017); *In re* Deepwater Horizon, 739 F.3d 790 (5th Cir. 2014); Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773, 778 (8th Cir. 2013); *In re* Nexium Antitrust Litig., 77 F.3d 9, 21 (1st Cir. 2015); Messner v. Northshore Univ. Health Sys., 669 F.3d 802, 825 (7th Cir. 2012); *In re* Rail Freight Fuel Surcharge Antitrust Litig., 934 F.3d 619, 625 (D.C. Cir. 2019).

In *Olean*, the Ninth Circuit missed an opportunity to reform Rule 23's predominance inquiry.[15] And the Ninth Circuit's en banc decision, in turn, diverged from the existing circuit split.[16] Although the Supreme Court explained that "district courts must perform a 'rigorous analysis' to determine whether this exacting burden has been met before certifying a class,"[17] the Court refrains from resolving this circuit split.[18]

Part II of this note outlines recent cases that address the effect of uninjured class members upon the predominance requirement. Then, Part III describes the flaws of the circuit courts' current solutions to this issue. Part IV details two solutions that could harmonize the circuit split regarding uninjured members and predominance. First, the Supreme Court should implement a prudential standing doctrine that requires plaintiffs to show that the uninjured members share a common interest with the injured class members. Second, the burden of proof to show predominance should be a clear and convincing evidence standard instead of a preponderance of the evidence standard. Finally, Part V concludes that given the dissonance between Article III standing and the numerous approaches by the circuit courts, the Supreme Court must resolve this circuit split.

## II. CIRCUIT SPLIT AND PREDOMINANCE

### *A. Fundamentals of Class Certification*

Rule 23 of the Federal Rules of Civil Procedure shoulders the responsibility of ensuring that class certification is a fair procedural tool—allowing plaintiffs to exercise their rights without placing an inordinate burden on defendants.[19] Pursuant to Rule 23, a prospective class of plaintiffs must satisfy numerosity, commonality, typicality, and adequacy.[20] Further, Rule 23(b) explicates three categories of classes: prejudice, injunction, and damages.[21] Damages class actions—where class members seek monetary

15. Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651 (9th Cir. 2022) (en banc).

16. *Id.*

17. Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 993 F.3d 774, 784 (9th Cir.), *reh'g en banc granted*, 5 F.4th 950 (9th Cir. 2021) (quoting Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 345 (2011)).

18. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208 n.4 ("We do not here address the distinct question whether every class member must demonstrate standing before a court certifies a class.") (citation omitted).

19. Fed. R. Civ. P. 23.

20. *Id.* 23(a).

21. *Id.* 23(b).

damages—are the most contentious of the three types.[22] Specifically, Rule 23(b)(3) requires damages class actions to contain "questions of law or fact common to class members" that "predominate over any questions affecting only individual members and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[23]

### *B. Article III Standing*

Standing "has a core component derived" from the Constitution—"a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[24] The Supreme Court has made clear that "the irreducible constitutional minimum of standing contains three elements."[25] Specifically, "a plaintiff must show (1) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) that the injury was likely caused by the defendant; and (3) that the injury would likely be redressed by judicial relief."[26] And "[t]he party invoking federal jurisdiction bears the burden of establishing these elements."[27] Indeed, "if the plaintiffs lack standing, the matter is non-justiciable and the court should dismiss without resolving any other issues in the matter."[28]

Article III standing is determined at the outset of a case and is often deemed a jurisdictional issue.[29] "In a class action, that same approach applies to the named plaintiffs or putative class representatives who initiate the action prior to it being certified as a class action."[30] Indeed, the named plaintiffs or putative class representatives "must have standing to pursue their individual claims or else those claims are non-justiciable."[31] In *TransUnion LLC v. Ramirez*, the Supreme Court further explained that "[e]very class member must have Article III standing in order to recover individual damages," and "Article III does not give federal courts the power to order relief to any uninjured plaintiff class action or not."[32]

---

22. *Id.* 23(b)(3).

23. *Id.*

24. Allen v. Wright, 468 U.S. 737, 751 (1984).

25. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

26. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (citing *Lujan*, 504 U.S. 555 at 560-61).

27. *Lujan*, 504 U.S. at 561.

28. Newberg & Rubenstein, *Newberg and Rubenstein on Class Actions*, § 2:2 (6th ed. 2006).

29. *Id.*

30. *Id.*

31. *Id.*

32. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208, 2213 ("risk of future harm on its own does not support Article III standing for the plaintiffs' damages claim.").

### C. Uninjured Class Members and Predominance: Circuits Divided

It is clear that a prospective class containing a large proportion of uninjured members would not be certified for a lack of common questions of law or fact that "predominate over any questions affecting only individual members."[33] But there is dissonance regarding how many uninjured members can retain membership without disrupting a finding of predominance. For example, some circuits strictly require every plaintiff to suffer an injury, while other circuits allow a de minimis number of uninjured members. For example, the First, Seventh, and D.C. Circuits allow a de minimis number of uninjured plaintiffs to pass muster at the class certification stage.[34] Yet the Second, Third, and Fifth Circuits require every plaintiff to suffer injury.[35] And in *Olean*, the Ninth Circuit fractured this existing circuit split by holding that a class could be certified even if the number of uninjured plaintiffs exceeded the de minimis threshold if there is a finding of commonality.[36]

### D. Polarity One: De Minimis Standard

The D.C. Circuit explained that "5% to 6% constitutes the outer limits of a de minimis number."[37] Additionally, the Seventh Circuit follows the de minimis approach but does not quantify this standard.[38] Along with the D.C. and Seventh Circuits, the First Circuit also allows "a de minimis number of potentially uninjured parties" to retain membership at the certification stage.[39] Indeed, the First Circuit opined that "it is difficult to understand why the presence of uninjured class members at the preliminary stage should

---

33. Fed. R. Civ. P. 23(b)(3).

34. *See e.g.,* Messner v. Northshore Univ. Health Sys., 669 F.3d 802, 825 (7th Cir. 2012); Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 (7th Cir. 2003); *In re* Rail Freight Fuel Surcharge Antitrust Litig., 934 F.3d 619, 625 (D.C. Cir. 2019); *In re* Nexium Antitrust Litig., 77 F.3d 9, 21 (1st Cir. 2015).

35. *See e.g.,* Denney v. Deutsche Bank AG, 443 F.3d 253, 264-65 (2d Cir. 2006); *In re* Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625, 634 (3d Cir. 2017); *In re* Deepwater Horizon, 739 F.3d 790 (5th Cir. 2014).

36. Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651 (9th Cir. 2022) (en banc).

37. *In re* Rail Freight Fuel Surcharge Antitrust Litig., 934 F.3d at 625.

38. *Messner*, 669 F.3d at 825 (explaining that a "class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant" and these "determinations are a matter of degree, and will turn on the facts as they appear from case to case").

39. *In re Nexium*, 777 F.3d at 21-2; *In re* Restasis Antitrust Litig., 335 F.R.D. 1, 16 (E.D.N.Y. 2020) (stating that "[t]he Supreme Court and the Second Circuit have recognized that the existence of uninjured plaintiffs does not bar class certification").

defeat class certification" because "the defendants will not pay, . . . the class members will not recover amounts attributable to uninjured class members, and judgment will not be entered in favor of such members."[40] The First Circuit further asserted that even though "the inclusion of some uninjured class members is inefficient," such "is counterbalanced by the overall efficiency of the class action mechanism."[41]

The First Circuit contends that the de minimis approach is supported by the Supreme Court's dicta in *Halliburton Co. v. Erica P. John Fund, Inc.*[42] The *Halliburton* Court stated that "there is no reason to think that these questions will overwhelm common ones and render class certification inappropriate under Rule 23(b)(3)."[43] Interpreting *Halliburton*, the First Circuit concluded that the Supreme Court "contemplated that a class with uninjured members could be certified" as long as "the presence of a de minimis number of uninjured members did not overwhelm the common issues for the class."[44]

### *E. Polarity Two: Injury Must Be Established at the Certification Stage in Shades of Article III*

The Second, Fifth, Seventh, and Eighth Circuits implement a strict rule that bars class certification—and finding of predominance—if any class member lacks Article III standing.[45] This approach follows Chief Justice Roberts's concurrence in *Tyson Foods, Inc. v. Bouaphakeo*, for the Chief Justice stated that "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not."[46] The Eighth Circuit explained that "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

40. *In re Nexium*, 777 F.3d at 21-2.

41. *Id.*

42. Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 268 (2014).

43. *Id.* at 276.

44. *In re Nexium*, 777 F.3d at 24.

45. Denney v. Deutsche Bank AG, 443 F.3d 253, 264 (2d Cir. 2006). See *Adashunas v. Negley,* 626 F.2d 600, 604 (7th Cir.1980), which upheld a district court's denial of class certification because the prospective class was so "amorphous and diverse" that it was not "reasonably clear that the proposed class members have all suffered a constitutional or statutory violation warranting some relief." *See also* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F.Supp.2d 289, 334 (S.D.N.Y.2003) (concluding that at the certification stage, "each member of the class must have standing with respect to injuries suffered as a result of defendants' actions"); *In re* Deepwater Horizon, 739 F.3d 790 (5th Cir. 2014); Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773, 778 (8th Cir. 2013).

46. Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring).

redressed in a favorable decision."[47] A class that does not meet the "irreducible constitutional minimum of standing requires a showing of injury in fact to the plaintiff" cannot pass muster in a predominance inquiry.[48]

The Seventh Circuit further explained its rationale for this standard: "Even if a class's claim is weak, the sheer number of class members and the potential payout that could be required if all members prove liability might force a defendant to settle a meritless claim in order to avoid breaking the company."[49] Although this "prospect is often feared with large classes, the effect can be magnified unfairly if it results from a class defined so broadly as to include many members who could not bring a valid claim even under the best of circumstances."[50]

### *F. TransUnion and the Representative Plaintiff Standard*

In *TransUnion*, Justice Kavanaugh held that 6,332 class members of "a class of 8,185 individuals with OFAC alerts in their credit files" who "sued TransUnion under the Fair Credit Reporting Act for failing to use reasonable procedures to ensure the accuracy of their credit files" lacked standing because they did not suffer sufficiently concrete harm.[51] However, the remaining 1,853 class members did demonstrate a concrete injury because the Court acknowledged that TransUnion caused these class members "concrete reputational harm," satisfying Article III's injury requirement.[52] In reaching this conclusion, the Court made clear that "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not."[53]

Prior to *TransUnion*,[54] some courts approached the divisive issue of uninjured plaintiffs at the class certification stage with a relaxed,

---

47. *Halvorson*, 718 F.3d at 778; *In re* Deepwater Horizon, 739 F.3d 790, 806 (5th Cir. 2014) (explaining that *Denney* "do[es] not require that each member of a class submit evidence of personal standing" but the class must be defined so that each member could allege "colorable claims").

48. *Id.*; *see also* Neese v. Becerra, 342 F.R.D. 399, 412 (N.D. Tex. 2022) (concluding that if a court must conduct "myriad mini-trials to identify and separate uninjured class members, then Rule 23(b)(3)'s requirement that 'questions of law or fact common to class members predominate over any questions affecting only individual class members'" is not satisfied).

49. Messner v. Northshore Univ. Health Sys., 669 F.3d 802, 825 (7th Cir. 2012).

50. *Id.*; *see also, e.g.*, Oshana v. Coca–Cola Co., 472 F.3d 506, 514 (7th Cir.2006) (affirming a district court's denial of certification of a class defined so broadly that it included "millions" of members who did not suffer any injury caused by the defendant).

51. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2197 (2021).

52. *Id.*

53. *Id.* at 2208.

54. *Id.* (asserting that federal courts must individually determine standing of all absent class members when calculating and ascertaining damages).

representative plaintiff standard.[55] For example, the Third Circuit explicated that "if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."[56] Put another way, a class seeking certification "must therefore be defined in such a way that anyone within it would have standing," *and* "a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves."[57] Although this approach does "not require that each member of a class submit evidence of personal standing," "no class may be certified that contains members lacking Article III standing."[58] While unpopular, some lower courts contend that *TransUnion* did not overrule this approach and continue to follow the representative plaintiff standard.[59]

### *G. The Ninth Circuit Further Diverges*

In April 2022, the Ninth Circuit deviated from its sister circuits, concluding that Rule 23 does not prohibit the certification of a class that "potentially includes more than a de minimis number of uninjured class members."[60] The Ninth Circuit further stated that the de minimis standard "is inconsistent with Rule 23(b)(3), which requires only that the district court determine after rigorous analysis whether the common question

55. *See* Kohen v. Pac. Inv. Mgmt. Co. LLC, 571 F.3d 672, 676 (7th Cir. 2009) (explaining that prior to certification, "the named plaintiff must have standing, because at that stage no one else has a legally protected interest in maintaining the suit").

56. *In re* Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625, 634 (3d Cir. 2017) (quoting O'Shea v. Littleton, 414 U.S. 488, 494 (1974)).

57. Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773, 779 (8th Cir. 2013); *see also In re* Zurn Pex Plumbing Prod. Liab. Litig., 644 F.3d 604, 616 (8th Cir. 2011) (affirming a district court's certification of a class of plaintiffs "whose plumbing systems have not leaked" or caused external damages because the plaintiffs alleged that the plumbing system "exhibited the alleged defect").

58. Denney v. Deutsche Bank AG, 443 F.3d 253, 263-64 (2d Cir. 2006); Rozema v. The Marshfield Clinic, 174 F.R.D. 425, 444 (W.D. Wis. 1997) (explaining that "[t]hose represented in a class action are passive members" who are not required to "make individual showings of standing").

59. *See, e.g.*, *In re* AXA Equitable Life Ins. Co. Litig., No. 16-CV-740 (JMF), 2023 WL 199284, at *1 (S.D.N.Y. Jan. 17, 2023) (concluding that the Supreme Court's reasoning in *TransUnion*, "did not alter the well-established law" observed by the Second Circuit "that standing in a class action 'is satisfied so long as at least one named plaintiff can demonstrate the requisite injury'") (quoting Hyland v. Navient Corp., 48 F.4th 110, 117 (2d Cir. 2022)); *see also* Bernstein v. Cengage Learning, Inc., No. 19-CV-07541 (ALC) (SLC), 2023 WL 6211771, at *6 (S.D.N.Y. Sept. 25, 2023) (quoting *Hyland*, 48 F.4th at 117).

60. Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 669 (9th Cir. 2022) (en banc).

predominates over any individual questions, including individualized questions about injury or entitlement to damages."[61]

## III. PITFALLS WITHIN THE CIRCUIT SPLIT

Despite the panel decision in *Olean* recognizing that "Rule 23(b)(3) requires that questions of law or fact be shared by substantially all the class members,"[62] the Ninth Circuit, sitting en banc, erroneously interpreted Rule 23 by allowing "more than a de minimis number of uninjured class members" to satisfy a predominance inquiry.[63] This holding is inapposite for two reasons. First, it is inconsistent with the Supreme Court's approach to class action litigation.[64] Second, defendants will shoulder an undue burden if lower federal courts allow classes to be certified with uninjured members.

In *Tyson Foods*, Chief Justice Roberts stated that "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not."[65] The Supreme Court further stated in *Wal-Mart Stores, Inc. v. Dukes* that courts must "rigorous[ly]" scrutinize whether plaintiffs have met class certification requirements.[66] The Ninth Circuit, however, nodded at the district court's certification of a class, where up to "a third of the class members" have not suffered injury.[67] This exceptional number of potentially uninjured plaintiffs would defeat a finding of predominance.[68] A de minimis threshold wholly sidesteps Article III implications and is "a solution in search of a problem"[69] that has no basis in Rule 23.

"Plaintiffs may not rely on the claims of class members to establish their own standing . . . . [i]f the litigant fails to establish standing, he or she may not seek relief on behalf of himself or herself or any other member of the class."[70] But until the Supreme Court provides further instruction, fact-

61. *Id.*

62. Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 993 F.3d 774, 792 (9th Cir. 2021) *rev'd en banc*, 31 F.4th 651 (9th Cir. 2022).

63. *Olean*, 31 F.4th at 669 (en banc).

64. *See* TransUnion LLC v. Ramirez, 141 U.S. 413, 431 (2021) ("*Every* class member must have Article III standing in order to recover individual damages.") (emphasis added).

65. 577 U.S. at 466 (Roberts, C.J., concurring).

66. 564 U.S. 338, 350-51 (2011).

67. *Olean*, 31 F.4th at 685 (en banc) (Lee, J., dissenting).

68. *See* Neese v. Becerra, 342 F.R.D. 399, 412 (N.D. Tex. 2022) (explaining that "if a court needs myriad mini-trials to identify and separate uninjured class members, then Rule 23(b)(3)'s requirement that 'questions of law or fact common to class members predominate over any questions affecting only individual class members' is not met.").

69. Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 993 F.3d 774, 797 (9th Cir. 2021) (Hurwitz, J., concurring) *rev'd en banc*, 31 F.4th 651 (9th Cir. 2022).

70. Higgins v. Tex. Dep't of Health Servs., 801 F. Supp. 2d 541, 554-55 (W.D. Tex. 2011).

intensive inquiries regarding predominance remain in the realm of the district courts' discretion.[71] "A numerical cap on uninjured class members is not very helpful to district courts analyzing predominance,"[72] rather, this judicially created doctrine erodes the district court's discretion.

A de minimis standard is simply unsupported by the text of Rule 23 and inordinately burdens defendants.[73] Even though the Supreme Court in *TransUnion* stated that federal courts are required to determine whether each absent class member satisfies standing when ascertaining damages,[74] "[p]unting this key question until later amounts to handing victory to plaintiffs because this case will likely settle without the court ever deciding that issue."[75] According to the Judicial Council of California's Office of Court Research's study of 1,500 class action cases filed between 2000 and mid-2006: "Settlements were the most common type of disposition in study cases, representing 31.9% of all dispositions in cases filed as class actions; however, the settlement rate skyrockets to 89.2% if the disposition analysis is confined to cases that had a certified class."[76] Plaintiffs' attorneys could equip the de minimis standard to inflate the number of class members with uninjured plaintiffs and could, in turn, be the catalyst that "force[s] a defendant to settle a meritless claim in order to avoid breaking the company."[77] Accordingly, the Seventh Circuit stated that a virtually forced settlement "can be magnified unfairly if it results from a class defined so

71. *See* TransUnion LLC v. Ramirez, 594 U.S. 413, 431 n.4 (2021) (citing Cordoba v. DIRECTV, LLC, 942 F.3d 1259, 1277 (2019)) ("We do not here address the distinct question whether every class member must demonstrate standing before a court certifies a class.").

72. *Olean*, 993 F.3d at 796 (Hurwitz, J., concurring); *see also In re* Nexium Antitrust Litig., 777 F.3d 9, 35 (1st Cir. 2015) ("If 2.4% is okay, why not 5.7%? Or any number under 50%? The percentage tells one almost nothing about the functional sufficiency of the method.").

73. *See, e.g.*, Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 686 (9th Cir. 2022) (en banc) (Lee, J., dissenting) ("But the majority opinion conflicts with Rule 23's text, common sense, and precedent from other circuits.").

74. *TransUnion*, 594 U.S. at 431 ("Every class member must have Article III standing in order to recover individual damages.").

75. *Olean*, 31 F.4th at 686 (en banc) (Lee, J., dissenting) ("A trial court must do more than just consider one side's expert opinion as 'reliable' and then kick the can down the road until trial. Rather, it must dig into the weeds and decide the battle of dueling experts if their dispute implicates Rule 23 requirements.").

76. Hehman, *supra* note 2, at 3.

77. Messner v. Northshore Univ. Health Sys., 669 F.3d 802, 825 (7th Cir. 2012); *see also Olean*, 31 F.4th at 692 (en banc) (Lee, J., dissenting) ("[A]llowing more than a *de minimis* number of uninjured class members tilts the playing field in favor of plaintiffs . . . . [T]he majority's opinion will invite plaintiffs to concoct oversized classes stuffed with uninjured class members—with little fear of having their class certification bids being denied for lack of 'predominance' or 'commonality.' And in creating these grossly oversized classes, plaintiffs will inflate the potential liability (and ratchet up the attorney's fees based in part on that amount) to extract a settlement, even if the merits of their claims are questionable.").

broadly as to include many members who could not bring a valid claim even under the best of circumstances."[78] After all, the "[c]ertification of the class is often, if not usually, the prelude to a substantial settlement by the defendant because the costs and risks of litigating further are so high."[79]

The Fifth, Seventh, and Eighth Circuits' rigid standard—requiring every plaintiff to have Article III standing—is also an illogical leap from the text of Rule 23.[80] Additionally, this stringent test exaggerates the Supreme Court's instruction to conduct a "rigorous" analysis.[81] This unforgiving approach is rooted in Article III standing—specifically, injury.[82] But the Supreme Court in *TransUnion* made clear that at the certification stage, standing is satisfied if one named plaintiff demonstrates the requisite injury.[83] Because the "filing of suit as a class action does not relax [standing,]"[84] lower federal courts need not amplify the Supreme Court's standing requirements and leap beyond the text of Rule 23. This approach will in turn force plaintiffs to shoulder an undue burden at the class certification stage because "excluding all uninjured class members at the certification stage is almost impossible in many cases, given the inappropriateness of certifying . . . a

78. *Messner*, 669 F.3d at 825; *e.g.*, Oshana v. Coca–Cola Co., 472 F.3d 506, 514-15 (7th Cir. 2006) (upholding district court's denial of class certification because the prospective class was defined overbroadly as it included "millions" of members who suffered no injury at the hand of the defendant).

79. Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 485 (2013) (Scalia, J., dissenting).

80. *In re* Deepwater Horizon, 739 F.3d 790, 801 (5th Cir. 2014) ("[N]o class may be certified that contains members lacking Article III standing."); Marion Diagnostic Ctr., LLC v. Becton Dickinson & Co., 29 F.4th 337, 346-47 (7th Cir. 2022) ("Standing cannot be acquired through the back door of a class action . . . . *Every* class member must have Article III standing in order to recover individual damages.") (emphasis added) (first quoting Payton v. Country of Kane, 308 F.3d 673, 682 (7th Cir. 2002); then quoting TransUnion LLC v. Ramirez, 594 U.S. 413, 431 (2021)); Halvorson v. Auto-Owners 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 . . . .") (emphasis added).

81. Wal-Mart Stores Inc. v. Dukes, 564 U.S. 338, 350-51 (2011).

82. *In re* Deepwater Horizon, 739 F.3d 790, 810-11 (5th Cir. 2014) (explaining that the Supreme Court's instruction in *Wal-Mart* makes clear that "the legal requirement that class members have all 'suffered the same injury' can be satisfied by an instance of the defendant's injurious conduct, even when the resulting injurious effects—the damages—are diverse.").

83. *In re* AXA Equitable Life Ins. Co. Litig., 16-CV-740 (JMF), 2023 WL 199284, at *1-2 (S.D.N.Y. Jan. 17, 2023) (asserting that the Supreme Court's dicta in *TransUnion*, "did not alter the well-established law in [the Second Circuit] . . . that standing in a class action 'is satisfied so long as at least one named plaintiff can demonstrate the requisite injury'") (quoting Hyland v. Navient Corp., 48 F.4th 110, 117 (2d Cir. 2022)).

84. Denney v. Deutsche Bank AG, 443 F.3d 253, 263 (2d Cir. 2006) (citing Allen v. Wright, 468 U.S. 737, 750 (1984)).

class defined in terms of the legal injury."[85] Indeed, such a strict rule suppresses the district courts' discretion.

## IV. TWO PROPOSALS TO RESOLVE THE CIRCUIT SPLIT

### *A. Solution One: Prudential Standing Requirement for Classes with Uninjured Members*

"In certifying a [damages] class there is an almost inevitable tension between excluding all non-injured parties from the defined class and including all injured parties in the defined class."[86] In resolving this divisive circuit split, the Supreme Court should adhere to the text of Rule 23 and protect the sound discretion of the district courts because "[a] district court is in the best position to determine whether individualized questions, including those regarding class members' injury, 'will overwhelm common ones and render class certification inappropriate under Rule 23(b)(3).'"[87] Further, the Supreme Court must not dilute the district courts' discretion nor should it unnecessarily favor plaintiff classes or defendants. It is clear that the Court must abandon the de minimis approach.

At the certification stage, uninjured members should only be able to retain class membership if the uninjured members share a common interest with the injured class members. The plaintiff will bear the burden to meet this standard. This requirement will only apply when discovery indicates that there are members in the prospective class who have suffered no injury. Further, this additional standard would take the form of a prudential standing requirement. The Supreme Court has clearly established that prudential standing requirements are judicially created limits that a challenger must satisfy in addition to Article III's constitutional standing requirements.[88] For

85. *In re* Nexium Antitrust Litig., 777 F.3d 9, 22 (1st Cir. 2015) (explaining that the "inclusion of some uninjured class members is inefficient, but" such is in turn "counterbalanced by the overall efficiency of the class action mechanism").

86. *Id.*

87. Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 669 (9th Cir. 2022) (en banc) (citing Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 276 (2014)).

88. *See* Bd. of Nat. Res. of State of Wash. v. Brown, 992 F.2d 937, 945 (9th Cir. 1993) ("Standing is comprised of both constitutional and prudential elements which limit our authority to review certain issues."); Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 99-100 (1979) ("Even when a case falls within these constitutional boundaries, a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim."); United States v. Windsor, 570 U.S. 744, 760 (2013) ("Even when Article III permits the exercise of federal jurisdiction, prudential considerations demand that the Court insist upon 'that concrete adverseness which sharpens the

example, the Tenth Circuit summarizes the prudential doctrine of third party standing: "Under the [third party] standing doctrine, a party may not 'rest its claims' on the rights of third parties where it cannot 'assert a valid right to relief of its own.'"[89] Indeed, prudential standing "imposes different demands than injury in fact."[90] Therefore, "a party may suffer a cognizable injury but still not possess a right to relief."[91]

This solution to the current circuit split—requiring the uninjured member to make a showing that they share a common interest with the injured class member—resembles the doctrine of third party standing.[92] Similar to a challenger who is suing to vindicate the rights of an absent third party, uninjured class members are retaining class membership when they have suffered no injury in fact.[93] In third party standing, the challenger's rights have not been violated, while in the class action context, the uninjured challenger has not suffered an injury in fact.[94] As the third party standing doctrine reconciles the lack of any right being violated with Article III, this novel standard would ensure that the uninjured party has a "stake" in the adjudication of the case or controversy. Also, this showing would ameliorate the concern of plaintiffs' attorneys packing their classes with uninjured members to gain momentum at the certification stage—placing a hurdle for plaintiffs when there are uninjured members within a prospective class.

Further, this proposed standard would not require a district court to conduct "myriad mini-trails to identify and separate uninjured class members," shifting the burden to each uninjured class member to satisfy this prudential standing requirement. Rather, a court would order an evidentiary hearing to scrutinize the uninjured class members. After all, a damages class action must be a superior device "for fairly and efficiently resolving the dispute in question."[95] Additionally, when implementing this standard, the Supreme Court should clarify that it will not be a vehicle that can certify a class with a superfluous quantity of uninjured members. Simply put, this

---

presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'") (citation omitted).

89. Hill v. Warsewa, 947 F.3d 1305, 1309-10 (2020).

90. *Id.* at 1310.

91. *Id.*

92. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004); Craig v. Boren, 429 U.S. 190 (1976); Bond v. United States, 564 U.S. 211 (2011).

93. June Med. Servs. L.L.C. v. Russo, 591 U.S. 299, 318 (2020), *abrogated by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) ("[W]e have generally permitted plaintiffs to assert third-party rights in cases where the enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights.").

94. *Id.*

95. Messner v. Northshore Univ. Health Sys., 669 F.3d 802, 814 n.5 (7th Cir. 2012) (citing Fed. R. Civ. P. 23(b)(3)).

prudential requirement will not replace the predominance inquiry but reconcile it with Article III.

Moreover, to temper this novel prudential requirement's effect on plaintiffs, "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules."[96] In *Halliburton*, the Supreme Court explained that the threat of "class actions" that "allow plaintiffs to extort large settlements from defendants for meritless claims" can be "appropriately addressed to Congress."[97] It is clear that "[p]rudential standing must exist in all cases except where the requirement is 'expressly negated,' for example by statutory directive from Congress."[98] For instance, the Supreme Court further explained that "Congress has, for example, enacted the Private Securities Litigation Reform Act of 1995," which was enacted with the intent "to combat perceived abuses in securities litigation with heightened pleading requirements, limits on damages and attorney's fees, a 'safe harbor' for certain kinds of statements, restrictions on the selection of lead plaintiffs in securities class actions, sanctions for frivolous litigation, and stays of discovery pending motions to dismiss."[99] The Courts, however, should not punt this dilemma to Congress. Evidently, federal courts are well-equipped to adjudicate such issues, and Congress need only intervene to prevent this new standard from unduly burdening prospective classes at the certification stage.

### *B. Solution Two: Elevating the Burden of Proof for Class Certification*

"[S]ome circuits have yet to specify a particular burden of proof when deciding class certification issues while others explicitly articulate a standard lower than the preponderance standard."[100] Accordingly, the Supreme Court should instruct the lower federal courts to adopt a clear and convincing evidence burden of proof at the class certification stage when evaluating whether a plaintiff has established predominance under Rule 23(b)(3). Even though the "trend in recent cases has been a move from lighter or loosely

96. Warth v. Seldin, 422 U.S. 490, 501 (1975); Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 120 (1979) (quoting *Warth*, 422 U.S. at 501 (1975)) ("These prudential rules, however, are subject to modification by Congress, which may grant to any person satisfying Art. III's minimum standing requirements a right 'to seek relief on the basis of the legal rights and interests of others, and, indeed, [to] invoke the general public interest in support of [his] claim.'"); Fed. Election Comm'n v. Akins, 524 U.S. 11, 19 (1998) ("History associates the word 'aggrieved' with a congressional intent to cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested.").

97. Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 276-77 (2014).

98. Hill v. Warsewa, 947 F.3d 1305, 1309 (10th Cir. 2020).

99. *Halliburton*, 573 U.S. at 277.

100. Newberg & Rubenstein, *supra* note 28, § 7:21.

defined burdens towards adoption of a preponderance of the evidence standard to facts necessary to establish the existence of a class,"[101] the Supreme Court has not established a burden of proof for plaintiffs seeking class certification.[102]

This additional solution would sidestep the circuit split, yet it would make certification more difficult to obtain. Indeed, the Supreme Court may be reluctant to resolve the circuit split.[103] Further, prior to *Olean*, no Ninth Circuit case determined the burden of proof at the class certification stage.[104] In the *Olean* panel decision, Judge Bumatay acknowledged that a number of district courts within the Ninth Circuit apply a preponderance of the evidence standard to establish a class.[105] Judge Bumatay also explained that a number of Circuit Courts have implemented this standard.[106]

Contrary to this trend among the circuits, a preponderance of the evidence standard does not capture the "district court's role as the gatekeeper of Rule 23."[107] Because certification propels plaintiffs into settlement,[108] district courts must scrutinize whether a class should be certified. This elevated burden of proof would track the "rigorous analysis" requirement established by the Supreme Court's dicta in *Wal-Mart* without suffocating the discretion of the district courts. A mere preponderance of the evidence standard does not capture the Supreme Court's instruction, nor is it grounded in Rule 23.

## V. CONCLUSION

The Ninth Circuit's holding in *Olean* tramples Article III's injury requirement and has virtually no basis in Rule 23. This Note's proposed

---

101. *Id.*

102. *See In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 29 (2d Cir. 2006).

103. StarKist Co. v. Olean Wholesale Grocery Coop., Inc., 143 S. Ct. 424 (2022).

104. Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 993 F.3d 774, 797 (9th Cir. 2021) (Hurwitz, J., concurring) *rev'd en banc*, 31 F.4th 651 (9th Cir. 2022) ("Although we have not previously addressed the proper burden of proof at the class certification stage, we hold that a district court must find by a preponderance of the evidence that the plaintiff has established predominance under Rule 23(b)(3).").

105. *Olean*, 993 F.3d at 785.

106. *Id.* at 784-85 (citing *In re* Lamictal Direct Purchaser Antitrust Litig., 957 F.3d 184, 191 (3d Cir. 2020); *In re* Nexium Antitrust Litig., 777 F.3d 9, 27 (1st Cir. 2015); Alaska Elec. Pension Fund v. Flowserve Corp., 572 F.3d 221, 228 (5th Cir. 2009); Teamsters Loc. 445 Freight Div. Pension Fund v. Bombardier Inc., 546 F.3d 196, 202 (2d Cir. 2008)).

107. *Olean*, 993 F.3d at 784.

108. *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310 (3d Cir. 2008) ("denying or granting class certification is often the defining moment in class actions for it may sound the 'death knell' of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants").

standard will remedy the danger of having plaintiffs' attorneys pack their classes with uninjured members to oppress defendants into settlement by creating a modest threshold ensuring that the uninjured plaintiffs' membership is congruent with Article III and the Supreme Court's extensive precedent on class action litigation. Additionally, as an alternate solution that evades resolving the circuit split, raising the burden of proof to a clear and convincing evidence standard will undoubtedly elevate the bar for obtaining class certification, counterbalancing the construction of a de minimis standard. Defendants will face an undue burden if the Circuit Courts adopt the *Olean* standard. Even though each class member must have Article III standing to recover individual damages, district courts must perform a "rigorous analysis" to determine whether a prospective class should be certified. After all, "[p]unting this key question until later amounts to handing victory to plaintiffs because this case will likely settle without the court ever deciding that issue."[109]

109. Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 686 (9th Cir. 2022) (en banc) (Lee, J., dissenting).